Chapter 11
Evidence[1]

[1] This Chapter is by School of Government faculty member John Rubin. His work in this area owes its start to Ilene Nelson, former administrator of North Carolina's Guardian ad Litem program, and Janet Mason, former School of Government faculty member, who many years ago began thinking and writing about how evidence principles apply in juvenile cases.

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This Chapter addresses common evidence issues that arise in abuse, neglect, dependency, and termination of parental rights proceedings (referred to in this manual as juvenile proceedings or juvenile cases). It is not intended to be a complete guide to all of the evidence issues that the court or parties may need to address. The Chapter draws on several sources on evidence, and the reader is encouraged to consult those sources for additional information and legal authority. Sources on North Carolina law include:

- KENNETH S. BROUN ET. AL., BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE (8th ed. 2018) (hereinafter BRANDIS & BROUN);
- ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS (3d ed. 2014) (hereinafter MOSTELLER); and
- Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07 (UNC School of Government, Dec. 2008).

General sources on evidence law include:

- ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE (8th ed. 2020) (hereinafter MCCORMICK);
- JOHN E. B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE (6th ed. 2015) (hereinafter MYERS); and
- EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE (6th ed. 2016) (hereinafter IMWINKELRIED).

Other sources are noted where applicable.

11.1 Applicability of Rules of Evidence

A. Adjudication

1. Applicability of rules. This Chapter focuses primarily on adjudication hearings in abuse, neglect, and dependency cases and termination of parental rights (TPR) proceedings. In both types of adjudication hearings, the North Carolina Rules of Evidence apply. *See* G.S. 7B-804

(so stating for abuse, neglect, and dependency cases); G.S. 7B-1109(f) (stating that the rules of evidence apply to adjudication hearings in TPR proceedings); *In re A.L.T.*, 241 N.C. App. 443 (2015) (recognizing that rules of evidence apply at adjudication hearing on abuse, neglect, and dependency); *In re F.G.J.*, 200 N.C. App. 681 (2009) (applying the rules of evidence in assessing the admissibility of evidence at a TPR adjudication); *see also* N.C. R. EVID. 1101(a) (stating that the rules of evidence apply to all actions and proceedings in the North Carolina courts except as otherwise provided by statute or rule).

The courts have stated that in cases heard by a judge without a jury, it is presumed in the absence of some affirmative indication to the contrary that the trial judge, having knowledge of the law, is able to distinguish between competent and incompetent evidence (that is, admissible and inadmissible evidence) and base findings on competent evidence only. *See In re F.G.J.*, 200 N.C. App. 681, 686–87 (2009); *In re L.C.*, 181 N.C. App. 278, 284 (2007). This principle may relax the formality of bench trials, but it does not lessen the importance of correctly applying the rules of evidence. The court's findings still must be based on competent, substantive evidence. *See Little v. Little*, 226 N.C. App. 499 (2013) (holding that although appellate court generally presumes that trial court disregarded incompetent evidence, the only evidence supporting the trial court's finding in action for domestic violence protective order was inadmissible hearsay; therefore, admission of the inadmissible evidence was not harmless error).

In addition to understanding whether evidence is competent, it is important to differentiate between evidence offered for a substantive or nonsubstantive purpose. *See In re K.W.*, 192 N.C. App. 646, 651 (2008) (distinguishing between substantive and impeachment evidence); 1 BRANDIS & BROUN § 3, at 6 (substantive evidence is evidence that "tends, directly or circumstantially, to prove a fact in issue"). The different purposes for which evidence may be offered are noted in this Chapter where applicable.

The question of whether evidence is admissible differs from whether the evidence is sufficient to satisfy the petitioner's burden of proving the allegations by clear and convincing evidence or, in a TPR case, by clear, cogent, and convincing evidence. This Chapter does not address the sufficiency, as opposed to the admissibility, of evidence at adjudication.

Note: To preserve questions about evidentiary rulings for appellate review, parties ordinarily must give the trial judge an opportunity to rule correctly by making timely and specific objections—that is, by objecting to inadmissible evidence or, if the evidence is admissible for a limited purpose, by requesting that the evidence be limited to that purpose. 1 BRANDIS & BROUN § 19, at 95–96. For a further discussion of objections, offers of proof, and other preservation requirements, see section 11.13, below.

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2. Reliance on criminal cases. A growing body of appellate decisions addresses evidence issues in juvenile proceedings. To fill in gaps, the discussion in this Chapter refers to criminal cases, particularly criminal cases involving children. Constitutional requirements for the two types of proceedings differ, but for the most part North Carolina's evidence rules apply equally to criminal and civil cases.

3. Evidence issues involving children. Many of the evidence issues in juvenile proceedings concern children. These issues fall into three basic categories, discussed in the indicated sections of this Chapter:

- testimony by children, which may involve questions about their competency as witnesses and accommodations to assist them in testifying (see section 11.2, below);
- testimony about statements made by children, which primarily involves questions about the admissibility of hearsay (see section 11.6, below) and the permissible use of their statements for nonsubstantive purposes (see section 11.3, below); and
- testimony in the form of an opinion about children, primarily expert testimony (see section 11.10, below).

4. Local rules affecting evidence. Many districts have local juvenile court rules. Attorneys and judges who participate in juvenile cases should familiarize themselves with those rules. Local rules for each district are available on the Administrative Office of the Courts website.

Some local rules contain evidence provisions not contained in the North Carolina Rules of Evidence. For example, to encourage treatment and other services, Local Rule 7 relating to civil juvenile cases in the Twelfth Judicial District restricts the admission at adjudication of evidence of treatment services provided after the filing of a petition as well as statements made by the respondent when receiving such services. *See* Twelfth Judicial District, District Court, Family Court Division, Juvenile Case Management Plan, I. Civil Cases (Apr. 2016).

Local rules are authorized by G.S. 7A-34 and Rule 2(d) of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, if they are supplementary to, and not inconsistent with, acts of the General Assembly. Few cases have addressed the extent to which local rules may modify evidence and other procedures and, absent additional clarification by the appellate courts, the parties should follow local rules on evidence. *See In re T.M.*, 187 N.C. App. 694, 697–701 & n.2 (2007) (because the respondent father failed to object to medical records by the deadline in the then-applicable Twelfth Judicial District local rules [deleted from the current version of the rules], the trial court admitted the records at the adjudication hearing over the respondent's objection that DSS had not established a proper foundation; the Court of Appeals did not specifically decide whether the local rules provided an appropriate basis for overruling the respondent's objection because the respondent could not show prejudice, but noted that the local rule was not intended to be an evidentiary rule but instead was designed to promote the efficient administration of justice); *see also In re J.S.*, 182 N.C. App. 79 (2007) (upholding, in a two-to-one decision, a local administrative discovery order requiring respondents to review DSS records within ten working days after receiving notice that records are available for review).

B. Disposition and Other Proceedings

The Juvenile Code relaxes the rules of evidence for most juvenile hearings other than adjudication. *See* G.S. 7B-506(b) (relating to nonsecure custody), 7B-901 (relating to disposition), 7B-906.1(c) (relating to review and permanency planning), 7B-1110(a) (relating to disposition in TPR proceedings), 7B-1114(g) (relating to reinstatement of parental rights).

For a further discussion of the applicability of the rules of evidence in particular proceedings, consult the applicable section of this manual. See Chapters 5.6.D (nonsecure custody), 7.2.E.1 (dispositional phase: initial, review, and permanency planning), 10.1.E (disposition in termination of parental rights proceeding), 10.4.C.7 (reinstatement of parental rights).

In light of these provisions, some cases have observed that the rules of evidence do not apply in such proceedings. *See In re J.H.*, 244 N.C. App. 255 (2015) (noting that dispositional hearing may be informal and court may consider written reports and other evidence about needs of juvenile); *In re M.J.G.*, 168 N.C. App. 638, 648 (2005). This means that the rules of evidence do not exclude some evidence that would be inadmissible at adjudication. The rules of evidence still play some role, however.

First, the parties have the right to present and have considered evidence that is competent (i.e., admissible) and relevant under the rules of evidence, subject to the court's discretion to exclude cumulative evidence. *See In re Shue*, 311 N.C. 586, 598 (1984) (error not to hear competent, relevant, non-cumulative evidence); *In re J.S.*, 182 N.C. App. 79, 84–85 (2007) (not error to preclude evidence as cumulative); *In re O'Neal*, 140 N.C. App. 254, 256–57 (2000) (error to refuse to allow respondent to offer evidence); *see also* G.S. 7B-506(b) (at hearing to determine need for continued custody, "the court shall receive testimony and shall allow . . . the right to introduce evidence, to be heard in the person's own behalf, and to examine witnesses").

Second, privileges apply to a limited extent at both adjudication and disposition. See section 11.11, below.

Third, while the court may consider hearsay and other evidence that ordinarily would be inadmissible under the rules of evidence, the court may consider only such evidence that it finds to be "relevant, reliable, and necessary." G.S. 7B-901; *see also In re K.G.W.*, 250 N.C. App. 62 (2016) (trial court had discretion to exclude respondent's expert testimony on ground that testimony would not assist trier of fact); *In re J.N.S.*, 207 N.C. App. 670, 679–80 (2010) (holding that unsworn testimony was not proper at disposition hearing); *In re P.O.*, 207 N.C. App. 35, 39–41 (2010) (holding that the trial court did not abuse its discretion in excluding certain hearsay evidence at a permanency planning hearing).

Although not binding, the rules of evidence remain a helpful guide to determining reliability and relevance. *See State v. Greene*, 351 N.C. 562, 568 (2000) (so noting for criminal sentencing proceedings, at which the rules of evidence do not apply); *State v. Stephens*, 347 N.C. 352, 363–64 (1997) (stating that although the rules of evidence are relaxed at sentencing, the rules should not be totally abandoned). The principal evidence rules that advance reliability and that may provide guidance to the trial court in its consideration of evidence are those limiting hearsay (discussed in sections 11.5 and 11.6, below) and opinion testimony (discussed in sections 11.9 and 11.10, below) and those requiring that witnesses have personal knowledge of the matters to which they testify (discussed in sections 11.6.F.3 (business records) and 11.9.A (lay opinion), below). On the question of relevance are rules related to admission of character evidence (discussed in section 11.8, below) as well as the general requirement of relevance expressed in Evidence Rule 401.

Note: Because the rules of evidence do not bar the introduction of otherwise inadmissible evidence at disposition hearings, questions have arisen over whether orders and other matters from such hearings are admissible at later adjudication hearings, at which the rules of evidence apply. For a discussion of this issue, see section 11.7, below.

11.2 Child Witnesses

The common law imposed a variety of grounds for disqualifying witnesses from testifying. Most of these disabilities have been removed by the current rules of evidence, which allow anyone to be a witness, including a child, who meets the standard of competency. *See* 1 BRANDIS & BROUN § 131, at 506.

A. Competency of Child Witnesses

1. General rule. Evidence Rule 601(a) provides that every person is considered competent to be a witness except as otherwise provided in the rules. *See also State v. DeLeonardo*, 315 N.C. 762, 766 (1986) (recognizing the requirements of Rule 601).

Rule 601(b) disqualifies a person as a witness if the person is incapable of (1) expressing himself or herself so as to be understood or (2) understanding the duty of a witness to tell the truth. *See also State v. Gordon*, 316 N.C. 497, 502 (1986) (stating that Rule 601(b) is consistent with prior North Carolina case law). In jurisdictions such as North Carolina, where every person is considered competent to testify unless shown otherwise, the party challenging a witness's competence probably has the burden of establishing incompetence. *See* MYERS § 2.13[B].

There is no fixed age under which a person is considered too young to testify. *See, e.g.*, *State v. Eason*, 328 N.C. 409, 426 (1991).

2. Procedure for determining competency. The trial court must determine the competency of a witness when the issue "is raised by a party or by the circumstances." *Eason*, 328 N.C. at 427. Evidence Rule 104 states that the trial court is not bound by the rules of evidence, except those related to privileges, when determining preliminary questions such as the competency of a person to be a witness. *See State v. Fearing*, 315 N.C. 167, 173 (1985) (recognizing applicability of Rule 104 to competency determinations); see also section 11.11, below (discussing limitations on assertions of privilege in juvenile proceedings).

No particular procedure is required for determining competency, but the trial court must make an adequate inquiry into the issue, which generally must include personal observation of the witness by the trial court. *See State v. Spaugh*, 321 N.C. 550, 553–55 (1988) (explaining that the primary concern is not the particular procedure used by the trial court, but that the trial court exercise independent discretion in deciding competency after observation of the child). A stipulation by the parties is insufficient to support a finding of incompetency. *Fearing*, 315 N.C. at 174 ("[T]here can be no informed exercise of discretion where a trial judge merely adopts the stipulations of counsel that a child is not competent to testify . . . ."); *State v.*

Pugh, 138 N.C. App. 60, 64–67 (2000) (trial court disqualified a 4-year-old from testifying without making an adequate inquiry because the court's brief questions were not sufficient to determine the competency of the witness).

Although statutory changes enacted in 2011 allow judges to rely on stipulations to support adjudicatory findings in abuse, neglect, and dependency proceedings (*see* G.S. 7B-807(a)), this change does not authorize stipulations as to a witness's competency, a conclusion of law. *See generally State v. Forte*, 206 N.C. App. 699, 707–08 (2010) (stating that trial court's findings "and its conclusion that [the witness] was competent" established that the court exercised its discretion in declaring the witness competent); *see also In re A.K.D.*, 227 N.C. App. 58 (2013) (holding that trial court could not rely on parties' stipulation of a ground for TPR, a conclusion of law).

Typically, a voir dire of the witness should be conducted before the witness testifies. *Fearing*, 315 N.C. at 174. The court may hear testimony from parents, teachers, and others familiar with the child, but such testimony is not required. *See State v. Roberts*, 18 N.C. App. 388, 391–92 (1973) (so stating).

The court also may observe the child while the child testifies. *See Spaugh*, 321 N.C. at 553–55 (finding that the trial court's observation of the witness while she testified was adequate without a separate voir dire). If the court waits until the child testifies and then finds the child incompetent, the child's preceding testimony may need to be disregarded. *See generally State v. Reynolds*, 93 N.C. App. 552, 556–57 (1989) (in a case involving a jury trial, stating that the better practice is to determine competency before the witness begins to testify); MYERS § 2.13[C] ("If, during a child's testimony, the judge determines that the child is incompetent, the court may order the child's testimony stricken . . . .").

In criminal cases, the courts have held that the defendant's Confrontation Clause rights are not violated by being excluded from a voir dire hearing to determine a child's competency. *See Kentucky v. Stincer*, 482 U.S. 730 (1987) (finding no violation where children were found competent to testify and the defendant had the opportunity to cross-examine at trial); *State v. Jones*, 89 N.C. App. 584 (1988) (finding no violation where the defendant could view the hearing via closed-circuit television and communicate with his attorney), *overruled on other grounds*, *State v. Hinnant*, 351 N.C. 277 (2000). For a further discussion of the issue of excluding a party during a child's testimony, see section 11.2.B.1, below.

If the court finds that a child is incompetent to testify, the party seeking to call the child should make an offer of proof about the substance of the child's testimony to preserve the issue for appeal. *See In re M.G.T.-B.*, 177 N.C. App. 771 (2006) (declining to address the propriety of the trial court's decision to quash a subpoena for a child based on incompetency because the respondent made no offer of proof and therefore failed to preserve the issue for appellate review); *see generally* 1 BRANDIS & BROUN § 18, at 83 (substance of what a witness would say should appear in the record).

3. **Application of standard.** Most appellate decisions have held that the trial court did not abuse its discretion in finding a child witness competent to testify. Most of these cases involve

criminal prosecutions, in which the State called a child who was a witness to or victim of a crime, but the legal principles appear to be equally applicable to juvenile proceedings. For summaries of the facts of several such cases, see Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 5–7 (UNC School of Government, Dec. 2008); *see also In re Clapp*, 137 N.C. App. 14, 19–20 (2000) (upholding the finding of competency of a child witness in a juvenile delinquency case); *In re Quevedo*, 106 N.C. App. 574, 584–85 (1992) (in a termination of parental rights proceeding, it was not error for a 10-year-old child to testify; the trial judge and attorneys questioned her about the duty to tell the truth, and any inability she had to remember all of the events went to the weight, not admissibility, of the testimony).

A witness may be found incompetent if, although able to understand the duty to tell the truth, the witness is incapable of expressing himself or herself so as to be understood. *See State v. Washington*, 131 N.C. App. 156, 159–60 (1998) (upholding the finding of incompetency of a witness with cerebral palsy based on her impaired ability to speak, which made her difficult to understand); *see also* MYERS § 2.05 (suggesting that an interpreter can be used for child witnesses whose speech is difficult to understand).

4. Unavailability distinguished from incompetency. The standard for incompetency under Rule 601 is not the same as for unavailability under North Carolina's hearsay rules. A person may be found unavailable to testify, based on a physical or mental illness or infirmity, for purposes of admitting a hearsay statement. *See* N.C. R. EVID. 804(a)(4). The potential detriment to the mental health of a child witness from testifying may establish the child's unavailability for purposes of admitting hearsay, but it is not sufficient alone to establish that the child is incapable of expressing himself or herself or understanding the obligation to tell the truth. *See In re Faircloth*, 137 N.C. App. 311 (2000) (explaining the difference between competency and unavailability and holding that the trial court erred in relying on the unavailability standard in disqualifying children from testifying). The court in *Faircloth* noted that other mechanisms are available to protect the mental health of a child witness who is required to testify. For a discussion of such accommodations, see section 11.2.B, below.

Hearsay statements of a child witness found to be incompetent to give live testimony are still admissible if they meet the requirements of a hearsay exception. If the hearsay exception requires that the declarant be unavailable, such as the residual hearsay exception, a child witness who is found to be incompetent would be considered unavailable to testify. Such a finding, however, may raise questions about whether the child's out-of-court statements are sufficiently trustworthy to be admissible under the residual hearsay exception. See section 11.6.H.2, below.

5. Quashing of subpoena for child. Some cases, cited below, indicate that trial courts have sometimes quashed subpoenas for child witnesses on the ground that the child is incompetent to testify, that testifying would be harmful to the child's mental health, or that the child has no relevant information to offer. In one case, the Court of Appeals addressed the merits of the motion to quash and upheld the trial court's order; the other opinions did not address the merits.

Incompetency may be a permissible ground for quashing a subpoena, but the court would need to conduct an adequate inquiry into the child's competency before ruling, including personally observing the child as discussed in subsection 2, above (discussing procedures for assessing competency). The inquiry also would need to be sufficiently close in time to when the child would be expected to testify. *See generally State v. McRae*, 58 N.C. App. 225, 227 (1982) (trial court did not err in denying the defendant's motion to quash a subpoena for two children who were in the car at the time of the alleged kidnapping; motion, in effect, asked the court to declare the children incompetent before they were asked to testify).

Potential harm to a child's mental health has been held not to be a ground for finding a child incompetent and precluding the child from testifying. It may provide a basis for one or more accommodations during the child's testimony, discussed in section B., below. In *In re A.H.*, 250 N.C. App. 546 (2016), the court went further and upheld the quashing of a subpoena, finding that the potential harm to the child supported the GAL's objection that the subpoena was "unreasonable and oppressive." The court was careful to clarify that the issue on appeal was whether quashing the mother's subpoena of her child violated her right to present evidence at the disposition phase of the termination proceeding; the mother did not challenge the adjudication phase of the proceeding, admitting that the trial court correctly found grounds for termination. The court also observed that the GAL presented comprehensive evidence about the child's mental health condition and extreme distress at the prospect of testifying.

Ordinarily, the relevance of a witness's testimony is determined when the witness testifies; the ordinary burden of testifying in a legal proceeding does not outweigh the right of a party to subpoena witnesses. If the objecting party raises concerns about the child's mental health or other extraordinary burdens, the subpoenaing party may need to forecast the testimony of the child to show that its relevance outweighs the potential burdens.

The improper quashing of a subpoena, if issued by a respondent, may infringe on the respondent's constitutional right to present evidence and call witnesses on his or her behalf, applicable in criminal cases through the Sixth Amendment, in civil cases under the Due Process Clause, and under the corresponding provisions of the North Carolina Constitution. *See Washington v. Texas*, 388 U.S. 14, 18–19 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense" under the Sixth Amendment and is a fundamental element of due process of law); *State v. Rankin*, 312 N.C. 592 (1985); *see generally In re L.D.B.*, 168 N.C. App. 206, 208–09 (2005) (respondent's right to present evidence in a TPR case "is inherent in the protection of due process"). In *In re A.H.*, 794 S.E.2d at 878–79, above, the court found that quashing of the respondent's subpoena did not violate the respondent's due process rights.

If the trial court quashes a subpoena, the party who subpoenaed the witness must make an offer of proof to preserve the issue for appeal unless the significance of the evidence is otherwise obvious from the record. *Id.* at 876–77.

Cases raising, although not resolving, the merits of motions to quash subpoenas for child witnesses in juvenile cases include:

- *In re M.G.T.-B.*, 177 N.C. App. 771 (2006) (based on a telephone conversation with the child's therapist and without observing or examining the child, the trial court found the child incompetent and quashed a subpoena for the child; the Court of Appeals declined to address the propriety of the trial court's determination of incompetence where the respondent made no offer of proof as to the potential testimony of the child and therefore failed to preserve the issue for appellate review).
- *In re C.N.P.*, 199 N.C. App. 318 (2009) (unpublished) (noting, but not ruling on, the trial court's decision to quash a subpoena in response to a DSS motion alleging that the children had little information to offer at the termination hearing and that testifying in front of their mother would have a negative impact on their mental health).
- *In re A.A.P.*, 193 N.C. App. 752 (2008) (unpublished) (holding that the trial court abused its discretion in quashing subpoenas for children where its decision was based substantially on the fact that it had already made its disposition decision before hearing evidence).

B. Examination of Child Witnesses

The courts have approved several accommodations for child witnesses who testify. Some are intended to reduce the potential harm to child witnesses from testifying about sensitive matters, others to assist children in communicating information more clearly.

1. Remote testimony. In appropriate cases, a child witness may testify remotely—that is, via closed circuit television or other audio-visual equipment by which the child testifies in one room and the respondent views the testimony from another room. The system can be either "one-way" where the witness is not in the party's presence and cannot see the party but the party can see the witness, or "two-way" where the witness is not in the party's presence but the witness and party can see and hear each other over audio-video monitors. Generally, in cases involving child witnesses, the testimony is by one-way closed-circuit television. One-way remote testimony has been permitted in both juvenile proceedings and criminal and delinquency proceedings. The standards differ somewhat, but the two key considerations are (a) the need for remote testimony and (b) the procedure for testifying.

Interest has grown in two-way remote systems for taking witness testimony, without an in-person appearance by the witness, as a possible way to comply with a defendant's confrontation rights in criminal cases. Whether two-way remote testimony would be permissible for reasons other than those permitted for one-way remote testimony is beyond the scope of this Chapter. *See generally* Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/02 (UNC School of Government, Feb. 2013); *see also State v. Seelig*, 226 N.C. App. 147 (2013) (allowing two-way remote testimony for seriously ill witness who lived in another state); *In re S.H.*, 206 N.C. App. 761 (2010) (unpublished) (finding that trial court did not abuse its discretion in denying respondent mother's motion to testify by telephone where she did not have funds or means to travel from West Virginia to hearing in North Carolina); G.S. 50A-111 (authorizing court in child custody proceeding, defined as including abuse, neglect, dependency, and TPR proceedings, to take testimony by

telephone, audiovisual means, or other electronic means from witness residing in another state).

(a) Showing of need. The showing of need for the taking of remote testimony by a child witness may be lower in juvenile cases than in criminal or delinquency cases. In criminal cases, the Confrontation Clause applies. *See Maryland v. Craig*, 497 U.S. 836 (1990); *see also In re Stradford*, 119 N.C. App. 654 (1995) (applying the Confrontation Clause to remote testimony in a delinquency proceeding and upholding its use on proper findings). The court must find both that the child witness would suffer serious emotional distress by testifying in the defendant's presence and that the ability of the witness to communicate with the trier of fact would be impaired by doing so. G.S. 15A-1225.1, enacted by the General Assembly in 2009, codifies these requirements for remote testimony by child witnesses in criminal and delinquency cases. In *State v. Jackson*, 216 N.C. App. 238 (2011), the Court of Appeals addressed the permissibility in a criminal case of a child testifying remotely, pursuant to G.S. 15A-1225.1, in light of the U.S. Supreme Court's Confrontation Clause decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The Court of Appeals held that *Crawford* did not overrule earlier decisions holding that a child may testify remotely in a criminal case when the court finds a sufficient showing of need and uses appropriate procedures for taking the child's testimony. Face-to-face confrontation is not required. *Accord State v. Lanford*, 225 N.C. App. 189 (2013).

In juvenile cases, the more flexible due process standard applies to remote testimony. *See In re J.B.*, 172 N.C. App. 1, 20–22 (2005). In juvenile proceedings, the cases have looked at whether "'the excluded party's presence during testimony might intimidate the witness and influence his answers, due to that party's position of authority over the testifying witness.'" *In re J.B.*, 172 N.C. App. at 21 (quoting *In re Barkley*, 61 N.C. App. 267, 270 (1983)). The cases also consider the emotional impact on the child. *See In re J.B.*, 172 N.C. App. at 21–22 (noting a counselor's testimony that testifying in front of the mother would have a very negative impact on the child); *see also* N.C. R. EVID. 616 (authorizing remote testimony by witnesses with developmental disabilities or mental retardation in civil cases if testifying in the presence of a party or in an open forum would cause serious emotional distress and impair the witness's ability to communicate with the trier of fact).

(b) Procedures for testifying. The procedures for taking remote testimony appear to be comparable in civil and criminal cases. The court must ensure that the defendant or respondent has the ability to confer with counsel, to cross-examine the witness fully, and to see and hear the witness while he or she is testifying. *See State v. Phachoumphone*, 810 S.E.2d 748 (N.C. Ct. App. 2018) (finding that trial judge failed to follow the procedural requirements for remote testimony); *In re J.B.*, 172 N.C. App. at 22 (finding that these procedures had been followed); G.S. 15A-1225.1 (requiring these procedures in criminal and delinquency cases); *compare Coy v. Iowa*, 487 U.S. 1012 (1988) (holding that placement of a screen obscuring the defendant's view of child sexual assault victims during testimony in a criminal case violated the defendant's Confrontation Clause rights).

May the court in a juvenile proceeding exclude a respondent parent without allowing the parent to view the witness via closed-circuit television or other device? Some cases have

found it permissible if the parent's counsel is present and is allowed to question the witness. *See In re Williams*, 149 N.C. App. 951, 960 (2002); *In re Barkley*, 61 N.C. App. 267, 270 (1983). Failing to allow a parent to view a witness's testimony, when the parent is otherwise permitted to participate in the proceedings, may create a risk of error, however. In an unpublished opinion, *In re B.P.*, 183 N.C. App. 154 (2007), the trial court heard testimony of a 17-year-old witness in chambers with the parent's attorney present and able to question the witness, but the parent was not able to view the witness and the testimony was not recorded. Focusing on the lack of recordation, the Court of Appeals found that the procedure violated the parent's due process rights. *See also In re Nolen*, 117 N.C. App. 693, 696 (1995) (finding no prejudice in the failure to record in-chambers testimony where the respondent failed to argue any error in the unrecorded testimony).

Note: To obtain closed circuit television equipment, contact the North Carolina Administrative Office of the Courts.

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2. Excluding bystanders during child's testimony. G.S. 7B-801(a) authorizes the court to close to the public any hearing or part of a hearing in a juvenile proceeding after considering the factors listed in the statute. Thus, during a child's testimony the court may have grounds to exclude from the courtroom those not involved in the hearing of the case. *See also* Michael Crowell, *Closing Court Proceedings in North Carolina* at 2–3 (UNC School of Government, Nov. 2012) (discussing qualified right of public access under Art. I, § 18 of the N.C. Constitution, which provides that "[a]ll courts shall be open," and grounds for excluding public). The hearing may not be closed, however, if the juvenile requests that it remain open. *See* G.S. 7B-801(b); Chapters 6.2.C, 7.2.D (further discussing the circumstances in which a hearing may be closed to the public).

In criminal cases, the courts have upheld the exclusion of bystanders in rape and sex offense cases during the testimony of the child victim. *See State v. Burney*, 302 N.C. 529 (1981) (holding that it was permissible for the court to exclude everyone from the courtroom during a child victim's testimony except court personnel and those engaged in the trial of the case); *State v. Godley*, 234 N.C. App. 562 (2014) (recognizing that to balance interests of State with defendant's constitutional right to public trial, court must employ four-part test; closing of courtroom during victim's testimony did not violate defendant's rights); *State v. Smith*, 180 N.C. App. 86 (2006) (trial court acted within its discretion in closing the courtroom in a statutory sex offense case; although the trial court did not hold a hearing or make findings on the issue, the defendant did not object to the closing of the courtroom); *see also* G.S. 15-166 (authorizing the trial judge to close the courtroom in such cases); *compare State v. Jenkins*, 115 N.C. App. 520 (1994) (trial court erred in closing the courtroom without making proper findings).

3. Excepting witnesses from sequestration order. Evidence Rule 615 authorizes the judge to exclude potential witnesses during the testimony of other witnesses. It also empowers the judge to permit a person to be present in the interest of justice.

In criminal cases, judges have used this authority to permit the parent of a victim to remain in the courtroom although the parent may later be a witness. *See State v. Dorton*, 172 N.C. App.

759, 765–66 (2005); G.S. 15A-1225 (stating this authority for criminal cases). In juvenile cases, no exception to a sequestration order is necessary to allow a parent to be present because a parent is a party and generally has the right to be present during the testimony of other witnesses. The juvenile court may find it appropriate to except other witnesses from a sequestration order and allow them to be present although they may testify later. *See State v. Stanley*, 310 N.C. 353, 356–57 (1984) (upholding an order allowing a social services worker and juvenile court officer to be present); *State v. Weaver*, 117 N.C. App. 434, 436 (1994) (upholding an order allowing a social worker and a therapist to be present).

4. Oath for child witness. Evidence Rule 603 provides that every witness must testify under oath or affirmation. The commentary states that the wording of the rule is intended to provide flexibility in dealing with, among others, child witnesses. No special verbal formula is required as long as the oath or affirmation is administered to the witness in a way "calculated to awaken his conscience and impress his mind with his duty" to tell the truth. N.C. R. EVID. 603; *see also State v. Beane*, 146 N.C. App. 220, 223–26 (2001) (not plain error for the trial court to permit a child to testify without taking an oath; although the child did not understand the significance of taking an oath, the child promised to tell the truth).

5. Leading questions. Several cases have upheld leading questions of child witnesses. *See State v. Higginbottom*, 312 N.C. 760, 767–68 (1985) (finding leading questions of a child witness to be permissible based on the principle that a party may ask leading questions if the witness has difficulty in understanding questions because of immaturity, age, infirmity, or ignorance or if the inquiry is into a subject of a delicate nature such as sexual matters); *State v. Ammons*, 167 N.C. App. 721, 729 (2005) (finding leading questions of a child witness to be permissible on the ground that a party may ask leading questions if the examiner, without stating the particular matters required, seeks to aid the witness's recollection or refresh his or her memory when the witness's memory is exhausted).

6. Written testimony. In addition to allowing leading questions, the court has allowed a child witness to write down particularly sensitive testimony while on the witness stand and the prosecutor to read the statement to the jury. *State v. Earls*, 234 N.C. App. 186 (2014) (testimony was that the defendant had placed his penis in her vagina).

7. Use of anatomical dolls to illustrate testimony. The use of anatomically-correct dolls to illustrate a child's testimony has been upheld. *See State v. Fletcher*, 322 N.C. 415, 421 (1988); see also section 11.6.E.11, below (discussing the admissibility of statements to medical personnel while using anatomical dolls).

8. Use of own terms for body parts. Child witnesses have been permitted to use terms with which they are familiar when referring to body parts. *See State v. Watkins*, 318 N.C. 498 (1986) (7-year-old child's testimony that the defendant stuck his finger in her "coodie cat" and her indication of her vaginal area through use of anatomically correct dolls constituted sufficient evidence of penetration to support conviction of first-degree sexual offense).

9. Questioning by court. Evidence Rule 614(b) permits the trial judge to question witnesses, and cases have upheld the trial judge's questioning of a child witness to clarify confusing or

contradictory testimony. *See State v. Ramey*, 318 N.C. 457, 463–65 (1986) (not improper for the trial court to ask questions of an 8-year-old witness where the questions were intended to clarify the child's answers on a delicate subject; the questions did not violate G.S. 15A-1222, applicable to criminal jury trials, as the questions did not express an opinion by the judge); *see generally In re N.D.A.*, 833 S.E.2d 768 (N.C. S.Ct. 2019) (finding that Evidence Rule 614(b) permits trial judge to question witnesses and that judge's questioning in this case did not show lack of impartiality).

10. Positioning on witness stand. The physical location or positioning of a child witness may be adapted in aid of the child's testimony. *See State v. Reeves*, 337 N.C. 700, 727 (1994) (permissible for the trial court to allow a child to sit on her stepmother's lap while testifying; the trial court warned the stepmother not to suggest to the child how the child should testify and, after the testimony was completed, made a finding that the stepmother had followed the court's instructions).

11. Recesses. The court may order a recess if a child witness becomes upset while testifying. *See State v. Higginbottom*, 312 N.C. 760, 769–70 (1985); *State v. Hewett*, 93 N.C. App. 1, 14 (1989).

11.3 Out-of-Court Statements to Refresh, Impeach, or Corroborate

A witness's prior out-of-court statements may be used in the circumstances discussed below to refresh the witness's recollection, impeach the witness, or corroborate the witness's testimony.

When an out-of-court statement is offered for one of these purposes, it is not subject to the restrictions on the admission of hearsay, discussed in sections 11.5 and 11.6, below. It also is not considered substantive evidence. *See State v. Williams*, 341 N.C. 1, 9–11 (1995) (holding that prior inconsistent statement offered to impeach is not substantive evidence); *State v. Bartlett*, 77 N.C. App. 747, 752 (1985) (prior inconsistent statement offered to impeach is not substantive evidence and may not be considered in determining whether the State produced sufficient evidence to withstand a motion to dismiss in a criminal case).

A. Refreshing Recollection

A witness may refer to a writing or object during or before testifying to refresh his or her recollection. The writing or object, including a prior statement, is not itself admitted into evidence (except as permitted on cross-examination) and does not establish any particular fact; rather, it is a prompt for testimony that may be admissible. *See* 1 BRANDIS & BROUN § 172, at 659.

If the witness refers to a writing or object during his or her testimony, the adverse party has a right to have the writing or object produced; if the witness refers to a writing before testifying, production is in the judge's discretion. *See* N.C. R. EVID. 612(a), (b). If entitled to have the writing or object produced, an adverse party may cross-examine the witness about it

and may offer into evidence those portions that relate to the witness's testimony. *See* N.C. R. EVID. 612(c).

If a writing does not refresh a witness's recollection, it may be admissible under the hearsay exception for past recollection recorded. To be admissible on this ground, the writing must satisfy the criteria in Evidence Rule 803(5). That hearsay exception appears to arise infrequently in juvenile cases. *See generally State v. Harrison*, 218 N.C. App. 546 (2012) (discussing differences between refreshing recollection and past recollection recorded); *see also State v. Harris*, 253 N.C. App. 322 (2017) (allowing videotape of witness interview as past recollection recorded under Evidence Rule 803(5)).

B. Impeachment

A witness may be impeached with his or her prior statements that conflict with the witness's testimony. Prior inconsistent statements to impeach are admissible for the purpose of assessing the credibility of the witness about the testimony he or she has given, not as substantive evidence of the facts asserted in the statements. *See* 1 BRANDIS & BROUN § 159, at 584–85 (collecting cases).

A party may impeach his or her own witness with prior inconsistent statements. *See* N.C. R. EVID. 607. It is impermissible, however, to impeach one's own witness as a subterfuge for getting otherwise inadmissible statements before the trier of fact. Thus, a party may not call a witness to the stand, knowing that the witness will not reiterate a prior statement the witness made, for the purpose of impeaching the witness with the prior statement. *Compare State v. Hunt*, 324 N.C. 343, 349–51 (1989) (so holding and finding impeachment improper in this case), *with State v. Williams*, 341 N.C. 1, 9–11 (1995) (reiterating holding of *Hunt* but finding impeachment permissible in this case).

If the impeachment does not concern a collateral matter, a party also may offer extrinsic evidence of the witness's prior statements—for example, a party may call other witnesses to attest to the prior statements. If the matter is collateral, the cross-examiner is bound by the witness's answer. *See, e.g.*, *State v. Gabriel*, 207 N.C. App. 440 (2010); *State v. Riccard*, 142 N.C. App. 298 (2001). Generally, a matter is not collateral if it relates to "material facts in the testimony of the witness"; it is collateral if it relates to immaterial facts. *See* 1 BRANDIS & BROUN § 161, at 589–94.

C. Corroboration

Under North Carolina law, if a person testifies, a party may offer prior consistent statements of that person to corroborate his or her testimony. The purpose of such evidence is to bolster the credibility of the witness's testimony. As with prior statements to impeach, discussed in section B., above, the prior statement itself is not substantive evidence and does not establish the particular fact or event. 1 BRANDIS & BROUN § 165, at 609–11; *see also State v. Bates*, 140 N.C. App. 743 (2000) (trial court erred in admitting a child's statements under the medical diagnosis and treatment exception; the statements could not later be treated as mere

corroborative evidence because the trial court treated them as substantive and did not limit their use).

North Carolina's approach to admitting prior consistent statements is more permissive than the approach taken elsewhere. In many jurisdictions, a prior consistent statement of a witness is admissible to corroborate the witness only after the witness's credibility has been challenged. North Carolina has effectively eliminated the requirement that the witness's credibility be challenged before a prior consistent statement may be admitted. *See* 1 BRANDIS & BROUN §§ 162–65.

To be admissible to corroborate a witness's testimony under North Carolina law, the prior consistent statement must be consistent with the witness's trial testimony. Variations between the prior statement and in-court testimony, including new information if it adds weight or credibility to the testimony, do not necessarily make the prior statements inconsistent and inadmissible as corroboration. *See id*. § 165, at 605–08 & nn.503–04.

A prior consistent statement may be established by examination of the witness and, if the matter is not collateral, by extrinsic evidence. *See id*. § 163, at 598; *see also State v. Yearwood*, 147 N.C. App. 662, 667–68 (2001) (permitting a videotape of a therapy session with a child to corroborate the child's in-court testimony).

Note: The above principles do not justify admission of out-of-court statements of someone other than the witness whose testimony is being corroborated. The prior statements must be those of the witness. *See State v. Freeman*, 93 N.C. App. 380, 387–88 (1989) (determining that a witness's testimony could not be corroborated by an extrajudicial statement of another person that was not otherwise admissible); 1 BRANDIS & BROUN § 165, at 611–12 & n.510.

If a witness's out-of-court statement is admissible as substantive evidence under a hearsay exception, other out-of-court statements by the witness may be admissible to corroborate (or impeach) the hearsay statement under Evidence Rule 806, which states that "[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." The rule explicitly requires that the credibility of the hearsay declarant be attacked before evidence supporting credibility may be admitted, which may be stricter than North Carolina's approach to prior statements that corroborate a witness's live testimony. Some North Carolina cases have allowed out-of-court statements to corroborate statements admitted under a hearsay exception, but they have not specifically referred to Rule 806 or described its requirements. *See State v. Chandler*, 324 N.C. 172, 182 (1989) (without referring to Rule 806, the court finds that a child's statements to others were admissible to corroborate the child's testimony from a previous trial, which was admitted as substantive evidence under a hearsay exception); *In re Lucas*, 94 N.C. App. 442, 450 (1989) (court follows *Chandler* in allowing a child's out-of-court statements to be admitted for the nonsubstantive purpose of corroborating other statements by the child admitted under a hearsay exception [note that the analysis of the applicability of the hearsay exception in this case is no longer good law after *State v. Hinnant*, 351 N.C. 277 (2000), discussed in section 11.6.E, below]).

11.4 Out-of-Court Statements and the Right to Confront Witnesses

A. Applicability of Confrontation Clause to Criminal and Delinquency Cases

1. General rule. The Confrontation Clause of the Sixth Amendment regulates the admissibility of out-of-court statements against the defendant in a criminal trial. In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court adopted a stricter interpretation of the Confrontation Clause, holding that the State may not offer into evidence an out-of-court "testimonial" statement except in one of the following circumstances:

- the declarant who made the statement is subject to cross-examination at the current trial,
- the declarant was subject to adequate cross-examination before trial, or
- a narrow exception applies (e.g., the defendant forfeited the right to confront the witness by the defendant's own wrongdoing).

In light of *Crawford*, for an out-of-court statement to be admitted against the defendant in a criminal case, it must first be determined whether the statement satisfies the constitutional requirements of the Confrontation Clause and then be determined whether the statement satisfies North Carolina's evidence rules, including North Carolina's rules on hearsay (discussed in sections 11.5 and 11.6, below). For a discussion of *Crawford* and subsequent case law, see Jessica Smith, *A Guide to* Crawford *and the Confrontation Clause*, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, July 2018).

The Confrontation Clause, as interpreted in *Crawford*, also applies to juvenile delinquency trials. *See State ex rel. J.A.*, 949 A.2d 790 (N.J. 2008); *In re N.D.C.*, 229 S.W.3d 602 (Mo. 2007); *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. App. 2004); *see also In re Stradford*, 119 N.C. App. 654 (1995) (applying the Confrontation Clause in determining the appropriateness of testimony of child witnesses by closed-circuit television in a delinquency proceeding).

2. Applicability to statements made to law-enforcement personnel, social workers, medical personnel, and others. The courts have explored the meaning of "testimonial" statements in light of *Crawford* in various contexts. Some patterns have emerged:

- Statements collected by or generated by law enforcement personnel are ordinarily considered testimonial because, except in emergency situations, they are ordinarily gathered for purposes of prosecution.
- Statements obtained by social workers in child welfare cases have been found to be testimonial in various circumstances, regardless of whether the social workers were formally affiliated with law enforcement.
- For a statement to medical personnel to be considered testimonial, there generally must be a more affirmative showing of a law-enforcement purpose or connection. *See also Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173 (2015) (holding that statement by child to teacher was not testimonial; in so holding, court relies in part on young age of child and states that mandatory reporting statutes alone do not convert a conversation between a teacher and student into a law enforcement mission); *accord State v. McLaughlin*, 246 N.C. App. 306

(2016) (mandatory duty to report child abuse under North Carolina law did not make statements to nurse testimonial).
- Statements to family and friends have usually not been found to be testimonial.

See Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 14–31 (UNC School of Government, Dec. 2008); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L. J. 917, 944–65 (2007).

B. Inapplicability of Confrontation Clause to Juvenile Cases

Because *Crawford* involved interpretation of the Sixth Amendment Confrontation Clause, which applies only in criminal (and delinquency) cases, the holding in Crawford does not apply to juvenile cases (that is, abuse, neglect, dependency, and termination of parental rights proceedings). *See In re D.R.*, 172 N.C. App. 300 (2005) (admission of statements by a child to DSS workers and others did not violate the Sixth Amendment right to confrontation, which does not apply to a proceeding to terminate parental rights, a civil action). Therefore, the admissibility of out-of-court statements in juvenile cases depends primarily on North Carolina's hearsay rules, discussed in sections 11.5 and 11.6, below.

The Due Process Clause of the Fourteenth Amendment still affords the respondent the right to confront the witnesses against him or her. It is unclear whether the Due Process Clause provides respondents with greater protections than under North Carolina's hearsay rules. *See generally In re Pamela A.G.*, 134 P.3d 746, 750 (N.M. 2006) (Confrontation Clause, as interpreted in *Crawford*, does not apply in an abuse and neglect case, but the Due Process Clause requires that "parents be given a reasonable opportunity to confront and cross-examine a witness, including a child witness"; no violation found where the parents failed to show how admission of a hearsay statement of a child and lack of cross-examination increased the risk of erroneous deprivation of their relationship with the child); *Commonwealth v. Given*, 808 N.E.2d 788 (Mass. 2004) (in a proceeding to commit the respondent as a sexually dangerous person, the trial court admitted a police report containing allegations by a victim against the respondent about a prior offense; the court held that the Confrontation Clause does not apply to civil commitment proceedings and that the constitutional test for admissibility of hearsay is whether the evidence is reliable under the Due Process Clause); *Smallwood v. State Dep't of Human Resources*, 716 So. 2d 684, 691 (Ala. Civ. App. 1998) (recognizing a due process right to confront witnesses in a civil proceeding to revoke a daycare license on the ground of child abuse and finding that hearsay statements were not admissible where the administrative law judge made no findings that the hearsay had "particularized guarantees of trustworthiness" or were "of a type relied upon by reasonably prudent persons in the conduct of their affairs"); *In re A.S.W.*, 834 P.2d 801 (Alaska 1992) (recognizing a due process right to confront witnesses in a civil child protection proceeding and finding that the hearsay rules adequately protected the parent's right).

11.5 Out-of-Court Statements and the Hearsay Rule

A. Governing Rules

Evidence Rules 801 through 806 set forth North Carolina's rules on the admissibility of hearsay. These rules apply in both criminal and civil cases, to statements by children and other witnesses, and to both oral and written statements. (If the statement is written, the offering party may need to satisfy other requirements, such as the rules on authentication.) The North Carolina rules governing hearsay are as follows:

- Rule 801 defines "hearsay" and the terms "statement" and "declarant," which are components of the definition of hearsay. The rule also excepts admissions of a party-opponent from the restrictions on hearsay.
- Rule 802, entitled the "hearsay rule," sets forth the basic principle that hearsay is inadmissible except as otherwise provided by statute or rule.
- Rule 803 sets forth numerous exceptions to the hearsay rule, which apply whether the declarant is available or unavailable as a witness.
- Rule 804 sets forth five exceptions to the hearsay rule, which apply only if the declarant is unavailable as a witness. The term "unavailability" is defined in the rule.
- Rule 805 provides that hearsay within hearsay is admissible if each part of the statement is admissible under an exception to the hearsay rule.
- Rule 806 provides for attacking or supporting the credibility of a hearsay declarant when hearsay has been admitted in evidence. See section 11.3.C, above (discussing potential application of this rule to corroborating statements).

B. Rationale for Hearsay Rule

The often-repeated hearsay principle is that an out-of-court statement offered for the truth of the matter asserted is inadmissible unless it satisfies an exception to the hearsay rule. The reason for this phrasing, particularly its focus on whether the statement is offered for its truth, lies primarily in the importance of cross-examination. *See* 2 BRANDIS & BROUN § 193, at 789 (rationale that most fairly explains the hearsay rule and offers a common justification for exceptions to the rule is the importance of cross-examination). The following observations highlight the relationship between the purpose for which a statement is offered and the importance of cross-examination.

- "We are interested in the declarant's credibility only when the out-of-court statement is being used to prove the truth of the assertion. In that circumstance, the evidence's value depends on the *credibility of the out-of-court declarant*." MOSTELLER § 11-1, at 11-5 (emphasis added). The opponent therefore has the need to cross-examine the declarant to inquire into possible problems with the declarant's perception, memory, or sincerity, which the trier of fact then may weigh in determining whether to accept the declarant's statement as true. The statement is nevertheless admissible if it satisfies one of a number of hearsay exceptions, discussed in section 11.6, below.
- "On the other hand, if the proponent does not offer the out-of-court declaration for its truth, the opponent does not need to cross-examine the declarant. If the declaration is

> logically relevant on some other theory, the evidence's value usually depends on the *credibility of the in-court witness*." MOSTELLER § 11-1, at 11-5 (emphasis added). The opponent still needs to cross-examine the in-court witness to determine whether the witness heard and remembered the statement correctly and is telling the truth about what he or she heard. The statement is not considered hearsay and does not require a hearsay exception to justify its admission.

Examples of statements offered for the truth and for other purposes are provided in section C.3, below.

C. Components of Hearsay Definition

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. EVID. 801(c). This definition contains three components, discussed in subsections 1 through 3, below.

1. Oral or written assertion of fact. The statement must be an assertion of fact. For example, if a child said to her mother, "Daddy hit me," the child's statement would be an assertion of that fact. In contrast, if the mother overheard the child say, "Ouch" or "Don't" in interacting with the father, the statement might not be an assertion of fact. "Ouch" is an exclamation, "don't" is a command or imperative; neither explicitly asserts a particular fact. But, if offered to elicit an implicit assertion of fact—that is, that the father hit the child, prompting her exclamation or imperative—the statement still might be considered an assertion of fact. *See* MOSTELLER § 11-2(A)(1), at 11-6 to 11-8 (imperative statement is not hearsay unless the proponent's purpose is to elicit an assertion embodied in the statement).

Because the distinction between an assertion of fact and other utterances can be difficult to draw, cases have sometimes assumed that an arguably non-assertive utterance is hearsay and then found an exception. *Compare State v. Mitchell*, 135 N.C. App. 617, 618–19 (1999) (testimony that the inmate told the defendant to "hurry" or "leave" as she was departing from the jail was not inadmissible hearsay; the statement was a directive not offered for the truth of the matter asserted), *with State v. Smith*, 152 N.C. App. 29, 35–36 (2002) (holding that victim's statements to the defendant, "Shut up" and "Hush," were admissible under the present sense impression hearsay exception in Evidence Rule 803(1)).

2. Made outside current proceeding. The hearsay rule is typically thought of as applying to out-of-court statements. This component of the definition actually covers a broader range of statements. Statements that are made other than while the person is testifying at the current trial or hearing, including statements made in previous court proceedings or in previous hearings in the same case, constitute hearsay (assuming they meet the other components of the definition of hearsay) and must meet a hearsay exception to be admissible. *See* N.C. R. EVID. 804(b)(1) (providing a hearsay exception for testimony of a witness at another hearing in the same or a different proceeding); see also section 11.7.F.2, below (discussing this hearsay exception).

3. Offered for truth of assertion. The last and most often considered component of the definition of hearsay is that the statement must be offered for the truth of the matter asserted. If a child said to her mother, "Daddy hit me"—and the proponent offered that statement to show that the father in fact hit the child—it would be considered as offered for the truth of the matter asserted and would be inadmissible unless within a hearsay exception.

Statements containing a factual assertion are not necessarily offered for their truth, however. Examples are discussed below. If a statement is not offered for its truth, two additional considerations come into play. First, the purpose for which the statement is offered must be relevant to the issues in the case. Second, consideration of the statement is limited to the purpose for which it is offered.

(a) To show resulting state of mind of person who heard statement. One common nonhearsay purpose is to show the state of mind of the person who heard the statements. For example, suppose the mother testifies that shortly before the father allegedly struck the child, she heard the child tell her father, "I broke those things." If the purpose of offering the mother's statement was not to show the child actually broke the items but rather to show the father's resulting state of mind, the statement would not be offered for the truth of the matter asserted—that the child broke the items—and would not constitute hearsay. *See* 2 BRANDIS & BROUN § 195, at 794–99 (declarations of one person may be admitted to prove the state of mind of another person who heard them); *see also State v. McLean*, 251 N.C. App. 850 (2017) (not error to allow witness's testimony that jailer told her that defendant was in adjacent cell; statement was not offered to prove its truth but rather to explain why the witness was afraid to testify); *In re S.N.*, 180 N.C. App. 169, 174–75 (2006) (social worker's testimony about what a drug counselor told the respondent about the terms of his case plan was properly allowed to show the respondent's knowledge of the case plan and was not offered for the truth of matter asserted); *State v. Chapman*, 359 N.C. 328, 354–55 (2005) (where the defendant left the house in response to a phone call, the statements in the phone call were admissible not for their truth but to explain the defendant's subsequent actions).

(b) To explain why police or DSS undertook investigation. A question that has arisen in both criminal and juvenile cases is whether a statement reciting misconduct of a defendant or respondent is admissible if it is offered not to show the truth of the statement—that is, that the misconduct actually occurred—but rather to show why the police or DSS investigated the matter or took some other action. Decisions have found that when offered for the latter purpose, the statement is not offered for its truth and does not constitute hearsay. *See In re F.G.J.*, 200 N.C. App. 681, 687 n.2 (2009) (noting that statements for this purpose were not hearsay); *In re Mashburn*, 162 N.C. App. 386, 390 (2004) (out-of-court statements of children were admissible to show why DSS initiated an investigation and were not offered for their truth); *see also State v. Treadway*, 208 N.C. App. 286, 290 (2010) (child's statement to grandparent admissible for nonhearsay purpose of showing why grandparent told parents, who then sought medical treatment).

The cases suggest that when offered for this purpose the statements should be limited in detail because of the potential prejudice of the statements. *See* 1 IMWINKELRIED § 1004, at

10-24 to 10-30; *State v. Harper*, 96 N.C. App. 36, 39–40 (1989) (statements were permissible for the nonhearsay purpose of explaining an officer's conduct in investigating drug transactions; the substance of the statements by informants who were guiding the officer was limited to telling the officer to wait, to go ahead, and where to go); *cf. State v. Hueto*, 195 N.C. App. 67, 69–71 (2009) (statement that a witness was told that a child had been sexually assaulted was offered for the nonhearsay purpose of explaining why the witness called the police; the defendant objected on hearsay grounds only and waived any objection that the testimony was irrelevant or, if relevant, that the testimony's probative value was outweighed by its prejudicial effect under Evidence Rule 403).

11.6 Hearsay Exceptions

A. Types of Hearsay Exceptions and Their Rationales

There are three basic categories of exceptions to the hearsay rule, each based on a somewhat different rationale. The discussion in the following sections deals with the hearsay exceptions within each category most likely to arise in juvenile cases. The three basic categories are:

- Rule 801 admissions of a party-opponent, discussed in section 11.6.B, below;
- Rule 803 exceptions, discussed in sections 11.6.C through H, below; and
- Rule 804 exceptions, discussed in section 11.6.H, below.

The rationale for allowing an admission of a party-opponent is unique. It is not based on considerations of reliability (as with Rule 803 exceptions) or on considerations of need (as with Rule 804 exceptions). Rather, the exception is "a product of the adversary litigation system; the opponent can hardly complain that he or she does not have an opportunity to cross-examine himself or herself." MOSTELLER § 11-3, at 11-20 to 11-21 (also noting that because of this unique rationale, the Federal Rules of Evidence treat admissions of a party-opponent as nonhearsay).

The hearsay exceptions in Rule 803 are recognized because they deal with statements that carry a greater inference of reliability or sincerity in light of the circumstances in which they were made. MOSTELLER ch. 11 pt. 3, at 11-39. Because the overriding reason for allowing such statements is their greater reliability, they are admissible whether the witness is available or unavailable.

The hearsay exceptions in Rule 804 depend to a greater degree on a showing of necessity for the evidence contained in the statement. MOSTELLER ch. 11 pt. 4, at 11-83. Therefore, in addition to meeting the criteria for a particular exception, the proponent must show that the declarant is unavailable.

B. Rule 801(d): Admissions of a Party-Opponent

1. Criteria. Evidence Rule 801(d) excepts admissions by a party-opponent from the prohibition on hearsay. To satisfy the exception, the statement must have been made by a

party to the case, and it must be offered against the party by the party's opponent. *See State v. Rainey*, 198 N.C. App. 427, 432 (2009) (reciting the requirements of Rule 801(d)). Juvenile cases involve various parties to which this exception may apply, discussed in subsection 3, below.

A number of cases state generally that the party's statement also must be against the party's interest. *See, e.g.*, *State v. Lambert*, 341 N.C. 36, 50 (1995) (stating that an admission of a party-opponent is a statement of pertinent facts that, in light of other evidence, is incriminating); *In re J.J.D.L.*, 189 N.C. App. 777, 782 (2008) (stating the same principle in a delinquency case). A showing that the statement is against the party's interest does not appear to be required under this exception, however. *See* 2 BRANDIS & BROUN § 199, at 814–15.

The statement still must be relevant to be admissible. *See* 2 BRANDIS & BROUN § 199, at 818 (observing that the general requirements of relevance and materiality apply to admissions); *State v. Hutchinson*, 139 N.C. App. 132, 135–37 (2000) (defendant's statement that he committed burglaries after the charged offense was admissible; the statement was an admission of a party-opponent, and the subsequent burglaries were admissible under Evidence Rule 404(b) to show the defendant's motive and intent).

2. Potential constitutional, statutory, and other bars. Constitutional and statutory principles may bar the use of statements (as well as other evidence) obtained from a respondent during an investigation of alleged abuse, neglect, and dependency. These issues primarily arise in criminal and delinquency cases when the State offers the statement against the defendant or juvenile respondent. For the statement to be admissible, the State must comply with constitutional as well as hearsay requirements. MOSTELLER § 11-3(A)(2), at 11-23. In civil proceedings, including abuse, neglect, dependency, and termination of parental rights proceedings (juvenile proceedings), constitutional and statutory grounds for exclusion are considerably more limited but still may arise depending on the violation and the nature of the proceeding. The discussion below briefly considers potential grounds, in both criminal and juvenile cases, for excluding statements and other evidence obtained in an investigation of alleged abuse, neglect, and dependency.

(a) *Miranda* warnings. In criminal cases, a person in custody is entitled to *Miranda* warnings before being questioned by law-enforcement officers or their agents. Ordinarily, a DSS representative is not required to give *Miranda* warnings because DSS is not considered a law enforcement or prosecutorial agency. *See generally State v. Martin*, 195 N.C. App. 43, 48 (2009). If, however, a DSS representative is working so closely with law enforcement as to be considered an agent of law enforcement, the representative must give an in-custody defendant *Miranda* warnings before questioning. *See State v. Morrell*, 108 N.C. App. 465 (1993) (determining that a social worker was acting as a law enforcement agent).

In juvenile cases, *Miranda* violations by law enforcement or their agents ordinarily do not provide grounds for excluding evidence of a statement that was made without the required warnings. *See In re Pittman*, 149 N.C. App. 756 (2002) (holding that because an abuse

and neglect proceeding is civil, an alleged *Miranda* violation by a law enforcement officer did not bar the use of the respondent's statements in that proceeding).

(b) Due process and involuntary statements. In criminal cases, a statement is inadmissible as a matter of due process if the statement was involuntary in the totality of the circumstances and the statement was causally related to some official, coercive action by law enforcement officers, their agents, or other government officials. *See Colorado v. Connelly*, 479 U.S. 157 (1986); *In re Weaver*, 43 N.C. App. 222, 223 (1979) (stating in a delinquency case that although a DSS representative was not required to give *Miranda* warnings to a juvenile before questioning, the juvenile's statement still must have been voluntarily and understandingly made); *see also generally* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(c), at 721 (4th ed. 2015).

A threat to take away a person's children may be considered coercive and, in the totality of the circumstances, render a statement involuntary. *See People v. Medina*, 25 P.3d 1216 (Colo. 2001) (detective's threat to have children removed from the defendant's family, in the totality of circumstances, rendered the defendant's statement involuntary and inadmissible in a criminal case); *compare Morrell*, 108 N.C. App. at 474–75 (finding that the defendant made the statements without threats, promises, or duress by the social worker and that the statements were voluntary); *Commonwealth v. Roberts*, 376 N.E.2d 895 (Mass. App. Ct. 1978) (defendant's confession to a social worker was not the product of physical or psychological coercion).

In juvenile cases, involuntary statements in violation of due process also appear to be inadmissible. *See generally Bustos-Torres v. I.N.S.*, 898 F.2d 1053 (5th Cir. 1990) (*Miranda* warnings are not required before questioning of a person about information used to deport him or her because deportation proceedings are civil, not criminal, but deportation proceedings still must conform to due process standards and involuntary statements are inadmissible).

(c) Fifth Amendment privilege against self-incrimination. In criminal cases, the Fifth Amendment privilege against self-incrimination bars use of statements if the person was compelled to answer by the threatened loss of rights for refusing to answer. This principle comes from the line of U.S. Supreme Court cases known as the "penalty cases." *See Debnam v. N.C. Dep't of Correction*, 334 N.C. 380 (1993) (public employee may be discharged for failing to answer a public employer's questions, but the Fifth Amendment right against self-incrimination bars the use of statements in a criminal case that were obtained from an employee under the threat of discharge for not answering); *State v. Linney*, 138 N.C. App. 169, 177–81 (2000) (holding that an attorney was not compelled to give statements to a State Bar investigator and therefore the attorney's statements were not inadmissible in a later criminal prosecution); *see also Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 562 (1990) ("In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled."); *McKune v. Lile*, 536 U.S. 24 (2002) (plurality finds that adverse consequences faced by a prisoner for refusing to make an admission required for participation in a sexual abuse treatment program were not so severe as to amount to compelled self-incrimination).

For a discussion of the application of the Fifth Amendment privilege in juvenile proceedings, see section 11.12, below.

(d) Right to counsel. In criminal cases, once a defendant's Sixth Amendment right to counsel attaches, law enforcement agents may not question the defendant, whether he or she is in or out of custody, without a proper waiver. *See generally Montejo v. Louisiana*, 556 U.S. 778 (2009). Questioning by a DSS representative after attachment of the Sixth Amendment right to counsel is not a violation if the representative is not acting as an agent of law enforcement. *See State v. Nations*, 319 N.C. 318, 325 (1987). The filing of a civil abuse and neglect petition does not constitute the initiation of criminal proceedings and so has been held not to trigger the Sixth Amendment right to counsel; therefore, questioning by a law enforcement agent does not make statements inadmissible on that ground in a criminal case. *See State v. Adams*, 345 N.C. 745 (1997) (also finding that the admission of statements in a criminal case did not violate the statutory right to counsel afforded to a defendant in an abuse and neglect case).

In juvenile cases, the respondent does not have a Sixth Amendment right to counsel, but a violation of the respondent's due process and statutory rights to counsel in those proceedings may warrant exclusion in some circumstances. The principal case on this issue is *In re Maynard*, 116 N.C. App. 616, 619–21 (1994), in which the respondent mother had been appointed counsel in a juvenile case and had stipulated through counsel that the children were dependent. During the pendency of review hearings, DSS workers talked with the respondent about surrendering her children for adoption and obtained her written surrender, without notice to or the presence of her appointed counsel. The court found a right-to-counsel violation and nullified the surrenders, analogizing the respondent's right to counsel in a juvenile case to a defendant's right to counsel in a criminal case and stating that once the respondent invokes the right to counsel, he or she has the right to have counsel present during any questioning unless he or she waives the right. It is unclear whether the courts would be willing to extend this principle beyond official concessions by the respondent, as respondents often must coordinate directly with DSS employees about the respondents' children and the issues that led to the court proceeding.

(e) Fourth Amendment issues. In criminal cases, searches and seizures in violation of the Fourth Amendment often require exclusion of the evidence obtained. Generally, actions by government officials, whether by law enforcement officers or other government actors, are subject to Fourth Amendment restrictions. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *see generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8(d), at 417–18 (5th ed. 2012). However, if they are not for law enforcement purposes, actions by child protection workers, such as DSS workers, are subject to relaxed requirements. *See generally* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.3(a) (5th ed. 2012) (discussing the application of the Fourth Amendment to investigations and other actions by child protection agencies); *see also* G.S. 7B-302(h) (regulating entry by DSS workers into private residences for assessment purposes).

In civil cases, violations of the Fourth Amendment or of statutory search and seizure restrictions ordinarily do not require exclusion of the evidence obtained. *See Quick v. N.C. Div. of Motor Vehicles*, 125 N.C. App. 123, 127 n.3 (1997) (holding in a license revocation proceeding that the exclusionary rule did not bar evidence obtained as the result of an allegedly illegal arrest). *But cf. In re Freeman*, 109 N.C. App. 100 (1993) (raising but not resolving the applicability of the exclusionary rule to a search in a teacher dismissal case); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (holding in deportation proceedings, which are considered civil, that the exclusionary rule ordinarily does not bar evidence obtained in violation of the Fourth Amendment, but recognizing that an exception may exist for "egregious violations"); *United States v. Janis*, 428 U.S. 433 (1976) (applying a balancing test to determine whether the exclusionary rule should apply in a civil proceeding).

It does not appear that North Carolina has specifically addressed the issue in juvenile cases, but generally courts have been unwilling to exclude evidence in such cases based on Fourth Amendment violations. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.7(e), at 333–35 (5th ed. 2012) (observing that the application of the Fourth Amendment to civil proceedings varies, but that generally courts are unwilling to exclude evidence for Fourth Amendment violations in child welfare cases); *cf. In re Beck*, 109 N.C. App. 539, 543–44 (1993) (sheriff's department seized materials from the respondent's home pursuant to a search warrant in a criminal case and, after the criminal charges were dismissed, transferred the materials to DSS, which later offered the materials as evidence in a TPR case; the court found no violation of the respondent's rights by the transfer of the materials to DSS, but the propriety of the initial seizure by the sheriff was not at issue).

(f) Settlement efforts. Other bars to admission of a respondent's statement also may exist. *See* N.C. R. EVID. 408 (stating that evidence of conduct or statements made in compromise negotiations is not admissible); Local Rule 7.3 of Twelfth Judicial District, District Court, Family Court Division, Juvenile Case Management Plan, I. Civil Cases (Apr. 2016) ("Statements made by respondents after the filing of the petition about or during treatment or services are inadmissible during the adjudicatory hearing except those made during court ordered assessments and evaluations."); *see also* Jessica Smith, *Criminal Evidence: Pleas and Plea Discussions*, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, Mar. 2015) (discussing Evidence Rule 410 and the admissibility of plea discussions).

3. Application of admission exception to common situations in juvenile cases. In criminal cases, the admissibility of a defendant's statements is complicated by the constitutional issues discussed in subsection 2, above, but application of the hearsay exception for admissions is relatively straightforward because ordinarily there is a single defendant against whom the statement is offered. The reverse is the case in juvenile proceedings. Some common scenarios are as follows:

(a) Offered by DSS against respondent. In juvenile proceedings, a statement of a respondent is admissible as an admission of a party-opponent when offered by DSS against that respondent. *See In re S.W.*, 175 N.C. App. 719, 723 (2006) ("In termination of parental

rights proceedings, the party whose rights are sought to be terminated is a party adverse to DSS in the proceeding"; therefore, DSS could offer the statement of the mother against the mother); *In re Hayden*, 96 N.C. App. 77, 80–81 (1989) (mother's statements to social workers about the father's conduct were admissions by her that the child was subject to conduct in her presence that could be found to be abusive and neglectful and therefore were admissible against the mother as admissions of a party-opponent); *see also State v. Wade*, 155 N.C. App. 1, 14–15 (2002) (in a criminal sex offense prosecution, the child victim testified that the defendant father said to her it would be her word against his and no one would believe her; the statement was admissible against the defendant father as an admission of a party-opponent).

(b) Offered by DSS against different respondent. The statement of one respondent parent is not necessarily admissible as an admission of a party-opponent when offered by DSS against another respondent parent. *See* 2 BRANDIS & BROUN § 204, at 831 (there is no presumption that spouses are authorized agents for each other and that the statement of one is admissible against the other); *cf. In re F.G.J.*, 200 N.C. App. 681 (2009) (mother's statements were admissible against her; father waived objection as to the admission of her statements against him).

Grounds may exist, however, for attributing the statement of one respondent to another. *See* 2 BRANDIS & BROUN §§ 200–08 (discussing various theories for admissibility, such as agency); *State v. McLemore*, 343 N.C. 240, 247–48 (1996) (defendant husband told his wife to tell his father and the police that he had shot his mother; the wife was acting as an agent of the defendant husband and the statement was admissible as an admission of a party-opponent).

Even if not attributable to other respondents, statements by one respondent may still be relevant to an issue to be decided in the case. For example, a statement by the mother that the father struck the child may be admissible to show the status of the child as abused. *See In re J.M.*, 255 N.C. App. 483 (2017); *see generally In re M.G.*, 187 N.C. App. 536, 549 (2007) (stating that the issue to be decided is whether abuse occurred, not whether the mother committed the abuse), *rev'd in part on other grounds*, 363 N.C. 570 (2009). In contrast, at a proceeding to terminate the father's rights, at which the father's fault is at issue, the mother's statement would not be admissible against the father as an admission of a party-opponent (unless a ground existed for attributing the mother's statement to the father).

(c) Offered by one respondent against another respondent. The statement of one respondent, for example, the statement of a respondent father, is not necessarily admissible as an admission of a party-opponent when offered by another respondent, for example, by a respondent mother. The respondent father's statement would appear to be admissible only when truly offered *against* the respondent father and not for the respondent mother's benefit. *See* 1 IMWINKELRIED § 1102, at 11-2 & n.3 (discussing the issue in the context of one co-defendant offering a statement of another co-defendant).

(d) Statement of child. The statement of a child is not admissible as an admission of a party-opponent when offered by either DSS or a respondent. Treating a child's statement as an admission under this exception would effectively negate the prohibition on hearsay involving statements by children and render the other hearsay exceptions unnecessary. Although a child is designated as a party to a juvenile case (*see* G.S. 7B-401.1(f); G.S. 7B-1104), the child's statement is generally not offered against the child but rather for the benefit of the offering party. *See generally* 1 IMWINKELRIED § 1102, at 11-2 & n.3; *cf. State v. Shoemaker*, 80 N.C. App. 95, 100 (1986) (statement by a complaining witness is not admissible as an admission of a party-opponent because a complaining witness is not a party to a criminal case).

(e) Statement of DSS worker. The statement of a DSS worker is admissible against DSS as an admission of a party-opponent when offered by a respondent against DSS. *See* N.C. R. EVID. 801(d)(D) (stating that this exception includes a statement by an "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship"); *State v. Villeda*, 165 N.C. App. 431, 436–37 (2004) (holding that since a law-enforcement officer was an agent of the government, his statements were admissible against the state in a criminal case as an admission of a party-opponent).

In *State v. Phillips*, 365 N.C. 103, 128–29 (2011), the Supreme Court noted that it had not yet considered whether the statement of a law-enforcement officer is admissible against the State in a criminal case as an admission of a party-opponent. The court did not resolve the issue, finding that any error by the trial court did not constitute plain error. The comment in *Phillips* may signal a willingness by the Supreme Court to consider the approach taken in some jurisdictions that a law enforcement officer's statements are not necessarily attributable to the government in a criminal case. *See, e.g., United States v. Kampiles*, 609 F.2d 1233, 1246 (7th Cir. 1979) (citations omitted) ("Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party."). Such an approach, if adopted in North Carolina, would have less applicability to statements by DSS workers acting on behalf of DSS, the party bringing the case. *See generally In re N.X.A.*, 254 N.C. App. 670 (2017) (discussing authority of DSS representatives to verify petition as agents of the State).

C. Rule 803(2): Excited Utterances

1. Criteria. Rule 803(2) excepts from the prohibition on hearsay an excited utterance, defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The courts have recognized that this definition requires that two conditions be satisfied. There must be:

- a sufficiently startling experience suspending reflective thought, and
- a spontaneous reaction, not one resulting from reflection or fabrication.

State v. Fullwood, 323 N.C. 371, 387 (1988) (the defendant's statement that his girlfriend had stabbed him, when the statement was made in the emergency room one hour after stabbing, was not an excited utterance; the trial court properly could conclude that the defendant had time to manufacture the statement and did not make it spontaneously), *vacated on other grounds*, 494 U.S. 1022 (1990).

Factors to consider in determining whether a statement meets these criteria include:

- the time lapse between the event and statement;
- whether the statement was made at or away from the scene or the event;
- whether the statement was spontaneously uttered or in response to an inquiry;
- the appearance of the declarant;
- the nature of the event and statement; and
- the declarant's conduct after the event.

2. Statements by children. When considering whether a child's statement satisfies the spontaneity requirement, the North Carolina courts have been more flexible about the length of time between the event and the child's statement. In *State v. Smith*, 315 N.C. 76, 86–90 (1985), a rape prosecution, the court held that out-of-court statements by 4-year-old and 5-year-old victims to their grandmother were excited utterances although made two to three days after the rape. The conversation began when the grandmother visited the home, apparently for the first time after the rape, and one of the children volunteered to the grandmother, "I have something to tell you . . . . I want you to come in the room. I am scared . . . . I want to tell you what Sylvester done [*sic*] to me." The court reviewed several cases and other authorities and noted the special characteristics and circumstances of young children that may prolong stress and spontaneity, which the court stated are the critical factors in evaluating whether a statement qualifies as an excited utterance. The court held that those factors remained present notwithstanding the lapse in time between the event and statements.

Based on this rationale, several North Carolina cases have admitted as excited utterances statements by children that were not contemporaneous with the event but were made within a few days thereafter. In a termination of parental rights case, *In re J.S.B.*, 183 N.C. App. 192, 199–200 (2007), a 9-year-old child's statement that she saw her mother whip and hit her brother was found to be an excited utterance. Although the statement was made during an interview by a detective at the police station sixteen hours after the incident, the court found that the stress and spontaneity were prolonged because of intervening events—the child had watched the mother's boyfriend attempt CPR on the brother, emergency technicians had come to the house, and the child's brother died—and because of the child's demeanor when she made the statements to the detective—the child was teary-eyed and very withdrawn while talking to the detective and was seen in the victim assistance room "basically in a corner in like a ball, like a fetal position." *See also State v. McLaughlin*, 246 N.C. App. 306 (2016) (admitting statement by 15-year-old victim of sexual abuse); *In re Clapp*, 137 N.C. App. 14, 20–21 (2000) (in a juvenile delinquency case, a 3-year-old child's statement to her mother that the juvenile had licked her private parts was admissible; the child told her mother about the act immediately after the juvenile left the house). *But see State v. Blankenship*, 814 S.E.2d 901 (N.C. Ct. App. 2018) (statement by child to grandparents after they picked up the child from

defendant's house was not excited utterance; delay did not bar admission of statements but State presented insufficient evidence that the child was under stress when she made the statement; later statements to others also did not satisfy exception); *State v. Carter*, 216 N.C. App. 453, 462–63 (2011) (statement by child to social worker was not admissible as excited utterance; record contained no evidence of child's behavior or mental state at time of statement), *rev'd on other grounds*, 366 N.C. 496 (2013); *State v. Thomas*, 119 N.C. App. 708, 712–17 (1995) (statements by the victim to her kindergarten friends four or five days after alleged sexual abuse were excited utterances, but the friends' statements to their mothers relating the victim's statements were not excited utterances). For additional summaries of cases applying the excited utterance exception to statements by children, see Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 34–36 (UNC School of Government, Dec. 2008).

D. Rule 803(3): State of Mind

1. Criteria. Rule 803(3) excepts from the hearsay rule "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered" (unless it relates to a will). *See In re Hayden*, 96 N.C. App. 77, 81 (1989) (respondent father offered testimony of his wife that the child said to her that the child had burned herself on the previous day; statement was inadmissible under this exception because Rule 803(3), by its terms, excludes "a statement of memory or belief to prove the fact remembered or believed"); *see also State v. Blankenship*, 814 S.E.2d 901 (N.C. Ct. App. 2018) (statement by child to grandparents was not admissible as present sense impression under Evidence Rule 803(1); record did not show when sexual misconduct occurred in relation to statements and thus did not show that child made the statement while perceiving the conduct or immediately thereafter).

The exception does not appear to arise very often in juvenile cases. The exception arises more in criminal cases in which the State seeks to offer a deceased victim's statements about his or her feelings toward the accused. *See generally* 2 BRANDIS & BROUN § 217, at 880–83; *see also State v. Hipps*, 348 N.C. 377, 392 (1998) ("Evidence tending to show the state of mind of a victim is admissible as long as the declarant's state of mind is a relevant issue and the potential for unfair prejudice in admitting the evidence does not substantially outweigh its probative value"; the court found that a murder victim's statement that she feared the defendant was relevant to show the status of the victim's relationship with the defendant); *State v. Lesane*, 137 N.C. App. 234, 240 (2000) ("[O]ur courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception."). *But see State v. Jones*, 137 N.C. App. 221, 227 (2000) (stating, in a case decided the same day as *Lesane*, that "our courts have repeatedly found admissible under Rule 803(3) a declarant's statements of fact that indicate her state of mind, even if they do not explicitly contain an accompanying statement of the declarant's state of mind").

2. Examples. A declaration of intent, such as a threat, is a type of declaration of state of mind. *See* 2 BRANDIS & BROUN §§ 218–19. Threats by a party, when offered against that party, are also admissible as admissions of a party-opponent, discussed in section 11.6.B, above. Threats also can be analyzed as non-hearsay evidence of a verbal act. *See State v. Weaver*, 160 N.C. App. 61, 64–66 (2003) (the statement of a bribe was evidence of a verbal act and was not offered for the truth of the matter asserted but rather to prove the statement was made).

Diary entries may or may not be admissible under this exception depending on whether they consist of mere factual recitations or express the writer's then-existing state of mind. *Compare State v. Hardy*, 339 N.C. 207, 227–30 (1994) (holding that diary entries that consisted of mere factual recitations, written in a calm and detached manner after the events occurred, were inadmissible under the state of mind exception), *with State v. King*, 353 N.C. 457, 474–78 (2001) (holding that diary entries that stated the victim's frustration with the defendant and her intent to end their marriage were admissible under this exception).

E. Rule 803(4): Medical Diagnosis or Treatment

1. Criteria. Rule 803(4) excepts from the hearsay rule statements made for the purpose of medical diagnosis or treatment. In *State v. Hinnant*, 351 N.C. 277 (2000), the North Carolina Supreme Court reexamined the requirements of this exception. *Hinnant* involved a criminal prosecution for rape and other sexual acts. The State offered the hearsay statements of the defendant's 5-year-old niece, who met with a clinical psychologist specializing in child abuse approximately two weeks after the alleged abuse and initial medical examination. In finding the statements inadmissible, the court held that the proponent of statements under this hearsay exception must establish that:

- the declarant made the statements understanding that they would lead to medical diagnosis or treatment, and
- the statements were reasonably pertinent to diagnosis or treatment.

2. First requirement: declarant's understanding and motivation. The *Hinnant* decision modified or at least clarified North Carolina law by emphasizing the importance of the first requirement of the medical diagnosis and treatment exception, which depends on the declarant's motivation for making the statements. The court found that a statement made for purposes of medical diagnosis and treatment is treated as inherently reliable and is excepted from the hearsay rule (assuming the second requirement is also satisfied) when the declarant is motivated "to tell the truth in order to receive proper treatment." *Id.* at 286. The proponent of the statement therefore "must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287.

The discussion in subsections 3 through 6, below, discusses some of the issues raised by this requirement.

3. Child declarants. The requirement of a treatment motive applies to children as well as adult declarants. *Id.* at 287–88. Although acknowledging the occasional difficulties in determining a

child's intent, the court found that trial courts could make this determination by considering the objective circumstances surrounding the examination, including whether the purpose of the examination was explained to the child, the person to whom the child was speaking (a medical professional versus another person), the setting of the interview (a child-friendly room versus a doctor's examination room), the nature of the questions (leading versus non-leading), and the time of the examination in relation to the incident (whether medical attention was sought immediately or delayed). The court added, however, that corroborating physical evidence cannot be used to establish the declarant's treatment motive. *Id.*

In *Hinnant*, the court found that the proponent failed to establish that the child declarant had a treatment motive in talking with the clinical psychologist. Although the clinical psychologist testified that she interviewed the child to obtain information for the examining physician, there was no evidence that the purpose of the interview was explained to the child. In addition, the interview was conducted in a "child-friendly" room, not a medical environment, and consisted entirely of leading questions, which in the court's view further undermined the reliability of the child's responses. *Id.* at 289–90.

Note: Because a child's intent for purposes of this exception may be determined from the circumstances surrounding the statements, neither a psychological examination nor a voir dire examination of the child is required. *See State v. Carter*, 153 N.C. App. 756, 760–61 (2002) (so holding in reliance on *Hinnant*).

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4. Examination protocols. In a number of cases immediately after *Hinnant*, the court found that examination protocols involving children, particularly for mental health examinations, did not show that the child understood the purpose of the interview and did not meet the requirements for the medical diagnosis and treatment exception. *See State v. Waddell*, 351 N.C. 413 (2000) (holding on facts similar to *Hinnant* that the child's statements to a psychologist were inadmissible under the medical diagnosis and treatment exception); *State v. Bates*, 140 N.C. App. 743 (2000) (to same effect); *State v. Watts*, 141 N.C. App. 104 (2000) (child's statements to nurse, child medical examiner, and child mental health examiner were inadmissible under the medical diagnosis and treatment exception; the nurse, who examined the child shortly after the alleged incident, testified that the child seemed unaware of why she was there, and the examination by the two doctors took place three months later); *see also State v. Blankenship*, 814 S.E.2d 901 (N.C. Ct. App. 2018) (observing that it was a "close call" whether child had required intent under *Hinnant* where record did not indicate that nurse impressed importance of truth telling, child did not understand why she was at hospital, and nurse did not make it clear to child why she needed treatment; court does not decide issue because other, substantially identical statements were properly admitted).

The frequency of such cases has declined, as examiners have changed their protocols to communicate the purpose of the examination more clearly to child patients. *See, e.g.*, *State v. Lewis*, 172 N.C. App. 97 (2005) (holding that the *Hinnant* requirements were satisfied where the interviews were at a medical center by a registered nurse, the children signed a form stating they understood that the nurse would share information with the doctor, and the nurse testified that she explained to the children that she would share information with the doctor, who would perform a medical examination).

5. Identity of listener. Cases before *Hinnant* admitted statements by children to family members and others who were not medical personnel if, following the statements, the children received treatment. *See, e.g.*, *In re Lucas*, 94 N.C. App. 442, 446–47 (1989) (in a pre-*Hinnant* case, a child's statements to her mother resulted in medical attention and were therefore found admissible under the medical diagnosis or treatment exception).

Hinnant observed that statements made to a family member or other person who is not a medical professional may be admissible under the medical diagnosis and treatment exception, but the proponent must affirmatively show that the child made the statement understanding that it would lead to treatment. *See Hinnant*, 351 N.C. at 288. To the extent that pre-*Hinnant* cases did not require such a showing, they are no longer good law. *See also In re T.C.S.*, 148 N.C. App. 297 (2002) (per *Hinnant*, a doctor's testimony about a child's statements to a social worker, which the social worker relayed to the doctor, was inadmissible, even though the statements were used by the doctor for purposes of diagnosis); *State v. McGraw*, 137 N.C. App. 726 (2000) (per *Hinnant*, statements made to a person other than a medical doctor may constitute statements for purposes of medical diagnosis or treatment, but there was nothing to indicate that the child made statements to her mother with the understanding that they would lead to medical diagnosis or treatment). *But see In re Clapp*, 137 N.C. App. 14 (2000) (in a decision issued shortly after *Hinnant*, the court found that a child's statements to a doctor at an emergency room were for purposes of medical diagnosis and treatment; the court also stated, without explanation, that the medical diagnosis and treatment exception allowed the doctor to testify to the child's statements to her mother prior to the emergency room visit).

The participation in an examination of a person who is not a medical professional does not necessarily remove the child's statement from the coverage of the exception. *See State v. Thornton*, 158 N.C. App. 645 (2003) (statements by a child to a social worker were admissible where the social worker was part of the team conducting the medical and psychological evaluation at a medical center, the interview was the same day as the physical examination, and the social worker explained to the child that she worked with the doctor, whose office was in the same building and doors apart); *State v. Stancil*, 146 N.C. App. 234 (2001) (child's statements to a physician, nurse, and social worker at a hospital were admissible under the medical diagnosis and treatment exception; the father took the child to the hospital within hours of the incident, the interviews were for the purpose of diagnosis, and the child testified that she went to the hospital because the defendant had "hurt her privacy"), *aff'd as modified on other grounds*, 355 N.C. 266 (2002).

6. Statements to medical professional by parent of child obtaining treatment. In *In re J.M.*, 255 N.C. App. 483 (2017), the court found that Evidence Rule 803(4) allowed the mother's statements to medical professionals that she had observed the father punch the child who was being examined, hold him upside down by the ankles, and do other physical acts. (The mother was not recounting statements the child had made to her, discussed in subsection 5, above.) The court held in this case that the parent had the same incentive to obtain appropriate medical care for the child and that neither the evidence rules nor *Hinnant* required that the declarant be the patient. The court also found that the statements were pertinent to diagnosis and treatment, the second requirement for admissibility.

7. Second requirement: pertinence to diagnosis and treatment. North Carolina cases, before and after *Hinnant*, have given the term "diagnosis" a relatively narrow construction. Diagnosis, without the possibility of subsequent treatment, is not covered by the exception. *See* 2 BRANDIS & BROUN § 217, at 885–86. *Hinnant's* emphasis on the declarant's treatment motivation reinforces the requirement that for the exception to apply, diagnosis must be connected to treatment. *See Hinnant*, 351 N.C. at 289 ("If the declarant's statements are not pertinent to medical diagnosis, the declarant has no treatment-based motivation to be truthful.").

Statements made to a medical professional for the purpose of preparing for trial, although diagnostic, do not meet this treatment requirement and are not admissible under the exception. *See State v. Stafford*, 317 N.C. 568 (1986) (witness's statements to a pediatrician concerning symptoms she had experienced earlier were not made for the purpose of diagnosis or treatment but rather for the purpose of preparing and presenting the State's "rape trauma syndrome" theory at a rape trial; the statements did not qualify under the medical diagnosis and treatment exception); *State v. Reeder*, 105 N.C. App. 343 (1992) (holding that since the examination was for the purpose of determining whether the child was sexually abused and not for purposes of diagnosis or treatment, the child's statements to the doctor were inadmissible under this exception).

The courts also have scrutinized statements, particularly to nonphysicians, after the declarant is no longer in need of immediate medical attention. *See Hinnant*, 351 N.C. at 289–90 (finding that statements to a clinical psychologist two weeks after a medical examination were not pertinent to medical diagnosis and treatment); *State v. Smith*, 315 N.C. 76, 85–86 (1985) (determining that statements to rape task force volunteers after a medical examination were not pertinent to medical diagnosis and treatment); *see also State v. Reeder*, 105 N.C. App. 343, 351–54 (1992) (determining that statements by child to physician at an examination over a year after the incident were not pertinent to diagnosis and treatment and were not admissible); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 956–57 (2007) (expressing skepticism about the purpose of later examinations in analyzing whether statements are for purposes of treatment or prosecution [the discussion concerns the Confrontation Clause, which is applicable to criminal cases only, but the analysis is similar]).

Statements to psychological professionals for the purposes of mental health treatment are not necessarily excluded from the hearsay exception if the proponent makes an adequate showing of both prongs. *Compare State v. Kidd*, 194 N.C. App. 374 (2008) (unpublished) (upholding admission of child's statement to licensed clinical social worker, which led to mental health treatment); *In re N.M.H.*, 183 N.C. App. 490 (2007) (unpublished) (upholding admission of statements by child to family therapist for purposes of treatment); *with State v. Carter*, 216 N.C. App. 453 (2011) (excluding statement by child to social worker who conceded that she was not qualified to give medical diagnosis or treatment), *rev'd on other grounds*, 366 N.C. 496 (2013); *State v. Hilton*, 194 N.C. App. 821 (2009) (unpublished) (holding that trial court erred in admitting children's statements to licensed clinical counselor who was providing therapy to children; record failed to show that children had requisite treatment motivation at time of statements).

Additional issues involving this second requirement are discussed in subsections 8 and 9, below.

8. Mixed purpose examinations. Statements made by a patient during an examination with a mixed purpose—for example, for treatment and potentially for use in criminal investigation or other legal proceedings—are still admissible under the medical diagnosis and treatment exception if the requirements of *Hinnant* are satisfied. *See State v. Isenberg*, 148 N.C. App. 29, 36–39 (2001) (determining that, although the child was examined after a request by law enforcement, the examination was for treatment purposes and the child's statements to the pediatric nurse and physician who conducted the physical examination of the child were admissible under the medical diagnosis and treatment exception). *But see State v. Lowery*, 219 N.C. App. 151 (2012) (defendant's statements were not admissible under this exception where his primary objective was to obtain diagnosis of mental illness to use as defense even though defendant may have wanted continued treatment of any diagnosed condition), *remanded on other grounds*, 748 S.E.2d 527 (2012). When an examination involves mixed purposes, this factor also may bear on whether the statements are admissible in a criminal case under the Confrontation Clause, discussed in section 11.4.A, above.

9. Identification of perpetrator. North Carolina cases have allowed under the medical diagnosis and treatment exception a child's statement to a medical professional identifying the perpetrator of sexual abuse. The same may apply to child victims of physical abuse. The courts have reasoned that the identification of the perpetrator is pertinent to continued treatment of possible psychological problems and is not merely a statement as to "fault," which ordinarily is not pertinent to diagnosis and treatment. *See State v. Aguallo*, 318 N.C. 590, 596–97 (1986) (allowing statement); *State v. Lewis*, 172 N.C. App. 97 (2005) (allowing statement); *State v. Reeder*, 105 N.C. App. 343, 351–54 (1992) (disallowing statement because the examination was not for the purpose of diagnosis and treatment but rather to determine whether sexual abuse had occurred); *see also In re Mashburn*, 162 N.C. App. 386 (2004) (in a neglect case, the trial court allowed, under the medical diagnosis and treatment exception, a statement by a child to a doctor that her mother did not believe the child about sexual abuse; the dissent argued that the statement was not reasonably pertinent to medical diagnosis and treatment and should not have been admitted); Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, LAW & CONTEMPORARY PROBLEMS, Winter 2002, at 47, 94–95 (supporting the admissibility of such statements under the medical diagnosis and treatment exception when made at initial medical examinations, but expressing skepticism about the treatment purpose when such statements are elicited at later examinations).

10. Videotape of examination. A videotape of a child's statements during an examination is admissible under the medical diagnosis and treatment exception if it satisfies the *Hinnant* requirements. *See State v. Burgess*, 181 N.C. App. 27, 34–35 (2007) and cases cited therein (upholding the admission of a videotape of an interview with a nurse before an examination by a physician; also noting that the trial court had denied admission of a videotape made six days later at which a detective was present); *cf. State v. McLaughlin*, 246 N.C. App. 306 (2016) (finding that admission under medical diagnosis and treatment exception of videotape of interview of child by nurse did not violate defendant's confrontation rights; court finds that

primary purpose of interview was health of child, not use at trial). Videotaping of an examination may suggest that the examination has a mixed purpose, discussed in subsection 8, above, and the proponent may need to show that the examination included a substantial treatment purpose. *See* Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 957 (2007) (formality of videotaping may indicate that an examination is for the purpose of preserving evidence for prosecution, and proponent should produce firm evidence of a substantial medical purpose).

A videotape also must be adequately authenticated. *See* MOSTELLER § 5-6, at 5-88 to 5-89; § 5-9(B), at 5-107 to 5-108 (authenticity of an audio recording may be established by someone who heard the conversation and indicates the recording is an accurate reproduction of the conversation; authenticity of a video recording may be similarly established by a person who was present when the activity occurred; if such a witness is not available, authenticity may be shown by proof of the circumstances of the recording, such as the operator's qualifications, working condition of the equipment, etc.); *see also* G.S. 8-97 (allowing videotape as substantive evidence with a proper foundation); *State v. Mason*, 144 N.C. App. 20, 24–27 (2001) (assessing adequacy of foundation for admission of videotape in criminal case).

The courts also have allowed videotapes to corroborate a witness's statement (see section 11.3.C, above); under the hearsay exception for past recollection recorded (see section 11.3.A, above); and under the residual hearsay exception (see section 11.6.H, below).

11. Anatomical dolls. Statements by children to medical personnel while employing anatomical dolls have been found admissible in cases alleging sexual abuse. *See State v. Bullock*, 320 N.C. 780, 781–83 (1987). The person who examined the child may use anatomical dolls in his or her testimony to illustrate how the child used the dolls during the examination. *See generally State v. Chandler*, 324 N.C. 172 (1989) (allowing such testimony [note, however, that the substantive use of the children's statements in this case likely would not qualify under the medical diagnosis and treatment hearsay exception as interpreted in the later *Hinnant* decision]).

The improper use of anatomical dolls by an interviewer may undermine the basis for admitting a child's statements under the medical diagnosis and treatment exception. *See Hinnant*, 351 N.C. at 290 (quoting *State v. Harris*, 808 P.2d 453, 459 (1991)) (child did not have a treatment motive and her statements were not inherently reliable where the entire interview consisted of a series of leading questions during which the interviewer pointed to anatomically correct dolls and asked whether anyone had or had not performed various acts with the child; "'[i]nherent in this type of suggestive questioning is the danger of planting the idea of sexual abuse in the mind of the child'"). The proper use of anatomical dolls, in contrast, has been found to bolster the reliability of a child's statements. *See State v. Wagoner*, 131 N.C. App. 285, 290 (1998) (finding that the use of anatomical dolls bolstered the trustworthiness of a child's out-of-court statement, which supported admission of the statement under the residual hearsay exception). (The residual hearsay exception is discussed in section 11.6.H, below.)

Statements by a child to a medical professional about sexual abuse while employing anatomical dolls, without adequate physical evidence of abuse, are insufficient to support the admission of expert testimony that the child has been sexually abused. *See State v. Delsanto*, 172 N.C. App. 42 (2005); *State v. Dixon*, 150 N.C. App. 46, 51–54 (2002), *aff'd per curiam*, 356 N.C. 428 (2002). For a further discussion of the admissibility of expert opinion in such cases, see section 11.10.D.6, below.

12. Basis of opinion. Statements of children to medical professionals that do not satisfy the medical diagnosis and treatment exception may still be admissible as the basis of an expert's opinion. *See* 2 BRANDIS & BROUN § 217, at 884. If admitted on that ground, the statements are not substantive evidence of the facts asserted in the statement.

F. Rule 803(6): Business Records

1. Criteria. Rule 803(6) excepts from the hearsay rule entries made in the regular course of business. This exception requires inquiry into: (1) the method and circumstances of the preparation of the record; and (2) the information contained within the record. This exception applies to hospital and medical records, among others. The cases also analyze DSS records under this exception.

Note: Pursuant to the statutory requirements for juvenile proceedings, documentary evidence alone is insufficient to support an order terminating parental rights. Some live testimony is required. *In re N.B.*, 195 N.C. App. 113, 118 (2009) (reversing termination order where "petitioner presented no oral testimony to carry its burden of proof"); *In re A.M.*, 192 N.C. App. 538, 541 (2008) (also relying on Rule 43(a) of the N.C. Rules of Civil Procedure in holding in a termination case that one or more witnesses must be "sworn or affirmed and tendered to give testimony"); *see also* Chapter 9.10.A.

The same principle applies in abuse, neglect, and dependency proceedings. *See In re J.T.*, 252 N.C. App. 19 (2017) (statements by attorneys are not considered evidence and do not satisfy requirement for taking of evidence); *In re D.Y.*, 202 N.C. App. 140, 141–43 (2010) (reversing a permanency planning order where no witnesses testified and the order was based solely on written reports, prior orders, and attorneys' oral arguments); *In re D.L.*, 166 N.C. App. 574 (2004) (holding that the trial court's findings in a permanency planning order were not supported by competent evidence where DSS offered a written summary but no oral testimony).

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2. Method and circumstances of preparation. The requirements as to the method and circumstances of the creation of business records are familiar ones: The record must be made at or near the time of the event, it must be prepared by someone with a business duty to the organization (typically, an employee of the organization), it must have been made in the regular course of business, and the regular practice of the business must have been to make such records. *See generally* 2 BRANDIS & BROUN § 225.

(a) Establishment of foundational requirements. The witness who testifies in court to the method and circumstances of the preparation of a business record is not required to be the

maker of the record. The rule requires only that the foundation be shown by the testimony of the custodian of the business's records or other qualified witness. Thus, if the employee who made the record is not available to testify, another employee familiar with the circumstances of the creation of the record and the business's procedures may testify to the method and circumstances of the record's preparation. *See In re Smith*, 56 N.C. App. 142, 148 (1982) (upholding the admission of a DSS report based on the testimony of a social worker who did not work on the report but who testified that it was made in the regular course of business, etc.); *accord In re C.R.B.*, 245 N.C. App. 65 (2016).

(b) Records within records. DSS records often include records from other organizations, such as records from other county DSS agencies, private drug labs, and police and sheriff departments. See Chapter 14.1 (discussing DSS access to information of other agencies). A proper foundation, including authenticity, must be shown for both the DSS record and the records from other organizations within the DSS record. The requirements are relatively easy to satisfy, but the mere sharing of the information with DSS may be insufficient. *See* 2 BRANDIS & BROUN § 243, at 985 & n.39 ("Copies that are neither certified as correct nor authenticated in any other recognized manner are not admissible.").

The foundation may be established by live testimony of a custodian or employee of the outside organization. If the record of the outside organization is an official record or report, the foundation may be shown, without live testimony, by a proper certification from an official with the outside organization attesting to authenticity and by the court's taking of judicial notice of the legal requirements for preparation of the record. *See* MOSTELLER § 5-4, at 5-77 to 5-78 (authenticity of a public record may be established by an attesting certificate), § 11-5, at 11-44 to 11-46 (court may take judicial notice of the statute, regulation, or custom requiring a public official to prepare the record and, if the attested copy is fair on its face (complete with no erasures), the document's face creates a permissive inference that the official followed the proper procedures in preparing the particular record). The hearsay exception for official records is discussed further in section 11.6.G, below.

In some circumstances, a DSS employee may be able to lay the foundation for an outside organization's records, but the extent to which the courts would allow that possibility may be limited. *See In re S.D.J.*, 192 N.C. App. 478, 482–84 (2008) (permitting a DSS employee to establish the foundation for a drug test report prepared by an outside lab where the DSS employee collected the sample, ordered the report, and filed the results with her office); *see also State v. Hicks*, 243 N.C. App. 628 (2015) (allowing officer to lay foundation for record from federal database showing defendant's purchases of pseudoephedrine, a methamphetamine precursor); *State v. Sneed*, 210 N.C. App. 622, 628–31 (2011) (not plain error for trial court to admit under Rule 803(6) printout from National Crime Information Center (NCIC) about stolen gun; court rejected defendant's argument that State was required to present testimony from a custodian of records for NCIC, finding that adequate foundation was laid through testimony of local police officer who used the database in his regular course of business).

Evidence Rule 803(6) now allows the use of an affidavit to establish the foundation for business records, without live testimony. The revised rule applies to records of nonparties, such as records obtained by DSS from an outside, nonparty organization. The proponent must give advance notice to all other parties of the intent to offer the evidence by affidavit. *See generally* Jonathan Holbrook, *Rule 803(6): Please Hold for the Next Available Representative . . .*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (Mar. 13, 2018) (discussing affidavit procedure).

Another mechanism for attesting to business records, without live testimony, is North Carolina Rule of Civil Procedure 45(c)(2), which provides that the custodian of hospital medical records or public records may submit an affidavit attesting to the records in response to a subpoena duces tecum. *See In re J.B.*, 172 N.C. App. 1, 17–18 (2005) (relying on the rule to admit mental health records). Opposing parties may still contest the admissibility of specific information within records offered by affidavit.

(c) Records prepared in anticipation of litigation. Exclusion is not automatically required of records prepared in anticipation of litigation. Thus, a DSS record that meets the requirements for admission as a business record is not necessarily inadmissible even though it is prepared in part in anticipation of legal proceedings. A record prepared specially for litigation purposes, however, would likely not satisfy the business record exception because it would not be prepared in the regular course of business. *See generally Palmer v. Hoffman*, 318 U.S. 109 (1943) (holding that a railroad company's preparation of an accident report for use in defending against potential litigation was not made in the regular course of the company's business within the meaning of the exception). Also, if the court finds a record untrustworthy, even though it otherwise satisfies the requirements of the business records exception, the court has the discretion to exclude it. *See* N.C. R. EVID. 803(6) (stating that business records are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness"); *State v. Wood*, 306 N.C. 510, 513–16 (1982) (factor in evaluating the reliability of a business record is whether it was prepared ante litem motam, that is, before a lawsuit was brought); MOSTELLER § 11-4(B), at 11-41 (court may exclude records that otherwise meet the business records exception if they are suspect or unreliable).

Note: By statute, predisposition reports are not admissible at the adjudication hearing in an abuse, neglect, or dependency proceeding. *See* G.S. 7B-808(a); *see also In re Quevedo*, 106 N.C. App. 574, 584 (1992). Such a report would likely not satisfy the business records exception in any event because, by its terms, it is prepared for the court's use and thus likely would not be considered a record prepared in the regular course of business.

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3. Observations, statements, and other information within a record. Two basic requirements, described below, apply to information recorded within a record. Both must be satisfied for information within a business record to be admissible.

(a) Knowledge of fact or event. First, the entry in a record must be based on information provided by a person with knowledge of the fact or event. The employee who enters the

information in the record (or the witness who testifies to the making of the record) need not have personal knowledge of the facts or events in the record, but the person who provided the information must have had personal knowledge. N.C. R. EVID. 803(6) commentary; *Donavant v. Hudspeth*, 318 N.C. 1, 9 (1986) (evidence of practice is sufficient to establish prima facie that a record was prepared from personal knowledge; in this case, however, the record showed that the information in the report was not based on personal knowledge, and the information was therefore not admissible under the business records exception). For example, if a DSS employee's report states, "The respondent had no food in the house on the day of the investigation," the employee must have personal knowledge, or have received the information from someone with personal knowledge, of that fact.

(b) Business duty. Second, the person who provided the information entered in the record must have a business duty to report the information. Information provided by third parties who do not have a duty to the business is generally inadmissible unless it qualifies under another hearsay exception. For example, in the above example about lack of food in the house, if the DSS employee received the information from the respondent's neighbor, even a neighbor claiming to have personal knowledge of the condition of the respondent's house, the information would not be admissible under the business records exception because the neighbor does not have a business duty to DSS. To be admissible, the neighbor's statement would have to qualify under another hearsay exception. *See* 2 BRANDIS & BROUN § 225, at 911 n.481 (stating that "the underlying theory of the exception [is] that the business environment encourages the making of accurate records by those with a duty to the enterprise"); *State v. Reeder*, 105 N.C. App. 343, 351–54 (1992) (statement by a child in a medical report identifying the defendant as the perpetrator was not admissible under the business records exception because it was hearsay within hearsay; the statement did not independently meet the medical diagnosis and treatment exception because the examination was not for that purpose). *But see State v. Scott*, 343 N.C. 313 (1996) (intake form of home for abused women and children, filled out by a resident after she arrived, was properly admitted even though the resident had no business duty in filling out the form; decision criticized by Brandis & Broun, in the above citation, as contrary to the underlying theory of the business records exception).

The obligation to report abuse, neglect, and dependency, in G.S. 7B-301, likely does not constitute a business duty to DSS for the purpose of qualifying a private person's statements to DSS under the business record exception. Reporting by a private person is not in the regular course of the person's responsibilities to DSS, as required by the rule.

4. Opinions within business records. Ordinarily, statements in business records are factual in nature, but Evidence Rule 803(6) also allows appropriate "opinions . . . or diagnoses." At a minimum, the opinion must meet the requirements for admissibility of opinion testimony, discussed in sections 11.9 and 11.10, below. *See In re J.S.B.*, 183 N.C. App. 192 (2007) (determining that the opinion in an autopsy report as to the cause of death as well as observations were admissible under the public records hearsay exception, which is similar to the business records exception); *State v. Galloway*, 145 N.C. App. 555, 565–66 (2001) (statement by a doctor in a hospital record that the patient had psychiatric problems was not

admissible because the sources of information on which the doctor based the opinion were not reliable and the doctor was not qualified to render a psychiatric opinion).

In some circumstances, courts may be reluctant to admit opinions contained in business records even if they satisfy the minimum requirements for admission. According to Imwinkelried, the modern trend is to allow such evidence if the subject matter of the opinion is relatively simple and noncontroversial—for example, an entry in a hospital record listing physical symptoms such as blood pressure. The courts may be reluctant to admit an opinion within a business record if the opponent has a substantial need to cross-examine the declarant of the opinion, which is a function of two factors. The first factor is the opinion's complexity or subjectivity. When the opinion is highly evaluative, "the policy underlying the hearsay rule mandates that we afford the opponent an opportunity to cross-examine." IMWINKELRIED § 1220, at 12-59 to 12-60. The second factor is the importance of the issue in the case. "The more central the issue in the case, the more likely the court is to hold that the opponent is entitled to confront a witness rather than a document." *Id.* at 12-60; *see also* 2 MCCORMICK § 293, at 481–82 (federal version of Rule 803(6) [which is comparable to North Carolina's version] allows opinions and diagnoses within business records, but such statements may be inadmissible if they lack trustworthiness or their probative value outweighs their prejudicial effect under Evidence Rule 403; courts also may be reluctant to permit a verdict based on an opinion in a business record without allowing the opponent the opportunity to cross-examine the person who gave the opinion).

5. Objections to business records. The rules of evidence do not contain any special requirement for objecting to business records. A party may do so before trial by motion in limine or at trial by objection. Some local rules may contain a time limit on objecting, however. *See In re T.M.*, 187 N.C. App. 694, 697–701 & n.2 (2007) (because the respondent father failed to object to medical records by the deadline in the then-applicable Twelfth Judicial District local rules [deleted from the current version of the rules], the trial court admitted the records at the adjudication hearing over the respondent's objection that DSS had not established a proper foundation; the Court of Appeals did not specifically decide whether the local rules provided an appropriate basis for overruling the respondent's objection because the respondent could not show prejudice, but noted that the local rule was not intended to be an evidentiary rule but instead was designed to promote the efficient administration of justice); *In re J.S.*, 182 N.C. App. 79 (2007) (upholding, in a two-to-one decision, a local administrative discovery order requiring respondents to review DSS records within ten working days after receiving notice that records are available for review).

If the method and circumstances of preparation of the record do not satisfy the business records exception (for example, the record was not prepared in the regular course of business), the opponent may object to the entire record. If specific information within a business record is not admissible (for example, the information is hearsay from a person without a business duty to the organization or is inadmissible opinion), the opponent should object specifically to each item of information. Otherwise, the issue may be waived on appeal for failing to bring the objectionable evidence specifically to the attention of the trial court. See section 11.13.D, below.

G. Rule 803(8): Official Records and Reports

Rule 803(8) excepts public records and reports from the hearsay rule. The use of the term "public" is somewhat misleading because the record does not need to be public in the sense that members of the public have a right to view it. For that reason, commentators refer to this exception as covering "official" records and reports.

The foundational requirements for official records are similar to those for business records, discussed in section 11.6.F, above. Because of this overlap, the exception has not arisen very often in juvenile or other North Carolina cases. *See In re J.S.B.*, 183 N.C. App. 192 (2007) (trial court allowed the admission of an autopsy report under the business records exception, while the appellate court upheld admission under the public records exception). For a brief discussion of laying a foundation for the admission of official records, see section 11.6.F.2(b), above (discussing official records within other records).

The principal reason for having a separate exception for official records appears to come from criminal cases. The exception prohibits the use of law enforcement reports and other investigative reports by the State against the defendant in a criminal case. *See* N.C. R. EVID. 803(8) & commentary (rule states this limitation and the commentary elaborates that if investigative reports are not admissible under the public records exception, they also are barred under the business records exception); *State v. MacLean*, 205 N.C. App. 247, 250–51 (2010) (holding that ministerial matters, such as fingerprints or photographs, are not subject to this limitation); John Rubin, *Evidence Rule 803(8) and the Admissibility of Police Reports*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (Mar. 7, 2017) (discussing whether police reports inadmissible under Rule 803(8) may be admitted under other hearsay exceptions); 2 MCCORMICK § 296, at 497–501 (discussing the meaning of the limitation).

This limitation does not apply to the use of law enforcement reports in civil proceedings. As under the business records exception, however, hearsay within a law enforcement report or other official record still must satisfy another hearsay exception to be admissible. *See Wooten v. Newcon Transportation, Inc.*, 178 N.C. App. 698, 703–04 (2006) (finding a 911 report admissible in a civil workers' compensation proceeding where the report met the public records exception and the statements from a caller within the report met the present sense impression hearsay exception).

H. Rules 803(24) and 804(b)(5): Residual Hearsay

Rules 803(24) and 804(b)(5) create a catch-all or "residual" exception to the hearsay rule, allowing the admission of a statement that does not satisfy an enumerated hearsay exception if the statement meets certain criteria.

1. Comparison of rules. Rules 803(24) and 804(b)(5) each create an exception for residual hearsay. The rules are identical, requiring that the proponent satisfy six requirements (discussed in subsection 3, below), except that Rule 804(b)(5) also requires that the declarant be unavailable to testify for his or her statement to be admissible. Although not explicitly a requirement for admission under Rule 803(24), unavailability is still a factor affecting

admissibility under that rule. *See, e.g., In re F.S.*, 835 S.E.2d 465 (N.C. Ct. App. 2019) (trial judge erred in allowing social worker to testify about notes of child's statements to therapist and former social worker under Rule 803(24) where, among other things, DSS made no showing of unavailability of child, therapist, or former social worker). The cases state that the inquiry into the trustworthiness and probative value of a statement, two of the six requirements for admission under both rules, may be less strenuous under Rule 804 because, if the declarant is unavailable to testify, the need for admitting the evidence may be greater. *See* 2 BRANDIS & BROUN § 241, at 964; *State v. Garner*, 330 N.C. 273, 284 (1991); *see also State v. Smith*, 315 N.C. 76, 91–92 (1985) (cautioning that the trial judge must carefully scrutinize evidence when offered under Evidence Rule 803(24)). The cases also indicate that the availability of the witness remains a factor under the other requirements for admissibility. *See State v. Hollingsworth*, 78 N.C. App. 578, 580 (1985) (to be admissible under Rule 803(24) or 804(b)(5), evidence must be more probative than other evidence reasonably available; the availability of a witness is therefore a crucial factor under either exception because usually live testimony will be more probative on the point for which it is offered); *State v. Nichols*, 321 N.C. 616, 624–25 & n.2 (1988) (reason for the declarant's unavailability to testify is relevant to whether the statement is sufficiently trustworthy, a key factor under both residual exceptions).

2. Unavailability. Rule 804(a) lists five grounds for a finding of unavailability. Those most likely to arise in cases involving child witnesses in juvenile cases are as follows.

(a) Physical or mental illness or infirmity. Rule 804(a)(4) provides that unavailability includes situations in which the declarant is unable to testify because of a then-existing physical or mental illness or infirmity. Before finding a child witness unavailable on this basis, the court may need to determine whether various accommodations would enable the child to testify (discussed in section 11.2.B, above). If a witness is incompetent to testify, then the witness is unavailable within the meaning of Rule 804(a)(4). *In re Clapp*, 137 N.C. App. 14, 20 (2000).

A finding of incompetency to testify may bear on whether the witness's out-of-court statements are sufficiently trustworthy to be admissible under either residual hearsay exception. *Compare State v. Stutts*, 105 N.C. App. 557 (1992) (holding that a child's out-of-court statements were inadmissible under the residual hearsay exception where the trial court found the child unavailable as a witness on the ground that the child could not tell truth from fantasy), *with State v. Wagoner*, 131 N.C. App. 285, 290–91 (1998) (determining that the child's incompetence to testify satisfied the unavailability requirement but did not render her out-of-court statements too untrustworthy to be admitted under the residual hearsay exception).

Other cases addressing unavailability under Rule 804(a)(4) include: *State v. Carter*, 338 N.C. 569, 590–92 (1994) (trial judge did not err in finding the witness unavailable where the witness refused to testify and the witness's former psychiatrist testified that compelling her to testify would exacerbate her depression for which she had previously been hospitalized and could lead to suicide); *State v. Chandler*, 324 N.C. 172, 178–81 (1989) (4-year-old child victim was unavailable to testify when she was so overcome with fear

that she was unable to respond to the prosecutor's questions even after the court allowed the mother to sit with the child while she attempted to testify).

Juvenile cases addressing unavailability under Rule 803(24) include: *In re F.S.*, 835 S.E.2d 465 (N.C. Ct. App. 2019) (trial judge erred in allowing social worker to testify about notes of child's statements to therapist and former social worker under Rule 803(24) where, among other things, DSS made no showing of unavailability of child, therapist, or former social worker); *In re W.H.*, 819 S.E.2d 617 (N.C. Ct. App. 2018) (trial judge's finding of trustworthiness was not contradicted by its basis for finding the daughters unavailable—that testifying would traumatize them and would cause them confusion and that there was a risk that they would not be truthful out of guilt and fear).

(b) Refusal to testify. Rule 804(a)(2) provides that a witness is unavailable if he or she persists in not testifying despite being ordered to do so by the court. As with other witnesses, for this ground of unavailability to apply the court must specifically order the child witness to testify and the child must refuse to do so. *See State v. Linton*, 145 N.C. App. 639, 645–47 (2001) (so holding). Hostility to the questions or questioner does not amount to a refusal to testify. *State v. Finney*, 358 N.C. 79, 80–84 (2004) (so holding).

(c) Lack of memory. Rule 804(a)(3) provides that a witness is unavailable if he or she testifies to a lack of memory about the subject matter of the out-of-court statement. This exception contemplates that the witness, including a child witness, take the stand and be subject to cross-examination. N.C. R. EVID. 804 commentary. If the witness remembers the incident or matter to which the statement refers, a lack of memory as to the details of the incident or matter does not make the witness unavailable. *See State v. Miller*, 330 N.C. 56, 60–62 (1991) (trial court erred in finding witnesses unavailable for lack of memory and admitting their statements under the residual hearsay exception where the witnesses testified that they remembered the incident; the witnesses were not unavailable for not being able to remember all of the details of the incident or for disagreeing with the detective's account of their out-of-court statements). The rationale for this ground of unavailability is that when the witness does not remember the subject matter of the statement, testimony about that subject is effectively "beyond reach." N.C. R. EVID. 804 commentary. One case has found that a lack of memory about the details of the out-of-court statement, as opposed to the subject of the statement, rendered the witness unavailable. This approach may not be in accord with the requirements of the rule. *See State v. Brigman*, 178 N.C. App. 78, 87–90 (2006) (holding that it was not an abuse of discretion for the trial court to find the children unavailable and to admit their statements where the children testified on voir dire that they had told their foster parents about the things the defendant had done to them but they could not remember what they said).

3. Notice, trustworthiness, probative value, and other criteria. For a statement to be admitted under Rule 804(b)(5), six conditions must be satisfied (in addition to the declarant being unavailable). The six conditions also apply to Rule 803(24) (although unavailability of the declarant is not an explicit requirement, as described in subsection 1, above). Under both rules, the trial judge must make findings on all six requirements. *See State v. Dammons*, 121 N.C. App. 61, 64 (1995) (requiring the trial court to make these six determinations for

statements offered under Rule 804(b)(5)); *In re Gallinato*, 106 N.C. App. 376, 377–78 (1992) (error for the court not to make the findings under Rule 803(24); the rationale for this requirement is to ensure that the trial court undertakes serious and careful consideration of admissibility).

(a) Conditions. The six conditions that must be satisfied are:

- The proponent must give the adverse party written notice of intention to offer the statement and its particulars, including the name and address of the declarant, sufficiently in advance of offering the statement to provide a fair opportunity to meet the statement.
- The statement must not be specifically covered by any other hearsay exception.
- The statement must have circumstantial guarantees of trustworthiness equivalent to those of the specifically listed exceptions.
- The statement must be offered as evidence of a material fact.
- The statement must be more probative on the point for which it is offered than any other evidence procurable by reasonable efforts.
- Admission of the statement will best serve the purposes of the rules of evidence and the interests of justice.

See State v. Smith, 315 N.C. 76 (1985) (setting forth the six-part test).

(b) Notice. The cases have stressed the importance of proper notice, although they have allowed relatively short notice when the circumstances showed that the adverse party had sufficient time and information to meet the statement. *See State v. Carrigan*, 161 N.C. App. 256, 260–62 (2003) (noting that some North Carolina cases have found notice given at the beginning of trial to be sufficient when notice was effectively given earlier through oral notice or discovery; finding in this case that the proponent did not give sufficient notice when he first notified the other side of his intent to offer evidence under the residual hearsay exception at the beginning of trial); *In re Krauss*, 102 N.C. App. 112 (1991) (respondent had sufficient notice of content of children's statements offered under Rule 803(24); DSS had provided names and addresses of witnesses and some notes of expert to whom children made some statements); *In re Hayden*, 96 N.C. App. 77, 82 (1989) (holding evidence inadmissible under Rule 803(24) because no notice was given); *see also* 2 BRANDIS & BROUN § 241, at 969 & n.763 (collecting cases).

(c) Trustworthiness. In considering whether a statement has sufficient guarantees of trustworthiness, courts consider various factors. *See Idaho v. Wright*, 497 U.S. 805 (1990) (noting that courts have considered the spontaneity of statements, consistent repetition, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of motive to fabricate); *State v. Isenberg*, 148 N.C. App. 29, 35–36 (2001) (quoting *State v. Wagoner*, 131 N.C. App. 285, 290 (1998)) (court should consider among other factors: "'(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination'"). (The last factor was interpreted in *State v.*

Nichols, 321 N.C. 616, 624–25 & n.2 (1988), as requiring consideration of the reason for the witness's unavailability.)

A finding of trustworthiness is particularly important because it overcomes the presumption of unreliability of statements that are not within a specific hearsay exception. *State v. Dammons*, 121 N.C. App. 61, 65 (1995).

For application of the trustworthiness factor in cases involving child witnesses in North Carolina, see *State v. Deanes*, 323 N.C. 508 (1988) (upholding a finding that statements had sufficient circumstantial guarantees of trustworthiness); *State v. Blankenship*, 814 S.E.2d 901 (N.C. Ct. App. 2018) (trial judge erred in failing to make finding on trustworthiness, but appellate court conducted own review of the record and found sufficient guarantees of trustworthiness to allow admission of child's statements under Rule 804(b)(5)); *In re M.A.E.*, 242 N.C. App. 312 (2015) (trial judge found that certain statements were sufficiently trustworthy and admissible, including videotaped statements, and others were not; Court of Appeals upholds admission of statements); *State v. Brigman*, 178 N.C. App. 78 (2006) (upholding admission); *State v. Isenberg*, 148 N.C. App. 29, 35–36 (2001) (upholding admission); *State v. Wagoner*, 131 N.C. App. 285, 289–90 (1998) (child's incompetence to testify satisfied the unavailability requirement but did not render her statements to a social worker too untrustworthy to be admitted); *State v. Holden*, 106 N.C. App. 244, 251–52 (1992) (distinguishing *Stutts*, below, and finding that the trial court's isolated statement that the child seemed unable to understand the consequences of not telling the truth did not undermine the finding that the statements were sufficiently trustworthy to be admissible); *State v. Stutts*, 105 N.C. App. 557 (1992) (holding that the child's statements were inadmissible under the residual hearsay exception where the trial court found the child unavailable as a witness on the ground that the child could not tell truth from fantasy).

4. North Carolina opinions on residual hearsay in juvenile cases. The following published opinions in juvenile cases address the admissibility of statements under the residual hearsay exception in Evidence Rule 803(24).

In re F.S., 835 S.E.2d 465 (N.C. Ct. App. 2019): Trial judge erred in allowing social worker to testify about notes of child's statements to therapist and former social worker under Rule 803(24). DSS made no showing of unavailability of child, therapist, or former social worker, and trial judge made no findings about trustworthiness or other conditions for admission.

In re W.H., 819 S.E.2d 617 (N.C. Ct. App. 2018): DSS sent written notice of intent to offer daughters' statements from one week to seven months before various hearings; notice was adequate under Rule 803(24). Trial judge made sufficient findings of trustworthiness despite failing to address daughters' recantation at one of interviews. Trial judge's finding of trustworthiness was not contradicted by its basis for finding the daughters unavailable—that testifying would traumatize them and would cause them confusion and that there was a risk that they would not be truthful out of guilt and fear.

In re M.G.T.-B, 177 N.C. App. 771 (2006): Any error in admitting child's statements under Rule 803(24) was harmless, as evidence was sufficient to support finding of neglect.

In re Gallinato, 106 N.C. App. 376 (1992): Trial judge's failure to make findings to support admission of statements under Rule 803(24) required reversal.

In re Krauss, 102 N.C. App. 112 (1991): Respondent had sufficient notice of content of children's statements offered under Rule 803(24). DSS had provided names and addresses of witnesses and some notes of expert to whom children made some statements.

In re Hayden, 96 N.C. App. 77 (1989): Respondent failed to comply with notice requirement for admission of statements under Rule 803(24), and trial judge properly excluded child's statements.

11.7 Prior Orders and Proceedings and Judicial Notice

A. Generally

1. Ambiguity in judicial notice principles in juvenile cases. Numerous North Carolina appellate decisions, discussed in this section, state that the trial court in a juvenile case may take judicial notice of prior proceedings in the same case. As one juvenile case observed, however, the extent to which the trial court actually may rely on prior proceedings is unclear. *See In re S.W.*, 175 N.C. App. 719, 725 (2006). The most troublesome question is the extent to which a trial court at an adjudication hearing, such as an adjudication hearing in a TPR case, may rely on prior abuse, neglect, and dependency proceedings, including disposition and review hearings at which the rules of evidence do not apply. Juvenile decisions on judicial notice have not clearly answered that question.

Many decisions, discussed further below, have bypassed close analysis of the permissible reach of judicial notice by relying on the presumption that the trial court disregarded any incompetent evidence in the judicially noticed matters and made an independent determination of the issues in the current proceeding. *See, e.g., In re D.M.R.*, 230 N.C. App. 598 (2013) (unpublished) (stating these principles and finding it immaterial that court copied language from its prior order because there were sufficient, properly supported findings to show grounds for termination); *In re J.W.*, 173 N.C. App. 450, 455–56 (2005) (stating these principles), *aff'd per curiam*, 360 N.C. 361 (2006); *In re J.B.*, 172 N.C. App. 1, 16 (2005) (to same effect).

Likewise, in determining whether the trial court's findings of fact were supported by competent evidence, several decisions have recited, without elaboration, that the trial court took judicial notice of aspects of prior proceedings. Although judicially noticed matters may provide support for a trial court's findings, *see, e.g., In re G.T.*, 250 N.C. App. 50 (2016), *aff'd per curiam*, 370 N.C. 387 (2017), these decisions did not evaluate whether the taking of judicial notice was proper. Some trial courts, in an effort to avoid possible error, have added a general qualification when taking judicial notice—for example, one trial court added "the

caveat that the court 'affords each such document the appropriate weight, taking into consideration the differing standards of proof which govern the hearing from which a particular Order was generated.'" *In re X.L.S.*, 806 S.E.2d 706 (N.C. Ct. App. 2017) (unpublished); *see also In re I.S.D.*, 797 S.E.2d 384 n.7 (N.C. Ct. App. 2017) (unpublished) (trial court took judicial notice of all orders in the case file "to the extent allowed by the North Carolina Court of Appeals").

Although many juvenile decisions do not resolve which aspects of prior proceedings are appropriate subjects of judicial notice, other juvenile decisions, discussed below, suggest that the appellate courts may limit consideration of prior proceedings. The remainder of this section suggests an approach consistent with those cases and established principles of judicial notice.

2. Suggested approach. To determine the extent to which the trial court may rely on prior proceedings, three basic questions should be addressed:

- First, what are the different aspects of prior proceedings that potentially could be considered? Prior proceedings may consist of orders and other entries in the court's records, findings and conclusions by the court, reports and other documentary evidence offered by the parties, and testimony by witnesses.
- Second, what are the appropriate legal principles governing consideration of the different aspects of prior proceedings? While the juvenile cases have relied primarily on the doctrine of judicial notice, other doctrines, such as collateral estoppel and the rules on hearsay, may be more appropriate in some instances.
- Third, what is the impact of the information from prior proceedings? Some information may be binding, other information may be admissible but not binding, and other information may be inadmissible if the opposing party objects.

The discussion below addresses the different aspects of prior proceedings and suggests the appropriate treatment for each. The discussion leans more heavily on decisions outside the juvenile context than in other parts of this Chapter because those decisions more closely analyze the requirements for judicial notice and other doctrines regulating reliance on prior proceedings. The discussion also attempts to order the North Carolina decisions according to the categories identified below. The decisions themselves do not always characterize the information in that way. The approach below reflects the author's analysis of the controlling principles under North Carolina law. First, however, the discussion describes the doctrine of judicial notice because the juvenile decisions so often refer to it in considering prior proceedings.

Note: The discussion in this section concerns whether information from prior proceedings may be considered at adjudication. Because the rules of evidence do not apply at disposition and other non-adjudication hearings, a court at those hearings may have greater latitude in considering prior proceedings, just as it has greater latitude at non-adjudication hearings in considering evidence that would be inadmissible at adjudication. *See, e.g.*, *In re R.A.H.*, 182 N.C. App. 52, 59–60 (2007) (at a permanency planning hearing, the court could take judicial notice of findings from a previous disposition hearing); *In re Isenhour*, 101 N.C. App. 550,

552–53 (1991) (in a custody review hearing under previous Juvenile Code provisions, the court could take judicial notice of matters in the file in considering the history of the case and conducting the current hearing); *see also State v. Smith*, 73 N.C. App. 637, 638–39 (1985) (at resentencing in a criminal case following appeal, at which rules of evidence did not apply, the court could consider evidence offered at the prior sentencing hearing).

B. Definition of Judicial Notice

1. Generally. Evidence Rule 201 contains the general definition of judicial notice. It covers "adjudicative facts," meaning it allows a court to take judicial notice of a fact for the purpose of adjudicating the issues in the current case. N.C. R. EVID. 201(a) & commentary. The term "adjudicative fact" should not be confused with facts adjudicated in a previous proceeding, which may or may not be the proper subject of judicial notice (discussed in section 11.7.D, below).

For a fact to be subject to judicial notice, it must "be one not subject to reasonable dispute." N.C. R. EVID. 201(b). A fact is not subject to reasonable dispute if it either is "generally known within the territorial jurisdiction of the trial court" or "is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* For example, a court may take judicial notice of the time that the sun set on a particular date. *See State v. McCormick*, 204 N.C. App. 105 (2010); *see also In re N.J.M.G.*, 822 S.E.2d 326 (N.C. Ct. App. 2019) (unpublished) (Court of Appeals took judicial notice that Duplin County is two counties away from New Hanover County and is separated by Pender County). The fact to be noticed also must be relevant to the issues in the case as provided in Evidence Rule 401, the general rule on relevance.

The court may not take judicial notice of a disputed fact. *See Crews v. Paysour*, 821 S.E.2d 469, 473 n.1 (N.C. Ct. App. 2018)). It may not take judicial notice of a matter that is not generally known within the territorial jurisdiction of the trial court. *See In re E.G.M.*, 230 N.C. App. 196 (2013) (in case involving Indian Child Welfare Act, court declines to take judicial notice of memorandum of agreement purporting to give state court subject matter jurisdiction). Nor may it take judicial notice of a matter that is not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See State v. Anthony*, 831 S.E.2d 905 (N.C. Ct. App. 2019) (improper to take judicial notice of studies offered by State about alleged risk of recidivism of sex offenders).

When a court takes judicial notice of a fact on the ground that it is not subject to reasonable dispute, evidence of the fact need not actually be offered in the current proceeding. Further, in a civil case, the taking of judicial notice of a fact removes the fact "from the realm of dispute," and evidence to the contrary "will be excluded or disregarded." 1 BRANDIS & BROUN § 24, at 116–17; *see also* N.C. R. EVID. 201(g) ("In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed").

A party is entitled on timely request to be heard about the propriety of the taking of judicial notice. *See State v. Anthony*, 831 S.E.2d 905 (judicial notice improper where matters were not offered in evidence or presented to the defendant or trial judge and were only discussed in

argument). If not notified ahead of time, a request to be heard may be made after judicial notice is taken. N.C. R. EVID. 201(e).

2. Judicial notice of prior proceedings. North Carolina decisions often have observed that a trial court may take judicial notice of its prior proceedings.

In cases outside the juvenile context, judicial notice has usually been limited to matters of record, such as the date of filing of an action (discussed in section 11.7.C, below). These decisions are consistent with the approach to judicial notice in Evidence Rule 201 because they involved facts that were not subject to reasonable dispute and that required no further proof. Isolated decisions outside the juvenile context have departed from this approach, allowing the trial court to consider evidence offered in prior proceedings, but these cases do not appear to reflect the general approach to judicial notice; rather, they appear to have involved an effort by the court to fill inadvertent gaps in the evidence in those cases. The decisions also do not appear to impose the usual consequences of judicial notice because they treat the evidence as competent in the current proceeding but not as beyond dispute. *See, e.g.*, *Long v. Long*, 71 N.C. App. 405, 408 (1984) (court could take judicial notice in an alimony suit of information about the husband's expenses from an order for alimony pendente lite [note that the decision may be superseded by later decisions, discussed in section 11.7.D.4, below]); *In re Stokes*, 29 N.C. App. 283 (1976) (court could take judicial notice of an order in an earlier delinquency case involving the same juvenile to show his age and the court's jurisdiction over the juvenile); *Mason v. Town of Fletcher*, 149 N.C. App. 636 (2002) (in a case in which the parties disputed the width of a right-of-way, the court could take judicial notice of a prior case involving the same parties and could consider evidence from that case about the width of the right-of-way).

In juvenile cases, the courts also have approved the taking of judicial notice of prior proceedings, relying on Evidence Rule 201. In most instances, however, the decisions do not appear to have used judicial notice in the sense meant under that rule. *See, e.g.*, *In re J.W.*, 173 N.C. App. 450, 455–56 (2005) (referring to Evidence Rule 201 but suggesting that the noticed matters were disputed and subject to further proof by stating that the trial court was presumed to have disregarded any incompetent evidence and had to make an independent determination), *aff'd per curiam*, 360 N.C. 361 (2006).

Note: If the taking of judicial notice of prior proceedings is impermissible in part, the objecting party may need to specify the objectionable part; an objection to the taking of judicial notice of all of the proceedings may be insufficient. *See generally* 1 BRANDIS & BROUN § 19, at 96 (so noting for objections to testimony or documents that are inadmissible in part). If the judge sustains an objection to the taking of judicial notice of all of the proceedings, the offering party would need to specifically reoffer the unobjectionable parts of the proceedings. *Id.*

A party requesting judicial notice of prior proceedings may waive objection to the matters noticed. *See generally In re D.T.N.A.*, 250 N.C. App. 582 (2016) (in reversing order terminating parental rights, court noted that permanency planning order, of which trial court took judicial notice, included findings that respondent's multiple drug screens were all

negative); *see also Riopelle v. Riopelle*, 833 S.E.2d 258 (N.C. Ct. App. 2019) (unpublished) (trial judge did not err in relying on prior orders where all parties, including respondent, stipulated and agreed to taking of judicial notice by judge).

C. Orders and Other Court Records

1. Summary. This section addresses information entered or appearing in the court's records, such as the date of filing of a case or an order requiring a party to take certain action. It does not address findings and conclusions within a prior order; nor does it deal with reports or other evidence introduced in prior proceedings, which although they become part of the court file are not record entries in the sense discussed in this section.

A juvenile court may take judicial notice of prior orders by a court and other entries in court records in the sense used here. In a TPR case, for example, it would be appropriate for a trial court to take judicial notice of a prior permanency planning order changing the permanent plan from reunification to adoption. The fact of the prior order and the directives within it are not subject to reasonable dispute and require no further proof to establish them, as contemplated by Evidence Rule 201.

2. Judicial notice of record entries. North Carolina decisions have routinely approved the taking of judicial notice of entries in court records. Decisions have done so, for example, to determine the chronology of litigation, such as the timeliness of a summons or the filing of an appeal. *See, e.g.*, *In re McLean Trucking Co.*, 285 N.C. 552, 557 (1974) (court could determine the chronology of litigation by taking judicial notice of docketed records); *Gaskins v. Hartford Fire Ins. Co.*, 260 N.C. 122, 124 (1963) (court could determine whether a complaint was filed within the time permitted for submitting a claim of loss by taking judicial notice of the filing date of the complaint); *Massenburg v. Fogg*, 256 N.C. 703, 704 (1962) (docketing of appeal); *Harrington v. Comm'rs of Wadesboro*, 153 N.C. 437 (1910) (issuance of summons); *In re M.G.S.*, 803 S.E.2d 665 (N.C. Ct. App. 2017) (unpublished) (appellate court took judicial notice that another state's law assigns role of terminating parental rights to courts); *In re S.D.*, 243 N.C. App. 65, 70 n.3 (2015) (appellate court took judicial notice of official records showing that father was serving active time in prison during period in question); *State v. King*, 218 N.C. App. 384 (2012) (appellate court could take judicial notice of clerk's records showing amount of fine and costs paid by defendant); *Slocum v. Oakley*, 185 N.C. App. 56 (2007) (in determining a motion to dismiss the plaintiffs' lawsuit for failure to prosecute, the court could take judicial notice of the plaintiffs' previous dismissal of a related case and other documents in the court's files showing the failure to prosecute the prior case).

Decisions also have allowed judicial notice of the entry of orders to show the existence of the order and its terms. *See, e.g.*, *State v McGee*, 66 N.C. App. 369 (1984) (magistrate's contempt order was properly admitted in evidence because the court could have taken judicial notice of the order, without its being offered into evidence, to determine whether the magistrate had the authority to hold the defendant in contempt; contempt order was reversed, however, where the State relied solely on statements in the magistrate's order and offered no independent evidence of acts of contempt).

Juvenile decisions likewise have allowed judicial notice of the entry of orders and other record entries in prior proceedings. These decisions are consistent with North Carolina decisions on judicial notice outside the juvenile context. *See, e.g.*, *In re D.K.*, 227 N.C. App. 649 (2013) (unpublished) (trial court took judicial notice of decretal portions of prior orders and made findings about respondent's failure to comply); *In re D.B.G.*, 222 N.C. App. 854 (2012) (unpublished) (stating that trial judge could take judicial notice of prior orders since it is presumed that judge disregarded incompetent evidence; court found that judge relied on prior orders primarily for procedural history); *In re F.H.*, 209 N.C. App. 470 (2011) (unpublished) (taking judicial notice of terms of prior visitation order); *In re A.S.*, 203 N.C. App. 140 (2010) (Court of Appeals stated that it could take judicial notice of its prior decision in finding that the trial court on remand relied on a finding that the Court of Appeals had disavowed); *In re S.W.*, 175 N.C. App. 719, 725–26 (2006) (court could take judicial notice of the entry of prior orders terminating the mother's parental rights to three other children); *In re Stratton*, 159 N.C. App. 461, 462–63 (2003) (court could take judicial notice of a termination order to determine whether the current appeal was moot); *In re Williamson*, 67 N.C. App. 184, 185–86 (1984) (court could take judicial notice of a custody order to determine whether the current appeal was moot).

A number of juvenile decisions state generally that the trial court may take judicial notice of prior orders, but they do not identify the parts of the order being noticed or the purpose for which they could be used. *See, e.g.*, *In re S.D.J.*, 192 N.C. App. 478, 487–88 (2008) (stating generally that a court may take judicial notice of prior orders, but also stating that the court is presumed to have disregarded incompetent evidence within the noticed matters). These decisions provide little guidance on the appropriate scope of judicial notice.

D. Findings and Conclusions by Court

1. Summary. This section deals with findings and conclusions from a prior proceeding, such as a determination at an adjudication hearing that a child is neglected or a finding at a review hearing that a parent is not making progress on certain matters. While judicial notice can establish that a particular record *is* the record of prior proceedings (as discussed in the preceding section), the applicable doctrine for considering findings and conclusions from orders in that record is ordinarily *not* judicial notice in the sense meant by Evidence Rule 201. *See generally U.S. v. Zayyad*, 741 F.3d 452, 464 (4th Cir. 2014) ("[f]acts adjudicated in a prior case, or in this instance, a prior trial in the same case, do not meet either test of indisputability in [Federal Evidence] Rule 201(b)") (citation omitted); 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 201.02[3], at 201-8 to 201-9 (11th ed. 2015) (explaining that a court may take judicial notice that a judgment was entered or that findings of fact were made, but "the truth of these . . . findings are not proper subjects of judicial notice"); N.C. R. EVID. 201 commentary (noting that N.C. Evidence Rule 201(b) is substantively the same as Federal Evidence Rule 201(b)).

The applicable doctrines and their impact appear to be as follows:

- The court may consider findings and conclusions from orders in prior proceedings if collateral estoppel applies, in which case the findings and conclusions are binding in a

later proceeding. Collateral estoppel applies to findings from prior adjudication hearings but not to findings from non-adjudication hearings.

- Under the rules of evidence, when collateral estoppel does not apply, prior judgments and orders ordinarily are not admissible as evidence of the facts found. Nevertheless, North Carolina opinions in juvenile cases may allow a court at adjudication to consider findings of fact from prior non-adjudication hearings. The opinions are unclear, however, about the circumstances in which such findings may be considered and the weight that may be given them.
- Formal concessions in prior proceedings, such as stipulations of fact, are likely binding in later proceedings against the party who made the concession or entered into the stipulation.

2. Collateral estoppel. The doctrines of res judicata and collateral estoppel permit consideration of findings from prior proceedings because their very purpose is to preclude a party from relitigating claims or issues decided in prior proceedings. Most relevant to juvenile cases is the doctrine of collateral estoppel (or issue preclusion), which bars the parties "'from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.'" *In re N.G.*, 186 N.C. App. 1, 4 (2007) (quoting *In re Wheeler*, 87 N.C. App. 189, 194 (1987)), *aff'd per curiam*, 362 N.C. 229 (2008).

When applicable, the effect of collateral estoppel is comparable to judicial notice, removing the matter from further dispute, but it is misleading to use the term "judicial notice" because it does not adequately identify the requirements for collateral estoppel. *See generally In re C.D.A.W.*, 175 N.C. App. 680, 686–87 (2006) (respondent objected to the court's taking of judicial notice of prior findings, but the court observed that the "basis of respondent's objection is that petitioner should not have the benefit of collateral estoppel with respect to previous findings of fact not determined by the requisite standard of proof required in a termination of parental rights proceeding"; the respondent showed no prejudice in this case), *aff'd per curiam*, 361 N.C. 232 (2007). It would be appropriate, however, for a court to take judicial notice of a prior order for the purpose of establishing the prerequisites of collateral estoppel. *See Eagle v. Johnson*, 159 N.C. App. 701 (2003) (so holding for related doctrine of res judicata).

3. Prior adjudication findings and conclusions. Juvenile cases have recognized that the trial court may rely on a prior determination of abuse or neglect in a later TPR case to show the occurrence of prior abuse or neglect. The prior finding or determination is conclusive as to the condition of the child at that time (although it is not conclusive on the question of whether the parents' rights should be terminated because the court still must consider the circumstances since the time of the adjudication as well as the relevant actions or inactions of each parent). *See In re N.G.*, 186 N.C. App. 1, 4–5 (2007), *aff'd per curiam*, 362 N.C. 229 (2008); *In re A.K.*, 178 N.C. App. 727 (2006) (based on collateral estoppel, the court could rely on a prior adjudication of neglect of one child of the parents in determining in a later case whether another child of the same parents was neglected; the prior adjudication was insufficient alone, however, to establish that the second child was neglected); *see also In re D.N.M.G.*, 245 N.C. App. 130 (2016) (unpublished) (holding that it was proper for trial court in termination of parental rights proceeding to rely on neglect adjudication and supporting findings; court

rejects argument that trial court erroneously applied findings from review proceedings to prove grounds for termination, finding that trial court received unrebutted live testimony at termination hearing); *In re G.N.*, 217 N.C. App. 399 (2011) (unpublished) (father was estopped from contesting adjudication of neglect based on consent order; father's counsel signed order and did not object to order when offered at later proceeding).

Collateral estoppel also applies to adjudications adverse to DSS. *See In re F.S.*, 835 S.E.2d 465 (N.C. Ct. App. 2019) (DSS was collaterally estopped from arguing that mother's hospitalizations showed risk of harm to child where issue was fully litigated and court's previous findings showed no nexus of harm or substantial risk of harm; collateral estoppel did not preclude trial judge from adjudicating subsequent allegations and events).

Some cases explicitly refer to the doctrine of collateral estoppel, while others state that a determination of abuse or neglect is admissible in a later proceeding. *See, e.g.*, *In re Ballard*, 311 N.C. 708, 713–14 (1984); *In re J.H.K.*, 215 N.C. App. 364, 368 (2011); *In re Brim*, 139 N.C. App. 733, 742 (2000); *In re Byrd*, 72 N.C. App. 277, 279 (1985). The result appears to be the same. The prior determination at adjudication establishes the matter found for purposes of the subsequent proceeding. *See In re Wheeler*, 87 N.C. App. 189, 194 (1987) (noting similarities in the two approaches).

When collateral estoppel applies, a court may rely on the ultimate conclusion reached in the prior proceeding (for example, that a child was abused) as well as subsidiary findings (for example, that a parent had engaged in a sexual act with the child). *See id.* (prior finding of sexual abuse of children by father had been fully litigated and was necessary to adjudication of abuse).

4. Prior findings and conclusions from non-adjudication proceedings. Perhaps the most perplexing aspect of judicial notice in juvenile cases is the treatment of prior findings and conclusions from non-adjudication proceedings. The issue requires consideration of collateral estoppel principles, rules of evidence, and juvenile caselaw.

(a) Collateral estoppel inapplicable. The decisions discussed in 3., above, indicate that for collateral estoppel to apply to findings from a prior proceeding, the findings must have been based on clear and convincing evidence, the standard applicable to findings at adjudication. *See In re N.G.*, 186 N.C. App. 1, 9 (2007) (holding that the doctrine of collateral estoppel permits trial courts to rely only on those findings of fact from prior orders that were established by clear and convincing evidence), *aff'd per curiam*, 362 N.C. 229 (2008); *In re A.K.*, 178 N.C. App. 727, 731–32 (2006) (to same effect).

Under this principle, collateral estoppel would not apply to findings from non-adjudication hearings at which the clear and convincing evidence standard does not apply. *See also In re K.A.*, 233 N.C. App. 119, 125–28 & n.4 (2014) (trial court erred in abuse, neglect, and dependency proceeding by applying doctrine of collateral estoppel to prior civil custody proceedings because proceedings involved different burdens of proof—preponderance of the evidence in civil custody case versus clear and convincing evidence at adjudication in abuse, neglect, and dependency case; court also rejected argument that juvenile decisions

allow trial judge to take judicial notice of facts in prior disposition orders subject to lower evidentiary standard, stating that taking judicial notice of the existence of an order or a disposition in an order "is not the same thing as taking judicial notice of each of the facts resolved in that order"); *In re J.S.B.*, 183 N.C. App. 192, 202–03 (2007) (judgment in a civil action is not admissible in subsequent criminal prosecution although exactly the same questions are in dispute because, among other reasons, the standard of proof in the civil action is lower).

Collateral estoppel likely would not apply even if the trial court at a non-adjudication hearing applied a clear and convincing evidence standard of proof. The court's decisions in *In re N.G.* and *In re A.K.*, cited above, reflect an unwillingness to accord collateral estoppel effect—that is, to bar a party from litigating an issue—based on findings from non-adjudication hearings. Collateral estoppel principles do not apply to bar a party from litigating an issue unless he or she had a full and fair opportunity to litigate that issue in a prior proceeding. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980) (recognizing that "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case"); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (recognizing due process basis for the requirement); *In re N.G.*, 186 N.C. App. at 4 (recognizing that doctrine of collateral estoppel operates to preclude parties from retrying "fully litigated issues"), *aff'd per curiam*, 362 N.C. 229 (2008). Because of the reduced procedural protections at non-adjudication hearings, findings from those hearings would not appear to be an appropriate basis for collateral estoppel even if the trial court found that clear and convincing evidence supported the findings. *See In re J.C.M.J.C.*, 834 S.E.2d 670 (N.C. Ct. App. 2019) (questioning reliance at adjudication on findings from prior nonsecure custody hearing; although subject to the clear and convincing standard of proof, nonsecure custody hearing lacks the procedural safeguards for adjudications); *see also Wells v. Wells*, 132 N.C. App. 401, 409–15 (1999) (in an alimony case, collateral estoppel did not preclude wife from relitigating at the final alimony hearing issues ruled on in interim postseparation support hearing in the same case; the court notes the relaxed rules of evidence, the lack of a right to appeal, and other characteristics distinguishing interim and final hearings); *accord Langdon v. Langdon*, 183 N.C. App. 471, 474 (2007).

Note: The cases do not distinguish between TPR proceedings by petition, which initiates a new case, and TPR proceedings by a motion in the cause, which is part of an ongoing case; however, the result would appear to be the same. In both instances the findings from prior non-adjudication hearings would not appear to be binding at adjudication. *See also* 18 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 134.20[1], at 134-52.3 (3d ed. 2018) (collateral estoppel principles apply to relitigation of an issue after final judgment; doctrine of the law of the case is similar for issues decided at various stages of the same litigation).

(b) Hearsay restrictions. If collateral estoppel does not apply, findings and conclusions within a prior judgment are ordinarily inadmissible in a later proceeding subject to the North Carolina Rules of Evidence. The principal reason is that they are a form of hearsay—

statements made outside the current proceeding, offered as evidence of the truth of those statements. See section 11.5.C, above (discussing the definition of hearsay). "It is chiefly on this ground that, except where the principle of *res judicata* [or the related principle of collateral estoppel] is involved, the judgment or finding of a court cannot be used in another case as evidence of the fact found." 2 BRANDIS & BROUN § 197, at 805; *see also Reliable Props., Inc. v. McAllister*, 77 N.C. App. 783, 787 (1985) ("North Carolina law has long prohibited the use of a previous finding of a court as evidence of the fact found in another tribunal. This practice remains the same under the new evidence code."); *cf. Bumgarner v. Bumgarner*, 231 N.C. 600, 601 (1950) (facts found on a motion for alimony pendente lite, a preliminary proceeding in an alimony action, "are not binding on the parties nor receivable in evidence on the trial of the issues").

Findings from a previous judgment are admissible in a later proceeding if the judgment comes within a hearsay exception. *See generally* N.C. R. EVID. 802 ("Hearsay is not admissible except as provided by statute or by these rules."). North Carolina's evidence rules contain one hearsay exception for prior judgments. *See* N.C. R. EVID. 803(23) & commentary (exception applies to "[j]udgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation"; the commentary notes the need for having an exception because judgments generally cannot be used to prove facts essential to a judgment except where the principle of res judicata applies).[2]

Because this hearsay exception ordinarily would not apply in juvenile cases, findings from non-adjudicatory hearings, such as nonsecure custody or disposition hearings, would not

[2] When it enacted the rules of evidence, North Carolina chose not to include a second hearsay exception, patterned after Federal Rule of Evidence 803(22), for criminal convictions. The federal hearsay exception allows use of a judgment of conviction to prove "any fact essential to sustain the judgment" in the circumstances described in the exception. Because North Carolina omitted this exception, a criminal conviction is generally not admissible in a later case to establish the facts of the offense underlying the conviction unless principles of res judicata or collateral estoppel apply. *See* N.C. R. EVID. 803 commentary (noting that exception (22) is reserved for future codification because North Carolina did not adopt the equivalent of the federal hearsay exception for judgments of conviction); *Carawan v. Tate*, 53 N.C. App. 161, 164 (1981) (holding that evidence of conviction of assault was not admissible in a civil action to establish the commission of the assault), *aff'd as modified on other grounds*, 304 N.C. 696 (1982); *see also* 2 BRANDIS & BROUN § 197, at 805 n.74 (collecting cases). *But see Little v. Little*, 226 N.C. App. 499 (2013) (finding it unnecessary to determine whether plaintiff in action for domestic violence protective order could rely on non-mutual offensive collateral estoppel as basis for using defendant's prior assault conviction to establish that defendant engaged in acts of domestic violence against her; judge in criminal case entered prayer for judgment continued, which was not final judgment); *Burton v. City of Durham*, 118 N.C. App. 676 (1995) (allowing defendant city in civil rights action to rely on non-mutual defensive collateral estoppel as basis for using plaintiff's prior conviction of assault on officer to preclude plaintiff from relitigating certain issues).

Other grounds may still allow use of a criminal conviction or aspects of it. For example, the fact of conviction, as opposed to the facts underlying the conviction, may be used to impeach a witness or, in juvenile cases, to show a basis for abuse designated in the Juvenile Code. See section 11.8.D.3, below (discussing this basis of admissibility of a prior conviction). A guilty plea, being an admission, generally would be admissible in a later civil action against the party who entered the plea. See section 11.6.B, above (discussing hearsay exception for admissions of party-opponent); *see also* Michael G. Okun & John Rubin, *Employment Consequences of a Criminal Conviction in North Carolina*, POPULAR GOV'T, Winter 1998, at nn.64–66 and accompanying text (1998) (discussing the admissibility of a guilty plea as opposed to a conviction). But see section 11.8.D.3, below (explaining that when a party is relying on Evidence Rule 404(b) to show another crime, wrong, or act, the proponent generally may not rely on a criminal conviction).

appear to be admissible under the rules of evidence at an adjudicatory hearing. This result would not preclude a party from offering testimony or other admissible evidence on the issues that were the subject of non-adjudicatory findings—for example, evidence of the condition of a parent's home or evidence that a parent had or had not taken certain steps directed by the court.

(c) A different theory of admissibility. A number of juvenile cases state that a court may take judicial notice of findings from non-adjudicatory hearings, such as disposition hearings. *See, e.g., In re M.N.C.*, 176 N.C. App. 114, 120–21 (2006) (in a TPR case, permitting the court to take judicial notice of prior findings on the respondent's progress in completing remedial efforts ordered at prior review hearings); *In re Johnson*, 70 N.C. App. 383, 388 (1984) (in a TPR case, noting that the trial court reviewed prior orders detailing the parents' lack of progress between the initial juvenile petition and TPR order). The decisions do not hold that such findings have collateral estoppel effect. Nor do they appear to use the term judicial notice in the sense meant by Evidence Rule 201—that is, as establishing the prior findings as conclusive for purposes of the later proceeding. At most, the cases may allow a court at adjudication to consider prior non-adjudicatory findings. In other words, the findings may be admissible but not binding or determinative; however, the matter is not settled.

The North Carolina Supreme Court's recent decision in *In re T.N.H.*, 831 S.E.2d 54 (N.C. S.Ct. 2019), illustrates this possibility. There, the Court held that at adjudication (in this instance, a TPR adjudication) a trial court may take judicial notice of findings from prior disposition orders (in this instance, about the respondent's lack of progress following a determination of neglect). The Court held that the trial court may do so even though the prior findings are based on a lower standard of proof than in the current proceeding. As in other juvenile cases referring to judicial notice, the decision raises several questions. First, the circumstances in which a court may consider prior non-adjudicatory findings is unclear. As in other juvenile cases, *T.N.H.* falls back on the often-stated principle that the trial judge is presumed to have disregarded incompetent evidence and relied on competent evidence only. Second, the weight that may be given prior non-adjudicatory findings, to the extent admissible, is unclear. The Court in *T.N.H.* states that the trial court may rely in its TPR findings on prior disposition findings but recognizes that the trial court still must make an independent determination. Reviewing the evidence in support of the TPR findings in *T.N.H.*, the Court upheld them in light of other permissible evidence, including prior stipulations by the respondent (binding on the respondent, as discussed in 5., below), findings from a prior adjudication (subject to collateral estoppel, as discussed in 3., above), and live testimony by a social worker and respondent at the TPR adjudication hearing. Last, the legal basis for admitting prior non-adjudicatory findings is unclear. *T.N.H.* relies on previous juvenile decisions stating that a trial court may take judicial notice of prior orders but, as in the cited decisions, does not articulate a rationale for admitting non-adjudicatory findings at a proceeding that is otherwise subject to the rules of evidence.

Another recent decision recognizes that basing adjudicatory findings on prior non-adjudicatory findings may be "problematic." *In re J.C.M.J.C.*, 834 S.E.2d 670, 677 (N.C.

Ct. App. 2019). There, the Court of Appeals found that the trial court's findings of fact from a nonsecure custody hearing were the sole evidentiary support for the great majority of its findings in a later adjudication order of neglect. Unlike the hearings in *T.N.H.*, the clear and convincing evidence standard applies at nonsecure custody hearings. Nevertheless, the Court found it significant that the usual rules of evidence do not apply at nonsecure custody hearings and the respondent has no right to appeal. The Court observed:

> There is thus no way to ensure that the findings in the "First Seven Day Hearing Order" [the nonsecure custody order] were based on evidence admissible for purposes of an adjudication. To allow the trial court to find adjudicatory facts simply by taking judicial notice of its prior findings in the nonsecure custody order risks insulating adjudicatory findings from appellate review and undermines the procedural safeguards for adjudications. *Id.*

The Court in *J.C.M.J.C.* questioned whether the trial court made the required independent determination of the facts and concluded in any event that the findings did not support the trial court's conclusions of law. *Id.* at 677 & n.8, *see also In re N.J.H.*, 820 S.E.2d 137 (N.C. Ct. App. 2018) (unpublished) (finding it improper for trial judge to incorporate findings from review hearings into order terminating parental rights without making an independent finding that they were supported by clear and convincing evidence).

Other opinions have considered these issues, but they also do not provide clear answers about the appropriate treatment of non-adjudicatory findings. *See In re Ballard*, 63 N.C. App. 580, 590 (1983) (Wells, J., dissenting) (dissent suggests that under due process requirements, a party might be permitted to offer prior findings as some evidence of issues previously heard, subject to rebuttal or refutation; dissent does not address impact of rules of evidence, and it is unclear whether the prior findings in question were made at an adjudicatory or non-adjudicatory hearing), *rev'd on other grounds*, 311 N.C. 708 (1984); *In re T.F.L.*, 243 N.C. App. 506 (2015) (unpublished) (observing that prior findings and orders were "broadly corroborative" of testimony at termination hearing); *In re C.M.G.*, 243 N.C. App. 505 n.2 (2015) (unpublished) (trial court found that different standard of proof at permanency planning hearing went to weight, not admissibility, of order; appellate court did not resolve issue, stating that trial court is presumed to have disregarded incompetent evidence in taking judicial notice of findings in prior orders).

5. Formal concessions; stipulations of fact. Formal concessions of a party during litigation, such as stipulations of fact, are considered "judicial admissions." *See In re I.S.*, 170 N.C. App. 78, 86 (2005); *see also* G.S. 7B-807(a) (allowing court to find from evidence, including stipulations, that allegations in abuse, neglect, and dependency proceeding have been proven by clear and convincing evidence). They remain in effect for the duration of the case, ordinarily "preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish the stipulated fact." *In re I.S.*, 170 N.C. App. at 86 (quoting *Thomas v. Poole*, 54 N.C. App. 239, 241 (1981)); *see also In re T.N.H.*, 831 S.E.2d 54 (N.C. S.Ct. 2019) (respondent bound at

TPR proceeding by stipulations from earlier neglect adjudication); *In re A.K.D.*, 227 N.C. App. 58 (2013) (stipulation is judicial admission and binding, but stipulation as to question of law is generally "invalid and ineffective"); 2 BRANDIS & BROUN § 198, at 809–12 (describing effect of formal concessions and stipulations and circumstances in which they may not be binding).

If a stipulation is from a previous case, it may not preclude a party from litigating the issue in a subsequent case. For purposes of this discussion, however, whether an abuse, neglect, and dependency proceeding is considered a part of or separate from a later TPR proceeding may be inconsequential. In *In re Johnson*, 70 N.C. App. 383, 387–88 (1984), the court considered a prior abuse, neglect, and dependency case to be part of the same "controversy" as a later TPR case and held that a stipulation from the prior proceeding was a binding judicial admission in the later proceeding. If an abuse, neglect, and dependency case is considered separate from a TPR case, a stipulation from the prior case may still bar relitigation of the issue in the subsequent case based on the principle of "judicial estoppel." *See, e.g.*, *Bioletti v. Bioletti*, 204 N.C. App. 270, 275 (2010) (doctrine of judicial estoppel, which applies to the same *or* related litigation, prevents a party from asserting a legal position inconsistent with one taken earlier in litigation). At the least, a stipulation from a prior case may constitute an "evidential admission," which is not conclusive in a later case but is still admissible. *See* 2 BRANDIS & BROUN § 203, at 829; *UNCC Props., Inc. v. Greene*, 111 N.C. App. 391, 395 (1993) (statement contained in an answer from another proceeding was evidential, not judicial, admission).

E. Documentary Evidence, Court Reports, and Other Exhibits

1. Summary. This section deals with evidence offered in prior proceedings, including reports presented to the court. No established doctrine allows the trial court in one proceeding to take judicial notice of documentary evidence and other exhibits received in prior proceedings. The documentary evidence must satisfy the rules of evidence applicable to the current proceeding. Juvenile decisions, however, appear to allow the trial court to consider documentary evidence from prior proceedings, if admissible in the current proceeding, without the evidence being physically reoffered.

2. Juvenile cases on documentary evidence. Juvenile cases have stated that the trial court may take judicial notice of the underlying case file, including reports submitted to the court in prior disposition hearings. *See, e.g.*, *In re W.L.M.*, 181 N.C. App. 518 (2007). It does not appear, however, that the decisions mean that the information in the reports is conclusively established, as under the traditional approach to judicial notice, or even that the information is admissible in the later proceeding. *See id.* (relying on the presumption that the trial court disregarded incompetent evidence in the files). Rather, it appears that the decisions mean that reports and other evidence received in a prior proceeding do not necessarily have to be physically reoffered into evidence to be considered by the trial court. *See generally In re J.M.*, 190 N.C. App. 379 (2008) (unpublished) (stating that the court at an adjudication hearing may consider prior proceedings but must evaluate the proceedings in accordance with the rules of evidence).

If this construction is correct, a party still may object to a court report and other documents that were received in a prior proceeding. Thus, a party may object to a document on the ground that the document does not meet the requirements for admission under the hearsay exception for business records or another hearsay exception. See section 11.6.F.2, above (discussing the requirements for business records and observing that reports to the court likely do not satisfy the requirements). If the document is admissible, a party also may have grounds to object to information within the document. See section 11.6.F.3, above (discussing admissibility of information within a business record).

F. Testimony

1. Summary. This section addresses testimony from prior proceedings, including testimony from adjudication and non-adjudication hearings. Testimony from prior proceedings is hearsay if offered for the truth of the matter asserted in the testimony. It is improper for a trial court to admit testimony from a prior proceeding unless the testimony satisfies a hearsay exception or is offered for a purpose other than its truth, such as impeachment of a witness's current testimony by his or her prior inconsistent testimony.

2. Hearsay nature of prior testimony. A witness's testimony from a prior proceeding, if offered for its truth, is a form of hearsay because it consists of statements made outside the current proceeding. See section 11.5.C, above (discussing the definition of hearsay). Even when the testimony is admissible at the prior proceeding—for example, the testimony recounted the witness's own observations and did not consist of hearsay statements—the prior testimony itself is hearsay when offered for its truth and is inadmissible at a later proceeding unless it satisfies a hearsay exception.

Evidence Rule 804(b)(1) governs "former testimony" and applies to testimony given "at another hearing of the same or a different proceeding." The rule creates an exception for former testimony if two basic conditions are satisfied. First, the witness must be unavailable at the current proceeding. *See* N.C. R. EVID. 804(a) (stating the definition of unavailability); see also section 11.6.H.2, above (discussing unavailability). Second, the party against whom the former testimony is now offered must have had an opportunity and similar motive to develop the testimony at the prior proceeding. Testimony from a prior non-adjudication hearing, such as a review hearing, may not satisfy this second requirement because the rules of evidence do not apply at such hearings, limiting the opposing party's ability to address the testimony, and because the purposes of review hearings and adjudications differ, which may bear on the opposing party's incentive to address the testimony.

If the testimony at the prior proceeding was given by a person who is a party in a later proceeding—for example, a parent—the testimony would be admissible against that party as an admission of a party-opponent. *See In re K.G.*, 198 N.C. App. 405 (2009) (unpublished) (holding that statements made by respondent-parents at a prior hearing on a domestic violence protective order were admissible as admissions of party-opponents at adjudication in a neglect case). This exception would not permit a party to offer the party's own prior testimony at a later proceeding—for example, DSS could not rely on this exception to offer the prior

testimony of one of its employees. See also section 11.6.B.3, above (discussing the application of the exception to admissions).

Decisions recognize that judicial notice is not a proper device for considering prior testimony. *See Hensey v. Hennessy*, 201 N.C. App. 56, 68–69 (2009) (in case involving domestic violence protective order, trial court could not take judicial notice of testimony from prior criminal proceedings; the facts that were subject of testimony must not reasonably be in dispute); *In re J.M.*, 190 N.C. App. 379 (2008) (unpublished) (testimony from a previous proceeding, when offered for truth of matter asserted, is hearsay and is not admissible at proceeding at which the rules of evidence apply unless it satisfies a hearsay exception; judicial notice may not be used as substitute for complying with hearsay restrictions on admissibility of former testimony).

11.8 Character and Prior Conduct

A. Generally

"Character comprises the actual qualities and characteristics of an individual." 1 BRANDIS & BROUN § 86, at 279. Thus, a person may have a violent character or a law-abiding character or a truthful one. Three basic types of evidence are potentially admissible to show a person's character:

- specific acts by the person,
- opinion about the person, and
- the person's reputation in the community.

The admissibility of these different types of character evidence depends on the theory under which the evidence is offered. The theory of admissibility also controls other rules regulating character evidence, such as whether a party may elicit character evidence on cross-examination only or may offer extrinsic evidence as well.

The rules on character evidence rarely have been addressed in appellate decisions in juvenile proceedings, perhaps because evidence of a type similar to character evidence is admitted for noncharacter purposes. The discussion below first addresses the different theories of admissibility for character evidence and then discusses the theories of admissibility that potentially apply in juvenile proceedings. The discussion also addresses (in section 11.8.D, below) the admissibility of prior conduct for noncharacter purposes under Evidence Rule 404(b).

B. Theories of Admissibility of Character Evidence

1. Character directly in issue. One theory of admissibility of character evidence is that a person's character is directly in issue. This theory applies in a narrow range of cases, "as in litigation to determine the custody of children when the fitness of one or both parents is in issue, or when the issue is the good moral character of an applicant for admission to the bar."

1 BRANDIS & BROUN § 86, at 279. When character is directly in issue, specific acts, lay opinion, and reputation are admissible. *See* N.C. R. EVID. 405(a), (b).

Evidence about character is still subject to general evidence requirements. Thus, the evidence must be relevant to the character issue to be decided—for example, marijuana use in high school may be considered irrelevant to fitness to practice law. *See generally* 1 BRANDIS & BROUN § 100, at 357 (observing that evidence of specific instances of conduct should be confined to those relevant to the trait at issue). The witness also must be qualified to testify about the matter. To testify to specific acts, the witness must have personal knowledge of the acts. To give an opinion about a person's character, the witness must know the person. To testify to reputation, the witness must know the person's reputation in the community. (Reputation testimony is a form of hearsay because the witness is testifying to what others in the community think about the person, but it is excepted from the hearsay rule by Evidence Rule 803(21). *See* 1 BRANDIS & BROUN § 96, at 335.) Opinion and reputation testimony also must be about matters of character, not factual information about a person's conduct. *See State v. Collins*, 345 N.C. 170, 173–74 (1996); *State v. Moreno*, 98 N.C. App. 642, 645–46 (1990) (explaining that "not using drugs" is a character trait akin to "sobriety," but "not dealing in drugs" is evidence of a fact and is not a character trait); *see also* JOHN RUBIN, THE ENTRAPMENT DEFENSE IN NORTH CAROLINA 70–71 & n.46 (UNC School of Government, 2001) (discussing the admissibility of opinion and reputation testimony). Testimony on character is subject to exclusion under Evidence Rule 403 if its probative value is substantially outweighed by the danger of prejudice, confusion of the issues, or considerations of undue delay or needless presentation of cumulative evidence. *See also* 1 MCCORMICK § 186, at 1132 (observing that the "pungency and persuasiveness" of character evidence declines as one moves from the specific to the general).

2. Character to show conduct. A second theory of admissibility is when character evidence is offered to show a person's conduct on a particular occasion. Ordinarily, character is inadmissible to prove conduct. *See* N.C. R. EVID. 404(a) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" except as otherwise provided).

Narrow exceptions exist. In a criminal case, the defendant may offer evidence of a pertinent trait of his or her own character or of the victim, and in rebuttal the State may offer evidence of that person's character. *See* N.C. R. EVID. 404(a)(1), (2) (describing this ground for admitting character evidence); N.C. R. EVID. 405(a) (describing the method of proving character for this purpose); *see also State v. Walston*, 367 N.C. 721 (2014) (holding in criminal case that trial court did not err in excluding opinion testimony about defendant's respectful attitude toward children because it was not sufficiently tailored to charges of unlawful sex acts; cites other decisions), *rev'g* 229 N.C. App. 141 (2013); *State v. Wagoner*, 131 N.C. App. 285, 292–93 (1998) (holding that evidence of the defendant's general psychological makeup was not a pertinent character trait in a prosecution for sexual assault). In either a civil or criminal case, a party also may offer evidence of a habit or routine practice of a person or organization to prove that the person or organization acted in conformity with that habit or practice. *See* N.C. R. EVID. 406.

3. Credibility. A third theory of admissibility is when character evidence is offered on a witness's credibility. *See* N.C. R. EVID. 404(a)(3). This theory is also an exception to the general rule that character may not be offered to prove conduct. In this instance, character evidence bears on the witness's conduct on the stand—that is, whether the witness is telling the truth. Under this theory, evidence is limited to the witness's character for truthfulness or untruthfulness. *See* N.C. R. EVID. 405(a), 607, 608, 609. Under these rules, a lay witness may give an opinion about the character for truthfulness of another person, including a child, if the person's character for truthfulness has been attacked, but neither a lay nor an expert witness may testify that a person is telling or told the truth. Compare sections 11.9.B.4, 11.10.D.1, below (discussing this limit on opinion testimony).

4. Opening the door. Last, character evidence may be offered when a party opens the door through the testimony he or she offers. The admissibility of evidence under this theory depends on the circumstances of the case. *See, e.g.*, *State v. Garner*, 330 N.C. 273, 287–90 (1991).

C. Is Character Directly at Issue in Juvenile Cases?

It does not appear that any North Carolina cases have addressed the issue in juvenile cases, but character is likely directly at issue at disposition in both abuse, neglect, and dependency cases and termination of parental rights cases. *See generally* MYERS § 8.02[B]. The focus of the dispositional phase is the best interest of the child, which necessarily is bound up with a determination of the parent's fitness. *See Adoption of Katharine*, 674 N.E.2d 256, 258 (Mass. App. Ct. 1997).

One writer posits that the character of the parent also could be considered at issue at adjudication because the petitioner is seeking to prove what happened in the past to protect the child in the future and evidence of parental character is relevant in this regard. *See* MYERS § 8.02[B]. The argument is not an exact fit, however, with the issues to be resolved at adjudication in North Carolina juvenile cases.

When the basis of alleged abuse is a discrete incident—for example, that a parent inflicted serious physical injury or committed a criminal act of a sexual nature—the issue to be decided is whether the incident occurred. In that kind of case, the rules prohibit evidence of the parent's character to show that the incident occurred (although evidence of the parent's past conduct may be admissible for a noncharacter purpose under Evidence Rule 404(b), discussed in section D., below).

When the allegations involve a broader inquiry into a parent's conduct—for example, when the basis of alleged neglect is that the juvenile has not received proper care or supervision or lives in an environment injurious to the juvenile's welfare—the question is closer. *See In re Mark C.*, 8 Cal. Rptr. 2d 856, 861–62 (Ct. App. 1992) (observing that the legislature intended to place character at issue "to some extent" when the allegation is that a caretaker's abuse of one child endangers another child). The North Carolina courts have permitted evidence of a parent's past conduct and behavior in a number of such cases, but they have not specifically analyzed whether the evidence is permissible because the parent's character is directly "in

issue" or because the conduct is simply relevant evidence of the alleged abuse or neglect. See Chapter 6.3.D and 6.3.E (discussing cases showing evidence that may support a finding of abuse or neglect). The North Carolina courts may be reluctant to premise the admission of evidence of prior conduct on the theory that the parent's character is directly in issue because such an approach would permit a broad range of opinion and reputation testimony (discussed in section 11.8.B.1, above), not just evidence of specific conduct and behavior. If the basis of admissibility is relevance, evidence of past conduct would be admissible to the extent relevant to the type of abuse or neglect alleged. This would not necessarily be true for opinion or reputation testimony unless admissible on another ground.

D. Rule 404(b) and "Bad Act" Evidence

1. Applicability of rule. Evidence Rule 404(b) prohibits evidence of a person's crimes, wrongs, or acts when offered "to prove the character of a person in order to show that he acted in conformity therewith." In other words, it prohibits evidence of other "bad acts" to show that a person had a propensity to commit the current act and therefore committed the act. Rule 404(b) permits evidence of other acts, however, if offered for a noncharacter purpose—that is, if the act is offered for a purpose other than the person's propensity to commit the current act. In juvenile cases, Rule 404(b) comes into play primarily when the basis of abuse or neglect is a person's alleged commission of a particular act, such as the infliction of serious injury or commission of a sex act against a child, and the issue is whether other acts by that person are admissible.

Rule 404(b) may not be the correct vehicle for analyzing "bad act" evidence when the alleged basis of abuse or neglect necessarily involves a broader inquiry into the parent's conduct. In such cases, a parent's prior conduct may be admissible without regard to Rule 404(b), either because the prior acts themselves are relevant evidence of abuse or neglect or because the parent's character is directly in issue, as discussed in section C., above. *See In re Deantye P.-B.*, 643 N.W.2d 194, 198–99 (Wis. Ct. App. 2002) (court observes that the "other acts" evidence statute in Wisconsin [which is similar to North Carolina's Rule 404(b)] prevents "fact finders from unnecessary exposure to character and propensity evidence in the context of determining whether a party committed an alleged act"; that concern is not applicable when a fact finder must determine "whether 'there is a substantial likelihood' that a parent will not meet conditions for the return of his or her children," which necessarily involves consideration of a "parent's relevant character traits and patterns of behavior"); *In re Allred*, 122 N.C. App. 561, 563–65 (1996) (respondent argued that Rule 404(b) barred evidence of prior orders finding neglect of her other four children; the court found that the evidence was relevant and admissible without determining whether the evidence needed to satisfy the other relevant purpose requirement of Rule 404(b)).

If Rule 404(b) applies, evidence of other acts would be admissible if offered for a noncharacter purpose relevant to the alleged basis of abuse or neglect. *See In re Termination of Parental Rights to Teyon D.*, 655 N.W.2d 752, 759–60 (Wis. Ct. App. 2002).

2. Basic requirements for admission of other acts under Rule 404(b). Numerous criminal cases have addressed the applicability of Rule 404(b). Review of those cases is beyond the

scope of this discussion. Certain basic principles have emerged, which presumably would apply to juvenile cases.

- Rule 404(b) is considered a rule of inclusion in North Carolina, allowing evidence of other acts if offered for a relevant purpose and excluding the acts if their only probative value is to show the defendant's propensity to commit the act in question. *State v. Coffey*, 326 N.C. 268, 278–79 (1990). This formulation means that the list of possible relevant purposes in Rule 404(b)—motive, identity, knowledge, and the like—is not exhaustive. The proponent may offer evidence of other acts for purposes not specifically listed in Rule 404(b) as long as the purpose is relevant to an issue to be decided in the case and is not to show the defendant's character.
- The courts have set an outer limit on relevance, excluding other acts that are too dissimilar or too remote in time in relation to the current act. *See, e.g.*, *State v. Al-Bayyinah*, 356 N.C. 150, 154–55 (2002).
- In prosecutions for sexual offenses, the courts have been "markedly liberal" in finding evidence of other sex acts to be for a relevant noncharacter purpose. *Coffey*, 326 N.C. at 279 (citation omitted). For a discussion of such cases, see Jeff Welty, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/04 (UNC School of Government, Aug. 2009).
- Evidence of other acts may be excluded if the probative value of the evidence is substantially outweighed by its prejudicial effect under Evidence Rule 403. *See State v. Smith*, 152 N.C. App. 514, 528 (2002) (trial court must engage in Rule 403 balancing in determining whether to admit evidence under Rule 404(b)); *see also State v. Hembree*, 368 N.C. 2 (2015) (cautioning trial courts to subject 404(b) evidence to strict scrutiny because of its dangerous tendency to mislead and raise spurious presumption of guilt; conviction reversed).
- If admitted for a noncharacter purpose, the factfinder must restrict consideration of the evidence to that purpose and not consider it for inadmissible purposes. *See* N.C. R. EVID. 105; *State v. Watts*, 370 N.C. 39 (2017) (reversing conviction for trial court's failure to instruct jury to limit its consideration of evidence admitted under Rule 404(b)).

3. Form of proof; prior criminal proceedings. A proponent must show the commission of other acts by admissible evidence. Thus, the proponent must offer live testimony by a person with personal knowledge of the acts or by hearsay within an exception, such as an admission by a party-opponent. *See* 1 IMWINKELRIED § 903, at 9-3. The other act need not have been the subject of a criminal proceeding. By its terms, Rule 404(b) applies to other "crimes, wrongs, or acts." When the other act has been the subject of criminal proceedings, however, the cases have limited the evidence that may be offered about the proceedings.

The other act may not be established by an arrest, indictment, or other charge. *See* 1 BRANDIS & BROUN § 98, at 351–52 (discussing this bar in the context of impeachment of a witness); *cf. State v. Bryant*, 244 N.C. App. 105 (2015) (recognizing that G.S. 15A-1221(b) prohibits entry of indictment, arrest warrant, and other charging documents into evidence).

Nor may the other act ordinarily be shown by the bare fact of conviction. *See* 1 BRANDIS & BROUN § 94, at 303–04; *State v. Wilkerson*, 356 N.C. 418 (2002), *rev'g per curiam for the reasons stated in the dissent* 148 N.C. App. 310 (2002) (dissent, adopted by the Supreme Court, states this rule and notes exceptions); *State v. Bowman*, 188 N.C. App. 635 (2008) (discussing exceptions but finding them inapplicable in the circumstances of the case). The proponent ordinarily must prove the acts underlying the charge or conviction through admissible evidence (as well as show that the acts are relevant to an issue to be decided in the case and not for character). *See also* Phil Dixon, *Rule 404 and Evidence of Prior Incarceration*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (Feb. 21, 2017) (discussing *State v. Rios*, 251 N.C. App. 318 (2016), which held that the bare fact of incarceration is improper propensity evidence).

The existence of a criminal conviction is admissible, however, when the fact of the conviction itself is a basis for a finding of abuse or a ground for termination of parental rights. *See* G.S. 7B-101(1)d. (providing that the commission of a violation of specified statutes, such as first-degree rape under G.S. 14-27.2, is abuse); G.S. 7B-1111(a)(1) (providing that a juvenile is deemed abused for the purpose of a termination of parental rights proceeding if the court finds the juvenile to be abused within the meaning of G.S. 7B-101); *Curtis v. Curtis*, 104 N.C. App. 625, 628 (1991) (holding that the father's conviction of first-degree sexual offense against the minor child provided a basis for a finding of abuse).

An arrest or conviction also may be admissible if not offered to show commission of an act but for another purpose, such as why a parent was physically unable to care for a child. *See In re Termination of Parental Rights to Teyon D.*, 655 N.W.2d 752, 759–60 (Wis. Ct. App. 2002) (offenses and sentences were admissible to show why the mother had been unable to take responsibility for her children). A conviction also may be used to impeach a witness's testimony under Evidence Rule 609. *See also* Phil Dixon, *Cross-Examination on Pending Charges*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (Oct. 31, 2017) (discussing right of defendant to cross-examine State's witnesses about pending charges to show bias).

For a further discussion of the admissibility of prior proceedings, see section 11.7, above.

E. Rape Shield Law

Evidence Rule 412 modifies the customary rules on character evidence and evidence offered for noncharacter purposes in rape and sex offense cases, barring evidence of opinion and reputation testimony on character and allowing evidence of specific acts in limited instances. By its terms, the rule applies only to criminal cases, but the North Carolina courts have held that a trial court may (although apparently is not required to) apply the rule's restrictions to juvenile cases. *In re K.W.*, 192 N.C. App. 646, 648–49 (2008). Asking questions about matters covered by the rape shield law, without following the procedures in the law, could result in sanctions. *State v. Okwara*, 223 N.C. App. 166 (2012) (upholding finding of contempt against defense counsel).

For a discussion of North Carolina's rape shield law, see Jeff Welty, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/04 (UNC School of Government, Aug. 2009). Cases since release of that bulletin have recognized additional circumstances in which prior sexual conduct may be admissible if relevant; the evidence need not fall within one of the rule's enumerated exceptions. *See, e.g.*, *State v. Martin*, 241 N.C. App. 602, 610 (2015); Shea Denning, *The Rape Shield Statute: Its Limitations and Recent Application*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (Aug. 17, 2017). The trial court may exclude the evidence under the balancing test in Evidence Rule 403. *See State v. West*, 255 N.C. App. 162 (2017).

11.9 Lay Opinion

A. Lay and Expert Testimony Distinguished

Two evidence rules distinguish the scope of lay and expert testimony.

1. Rule 602 and the requirement of personal knowledge. Evidence Rule 602 provides that a witness, other than an expert witness, may not testify to a matter unless the witness has personal knowledge of the matter. If a lay witness purports to describe facts that he or she observed, but the description actually rests on statements of others, the testimony is objectionable on the ground that the witness lacks personal knowledge of those matters. If the lay witness testifies directly to the statements of others, the admissibility of the testimony is then assessed in accordance with the rules on hearsay. 1 MCCORMICK § 10, at 72–73. An expert witness, in contrast, may base an opinion on facts or data that are not within his or her personal knowledge and are not admissible in evidence, if of a type reasonably relied on by experts in the particular field.

2. Rule 701 and the allowance of inferences if rationally based on perception and helpful. Evidence Rule 701 provides that a lay witness's testimony in the form of an opinion or inference is permitted if it is:

- rationally based on the perception of the witness and
- helpful to a clear understanding of the witness's testimony or a determination of a fact in issue.

These requirements both loosen and limit the scope of lay opinion testimony, allowing lay testimony in the form of an opinion but subject to greater restrictions than applicable to experts. The requirement that the opinion be based on the witness's "perception" reiterates that the testimony must be based on firsthand knowledge or observation. N.C. R. EVID. 701 commentary (so stating); *Duncan v. Cuna Mut. Ins. Soc'y*, 171 N.C. App. 403, 407–08 (2005) (generalized observations and opinions by a licensed social worker and substance abuse counselor about methadone use and abuse were not admissible because they were not based on personal knowledge and not offered as expert opinion). The rule loosens the distinction between fact and opinion, allowing the latter if "rationally" based on the witness's perception,

but it does not permit opinion testimony that goes beyond rational inferences and requires special expertise. The requirement that the opinion be "helpful" does away with any notion that the opinion must be "necessary" to be admissible, while giving the court discretion to exclude opinion testimony that is unhelpful. *See* N.C. R. EVID. 701 commentary (so stating); *see generally* 2 BRANDIS & BROUN § 175, at 676; *see also In re Wheeler*, 87 N.C. App. 189, 195–97 (1987) (in a case involving termination of a father's parental rights, the court questioned the helpfulness and therefore the admissibility of the mother's opinion that adoption would be best for the children and the GAL's opinion that termination was in the children's best interest [for a discussion of the inadmissibility of opinions in the form of a legal conclusion, see section 11.10.D.2, below]).

B. Examples of Permissible and Impermissible Lay Opinion

1. Shorthand statements of fact, including statements about mental and emotional condition. Many cases recognize that lay witnesses may testify in the form of a "shorthand expression of fact." *See generally* MOSTELLER § 10-2(A), at 10-2 (testimony under "the collective fact or shorthand rendition doctrine" is permissible because there are certain sorts of opinions and inferences that lay witnesses commonly draw, and it would be impractical to require that they describe in detail the subsidiary facts supporting their opinion); *State v. Davis*, 368 N.C. 794, 798 n.4 (2016) (reaffirming that such testimony is permissible).

Among other matters, a lay witness may testify about the mental or physical state of another person based on the witness's observations. *See, e.g.*, *State v. Dills*, 204 N.C. 33 (1933) (finding it permissible for a witness to testify that the defendant was "drunk"); *State v. Wade*, 155 N.C. App. 1, 13–14 (2002) (quoting *State v. Brown*, 350 N.C. 193, 203 (1999)) (witness could testify to the "'instantaneous conclusions of the mind'" as to the defendant's mental state, "'derived from observation of a variety of facts presented to the senses at one and the same time'"; included in the witness's testimony was an opinion that the defendant was a "molester at heart," which gave the court "pause," but in light of other evidence the court found that the jury would probably not have reached a different result absent this testimony); *State v. Wagner*, 249 N.C. App. 445 (2016) (allowing witness's testimony in sexual assault case that she should have picked up on "red flags," which court characterized as shorthand label for unusual conduct that witness had observed by defendant with victim); *State v. Pace*, 240 N.C. App. 63 (2015) (allowing as shorthand statement of fact testimony by victim's mother about changes she observed in her daughter after assault); *State v. Kelly*, 118 N.C. App. 589, 594–97 (1995) (lay opinion on the emotional state of another is permissible and, in a case involving allegations of sexual abuse, parents could testify that their children seemed embarrassed or frightened or displayed other emotions); *see also State v. Waddell*, 130 N.C. App. 488, 500–502 (1998) (assuming the witness was not testifying in the capacity of an expert, she could give lay opinion that the child demonstrated oral and anal intercourse by manipulations of anatomical dolls; her testimony was a shorthand statement of fact), *aff'd as modified*, 351 N.C. 413 (2000) (child's statements to the witness were not admissible under the medical diagnosis and treatment exception, discussed in section 11.6.E, above).

2. Lay opinion requiring special expertise. Lay opinion about another's mental or emotional state (or other matters) may not cross into areas requiring scientific knowledge or other special

expertise. *See State v. Solomon*, 815 S.E.2d 425 (N.C. Ct. App. 2018) (defendant's testimony about the relationship between his own mental disorders and criminal conduct was not relevant without additional foundation; such evidence required expert witness in compliance with rules of evidence); *State v. Storm*, 228 N.C. App. 272 (2013) (licensed clinical social worker could testify to her observations of defendant, but could not testify as lay witness that he "appeared noticeably depressed with flat affect," which was psychiatric diagnosis for which witness was not offered as expert); *State v. Kelly*, 118 N.C. App. at 594–97 (parents could not testify to behavioral patterns and characteristics of sexually abused children, which went beyond the perception of a non-expert); *State v. Hutchens*, 110 N.C. App. 455, 459–61 (1993) (family counselor who was not qualified as an expert could not give an opinion about the behavioral patterns of sexually abused children); *State v. Bowman*, 84 N.C. App. 238 (1987) (police officer, who had not been qualified as an expert, could not give an opinion that an 8-year-old child did not have sufficient information about sexuality to fantasize allegations of sexual abuse); *cf. State v. King*, 235 N.C. App. 187, 190–92 (2014) (although trial court did not formally qualify witness as expert in pediatric medicine and evaluation and treatment of child sex abuse, qualification was implicit in trial court's admission of witness's testimony about common behaviors of children who have suffered sexual abuse).

The North Carolina courts have stated that if a lay witness, "'by reason of opportunities for observation . . . is in a position to judge . . . the facts more accurately than those who have not had such opportunities,'" the witness's testimony may be admitted as lay opinion. *State v. Lindley*, 286 N.C. 255, 257–58 (1974) (citations omitted). Under this rationale, a witness may give what has been termed "skilled lay observer testimony." MOSTELLER, § 10-2(B), at 10-5 to 10-6. For example, by virtue of previous opportunities for observation, a witness who has become familiar with a person's voice or handwriting may give an opinion identifying the voice or handwriting. *Id.*

Some decisions have taken this principle further and have allowed, as lay opinion, testimony by someone with special training and experience in the subject. *See State v. Smith*, 357 N.C. 604, 610–13 (2003) (in a case in which a nurse did not have sufficient knowledge, training, or experience to testify as an expert about the effects of valium, it was nevertheless permissible for her to give a lay opinion about the typical effect of valium and her observation about whether the defendant exhibited those effects); *State v. Wallace*, 179 N.C. App. 710, 714–15 (2006) (based on his experience and training, a detective could give as lay opinion that if a child gives the same exact story each time, the child has been coached but in most cases the story will not be exactly the same each time; the court also found this testimony did not amount to improper opinion on the victim's credibility, discussed in subsection 4, below); *State v. Friend*, 164 N.C. App. 430, 437 (2004) (in a case in which an officer was not proffered as an expert witness, it was permissible for the officer to give a lay opinion about fingerprinting techniques and why it is rare to find useful prints).

These decisions may no longer be good law in light of amended Evidence Rule 702, which requires greater scrutiny of expert opinion. In *State v. Davis*, 368 N.C. 794 (2016), the State called a psychologist and mental health counselor as witnesses, who testified about their experiences treating victims of sexual abuse and the problems that victims experience, such as depression and anxiety. The Court of Appeals held that the testimony did not constitute

expert opinion because it involved the witnesses' own experiences and observations. The Supreme Court reversed, recognizing that "when an expert witness moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment 'to assist' the jury based on his 'specialized knowledge,' he is rendering an expert opinion." *Id.* at 798. The outcome in *Davis* was that the testimony was subject to the discovery requirements on disclosure of expert opinion. *Accord State v. Broyhill*, 254 N.C. App. 478 (2017). These decisions also mean that such testimony is not admissible as lay opinion; it must satisfy the requirements for the admission of expert opinion under Evidence Rule 702, discussed further in section 11.10, below. *See also* John Rubin, *A Rare Opinion on Criminal Discovery in North Carolina*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (May 3, 2016) (discussing implications of *Davis*).

A stricter dividing line between expert and lay opinion may prevent parties from avoiding the reliability requirements for experts by offering expert testimony "in lay witness clothing." *See* MOSTELLER § 10-2(B), at 10-6; *see also State v. Armstrong*, 203 N.C. App. 399, 411–15 (2010) (defendant argued that testimony by witness who was head of the Forensic Test for Alcohol Branch of the North Carolina Department of Health and Human Services was expert testimony "masquerading" as lay testimony and was inadmissible; while court found that defendant overstated its holdings, court agreed that witness provided expert testimony and that testimony was inadmissible because State did not comply with discovery requirements governing expert testimony); *State v. Moncree*, 188 N.C. App. 221, 225–27 (2008) (SBI agent's "extensive education and training in forensic analysis makes it difficult to imagine how he was able to separate his education, training, and experience" from his determination about the substance found in the defendant's shoe; court concludes that the agent testified as an expert, not a lay, witness and that the State violated criminal discovery requirements by failing to notify the defendant of its intent to offer expert testimony).

3. Guilt of another person. Neither a lay nor an expert witness may testify that a person is guilty of a particular act. *See State v. Warden*, 836 S.E.2d 880 (N.C. Ct. App. 2019) (testimony that DSS had substantiated sexual abuse by defendant constituted improper vouching for credibility of victim's allegations); *State v. Martinez*, 212 N.C. App. 661 (2011) (holding that trial court improperly admitted testimony by DSS social worker that DSS had substantiated claim that sex offense occurred); *State v. Giddens*, 199 N.C. App. 115 (2009) (child protective services investigator improperly testified that DSS had substantiated that abuse had occurred and that the defendant was the perpetrator), *aff'd per curiam*, 363 N.C. 826 (2010); *State v. Kelly*, 118 N.C. App. at 596 (stating general principles); *see also* 2 BRANDIS & BROUN § 190, at 779–80. *But cf. State v. Black*, 223 N.C. App. 137 (2012) (where defendant cross-examined children about their testimony at prior DSS hearing, it was permissible for State to ask DSS worker to explain what prior hearing was and why it took place).

4. Truthfulness of another person's statements. Neither a lay nor an expert witness may testify that a witness is telling the truth. *See State v. Robinson*, 355 N.C. 320, 334–35 (2002) (witness may not give an opinion vouching for the veracity of another witness); *Giddens*, 199 N.C. App. 115 (witness may not vouch for the credibility of the victim); *State v. Gobal*, 186 N.C. App. 308, 318–19 (2007) (detective could testify that a witness became less nervous

during an interview but not that the witness was therefore telling the truth; vouching for the veracity of a witness is not opinion that is helpful under Evidence Rule 701), *aff'd per curiam*, 362 N.C. 342 (2008); *State v. Owen*, 130 N.C. App. 505, 515–16 (1998) (finding exclusion proper for this reason); *see also* N.C. R. EVID. 701 commentary (explaining that if testimony amounts "to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule").

Opinion testimony about another person's statements may be admissible if it does not amount to a comment on the person's credibility, but the line may be difficult to draw. *See, e.g., State v. Orellana*, 817 S.E.2d 480 (N.C. Ct. App. 2018) (detective's observation about victim's demeanor during questioning—that she seemed thoughtful, was trying to recollect, and seemed genuinely affected by what had occurred—was not improper vouching but rather was instantaneous conclusion and admissible as shorthand statement of fact); *State v. O'Hanlan*, 153 N.C. App. 546, 562–63 (2002) (permitting the testimony of a detective who was not offering an opinion that the victim had been assaulted, kidnapped, and raped, but was explaining why he did not pursue as much scientific testing in a case in which the victim survived and was able to identify the assailant); *State v. Love*, 100 N.C. App. 226, 231–32 (1990) (mother permitted to testify that she believed her child when the mother had testified that at first she did not believe the child and that the child had lied to her in the past; in this context, the testimony was helpful to the jury in understanding the mother's testimony), *dismissal of habeas corpus rev'd on other grounds sub nom.*, *Love v. Freeman*, 188 F.3d 502 (4th Cir. 1999) (unpublished); *State v. Murphy*, 100 N.C. App. 33, 40–41 (1990) (upholding as permissible lay opinion the testimony of a school guidance counselor that a child's statements to others about sexual abuse were consistent with statements to the counselor). *But see, e.g., State v. Ramey*, 318 N.C. 457, 467 (1986) (improper for a detective to give opinion that a child did not make any inconsistent statements to her; the opinion was not helpful and not admissible as lay opinion); *State v. Carter*, 216 N.C. App. 453 (2011) (upholding exclusion of testimony of social worker that victim was "overly dramatic," "manipulative," and exhibited "attention seeking behavior," which court found to be inadmissible commentary on child's credibility), *rev'd on other grounds*, 366 N.C. 496 (2013).

When character evidence is admissible, a lay witness (but generally not an expert witness) may give an opinion on a witness's character, including character for truthfulness. See section 11.8.B.3, above.

11.10 Expert Testimony

This section reviews the basic requirements for expert testimony as well as testimony specifically about children and parents. The discussion begins by addressing the impact of the 2011 changes to the North Carolina Rules of Evidence on expert testimony.

A. Revised Evidence Rule 702(a)

In 2011, the North Carolina General Assembly revised North Carolina Rule of Evidence 702(a), one of the key rules governing the admissibility of expert testimony. In essence,

North Carolina adopted the federal *Daubert* test for evaluating the admissibility of expert testimony, adopted by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later incorporated into Federal Rule of Evidence 702(a). The North Carolina General Assembly's adoption of this approach requires greater scrutiny of expert testimony by North Carolina courts and possibly reconsideration of subjects of expert testimony previously considered to be admissible.

The revision applies to criminal and civil actions arising on or after October 1, 2011. *See also Sneed v. Sneed*, 820 S.E.2d 536 (N.C. Ct. App. 2018) (applying Rule 702 to expert testimony in child custody case). In felony criminal cases, the courts have construed the effective-date language as making the change applicable to cases in which the indictment was filed on or after October 1, 2011. *State v. Gamez*, 228 N.C. App. 329 (2013). Thus, the revised rule applies to acts underlying an indictment issued on or after October 1, 2011, even if the acts occurred before October 1, 2011.

In *State v. McGrady*, 368 N.C. 880 (2016), the court considered the requirements of revised Rule 702(a), which states:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
> (1) The testimony is based upon sufficient facts or data.
> (2) The testimony is the product of reliable principles and methods.
> (3) The witness has applied the principles and methods reliably to the facts of the case.

The earlier version of the rule did not include the criteria in (1) through (3), above.

The court in *McGrady* held that the amended rule incorporates the federal *Daubert* standard for admission of expert testimony. 368 N.C. at 884. The court recognized that the requirements of the rule are stricter than the approach articulated in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004), which had rejected the *Daubert* test. The general thrust of *Howerton* was that trial courts had to assess the reliability of expert testimony but did not have to be as exacting as under the federal rules of evidence. *See Howerton*, 358 N.C. at 464 (stating that North Carolina's approach was "less mechanistic and rigorous" than federal approach). The court in *McGrady* observed that the basic structure of the inquiry under the amended rule is not new, but it specifies new components and requires trial courts to scrutinize expert testimony with greater "rigor" before admitting it. *McGrady*, 368 N.C. at 892.

The court noted that the adoption of the stricter *Daubert* approach did not necessarily abrogate all North Carolina precedent on expert testimony. Previous cases may still be good law if they do not conflict with the *Daubert* standard. *Id*. at 888.

B. Three Basic Requirements

1. Generally. The *Daubert* test, as incorporated in Evidence Rule 702(a), has three main parts, discussed below. Expert testimony must satisfy each part to be admissible, although the inquiry may overlap and proposed testimony may satisfy or fail different parts for similar reasons.

In determining whether expert testimony is admissible, the trial court does a preliminary inquiry under Evidence Rule 104(a). Under that rule, the trial court is not bound by the rules of evidence except with respect to privileges. In fulfilling this gatekeeping function, the trial court is not required to follow particular procedural requirements, although questions of admissibility are often resolved at in limine hearings before trial or voir dire hearings at trial. *McGrady*, 368 N.C. at 892–93*; accord State v. Walston*, 369 N.C. 547 (2017). The trial court should assess the reliability of expert testimony under the *Daubert* test whether or not there is an objection. *See State v. Hunt*, 250 N.C. App. 238 (2016); Jeff Welty, *Must a Trial Judge Act as a Gatekeeper Even if Not Asked to Do So?*, UNC SCH. OF GOV'T: NORTH CAROLINA CRIMINAL LAW BLOG (June 13, 2017).

2. Scientific, technical, or other specialized knowledge that will assist trier of fact. First, as specified in Evidence Rule 702(a), "the area of the proposed testimony must be based on 'scientific, technical or other specialized knowledge' that "will assist the trier of fact to understand the evidence or to determine a fact in issue." *McGrady*, 368 N.C. at 889. This step is a relevance inquiry, but it requires more than that the expert testimony be relevant within the usual meaning of Evidence Rule 401, which gives the basic definition of relevance. To assist the trier of fact, "expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience." *Id.* at 889, 894–95 (trial court did not abuse discretion in self-defense case in finding that defense expert's proposed testimony about pre-attack cues and use of force variables would not assist jury); *see also State Daughtridge*, 248 N.C. App. 707 (2016) (medical examiner's testimony that victim's death was homicide, not suicide, was based on non-medical information provided to him by law enforcement officers, not on medical information; trial court erred in allowing testimony under *Daubert* test, as the medical examiner was not in a better position than the jury to draw this conclusion).

Note: Expert testimony need not be scientific in nature to be governed by the revised rule. Expert testimony may be based on "scientific, technical, or other specialized knowledge," N.C. R. EVID. 702, which means that the trial judge must assess the reliability of the testimony whether it is in a scientific or other field. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (recognizing that *Daubert* principles require the trial court to assess the reliability of expert testimony in nonscientific fields).

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3. Qualified as an expert. Second, as specified in Evidence Rule 702(a), "the witness must be 'qualified as an expert by knowledge, skill, experience, training, or education.'" *McGrady*, 368 N.C. at 889. Expertise may come from practical experience or academic training as long as the witness has "enough expertise to be in a better position than the trier of fact to have an opinion on the subject." *Id.* at 889, 895–96 (finding that trial court did not abuse discretion in

self-defense case in finding that defense expert was not qualified to offer expert testimony on the stress responses of the sympathetic nervous system); *see also State v. Godwin*, 369 N.C. 604 (2017) (record need not contain express finding that witness is qualified as expert if trial court implicitly recognized the witness as an expert by overruling objection to witness's qualifications and allowing testimony).

4. Three-pronged reliability test. Third, the testimony must satisfy the three-pronged test for reliability specified in Evidence Rule 702(a), which is new to the rule:

> (1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case.

These requirements constitute the reliability inquiry under *Daubert. McGrady*, 368 N.C. at 890.

Daubert articulated several factors that bear on reliability in the context of scientific inquiry, such as the known or potential rate of error of the theory or technique. Other reliability factors to consider generally include, among others, whether the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion and adequately accounted for alternative explanations. 368 N.C. at 890–91. The court in *McGrady* noted that the factors identified in *Howerton* for evaluating the reliability of expert testimony, such as the use of established techniques and independent research by the expert, may also be useful in determining whether the proposed testimony satisfies this third prong. *Id.* at 891.

In *McGrady,* the court found that the trial court did not abuse its discretion in a self-defense case in finding that the proposed expert testimony about reaction times was not sufficiently reliable under this test. *Id.* at 897. Other cases applying the three-pronged test include: *State v. McPhaul,* 808 S.E.2d 294 (N.C. Ct. App. 2017) (finding that trial court erred in allowing latent fingerprint testimony where evidence did not show that expert applied principles and methods reliably to facts of case as required under third prong of test); *State v. Babich*, 252 N.C. App. 165 (2017) (finding that trial court erred in allowing retrograde extrapolation testimony in impaired driving case where testimony was not based on sufficient facts or data about defendant; testimony failed "fit" test under *Daubert* because analysis was not properly tied to facts of case); *see also State v. Younts,* 254 N.C. App. 581 (2017) (proponent of horizontal gaze nystagmus (HGN) testimony was not required to show reliability of principles and methods under second prong of *Daubert* test because the General Assembly, by enacting Evidence Rule 702(a1) specifying the conditions for admissibility of HGN testimony, obviated the need for that part of the *Daubert* showing).

Cases decided under the previous version of the rule, although not explicitly employing the *Daubert* reliability test, may involve similar considerations. For example, earlier cases have excluded expert testimony when the theory or principles were unreliable, the second prong of the reliability inquiry under the amended rule. *See, e.g., State v. Berry*, 143 N.C. App. 187, 202–06 (2001) (barefoot impression analysis inadmissible); *State v. Spencer*, 119 N.C. App.

662, 663–68 (1995) (penile plethysmograph results inadmissible). Earlier cases also considered to some extent whether the testimony was based on sufficient facts or data and whether the witness applied the principles and methods reliably to the facts, the first and third prongs of the reliability inquiry under the amended rule. *Compare State v. McCall*, 162 N.C. App. 64, 72–73 (2004) (expert's opinion about the general characteristics and symptoms of sexually abused children was admissible; the expert relied on facts and data of a type reasonably relied on by experts even though the expert had not examined the child), *with State v. Grover*, 142 N.C. App. 411 (2001) (expert's opinion that a child was sexually abused was improperly admitted; among other things, psychological testing was contrary to that of sexually abused children in that the answers to a 54-question trauma symptom checklist administered to the child showed that the child was not in the clinical range for any symptoms), *aff'd per curiam*, 354 N.C. 354 (2001).

C. Other Requirements for Expert Opinion

1. Rule 403 balancing. The trial court has the inherent authority to exclude evidence, including expert testimony, under Evidence Rule 403, which provides that otherwise admissible evidence may be excluded if its probative value is substantially outweighed by other factors, such as the danger of unfair prejudice. The revisions to Evidence Rule 702 did not alter the trial court's discretion in this regard. *State v. McGrady*, 368 N.C. 880 (2016); *see also State v. King*, 366 N.C. 68 (2012) (in case decided before adoption of *Daubert* test, holding that although trial court found that expert testimony about repressed memory met requirements for admissibility, trial court had discretion to exclude it under Evidence Rule 403), *modifying and aff'g* 214 N.C. App. 114 (2011).

2. Degree of certainty of opinion. North Carolina cases have not required that an expert state his or her opinion with complete certainty but only to the degree of certainty that he or she believes. *See, e.g., In re C.M.*, 198 N.C. App. 53, 60 (2009) (doctor testified that "he could not say with 'absolute certainty' as to whether [the child's] injuries were accidental or non-accidental, but that there were 'a number of factors' that made him think that it was 'likely that this was a non-accidental injury'"; this testimony and other evidence constituted clear and convincing evidence to support the finding that the child's injuries were inflicted by non-accidental means).

When too speculative or equivocal, expert testimony has been excluded. *See State v. Clark*, 324 N.C. 146, 160 (1989) (finding that the testimony was so speculative and conjectural that it would not have assisted the trier of fact). Even if admissible, an uncertain opinion may be insufficient to support a finding. *See* 2 BRANDIS & BROUN § 189, at 776; *State v. Robinson*, 310 N.C. 530, 533–34 (1984) (holding that an expert's testimony that the insertion of a male sexual organ "could" have caused the vaginal condition was insufficient to support a rape charge).

The revisions to Rule 702(a) do not appear to affect this part of the analysis. *See State v. Babich*, 252 N.C. App. 165 (2017) (observing that when there are some facts that support an expert's testimony—in this case, about retrograde extrapolation—"the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing

expert witness testimony"; in this case, however, the expert's testimony was inadmissible because it was based on a speculative assumption and not on any actual facts); *see also* MOSTELLER § 10-3(D), at 10-53 (discussing approaches of different jurisdictions about the required degree of certainty—for example, some require that the expert be "reasonably certain," others require a "reasonably probable" opinion).

3. Permissible topics and purposes. The North Carolina courts have found that certain topics are improper areas for expert testimony—for example, the credibility of a witness, identity of the perpetrator, or conclusions about abuse in the absence of evidence of physical injuries (discussed in section 11.10.D.1, 3, and 6, below). These rulings could be construed as establishing additional limits on expert testimony, or they could be construed as applying the previous or current criteria for evaluating the reliability of expert testimony (described in section 11.10.B, above), although not all of the cases explicitly use that approach in finding the testimony impermissible.

Some opinions, although admissible, may be admissible for a limited purpose only—for example, to corroborate or explain (as discussed in section 11.10.D.7 through 10, below)—and therefore may not constitute substantive evidence or be sufficient to support a finding.

For a discussion of subjects of expert testimony that may arise occasionally in juvenile cases, such as DNA evidence, see Jessica Smith, *Criminal Evidence: Expert Testimony*, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, Aug. 2017).

D. Expert Testimony about Children

The following cases have addressed the admissibility of expert testimony on the indicated topics. Most were decided before the revisions to Evidence Rule 702(a). Where cases have considered the revisions to Evidence Rule 702(a), the discussion so indicates.

1. Credibility. An expert may not testify that a child is believable or is telling the truth. Several cases have applied this principle. *See State v. Aguallo*, 318 N.C. 590 (1986) (holding that it was improper under Evidence Rules 405 and 608 for the expert to testify that the child was believable, and ordering a new trial), *on appeal after remand*, 322 N.C. 818 (1988) (holding that it was not an impermissible comment on the child's truthfulness for an expert to testify that physical injuries were consistent with what the child had told the expert); *State v. Heath*, 316 N.C. 337 (1986) (holding that it was improper for the prosecutor to ask the expert whether the child had a mental condition that would cause her to make up a story about the sexual assault and for the expert to testify that the child had no record of lying); *State v. Brigman*, 178 N.C. App. 78 (2006) (expert improperly testified about the child's credibility when she testified about the child's disclosure that the defendant had "put his hand in his bottom and it hurt" and added "where a child not only says what happened but also can tell you how he felt about it is pretty significant because it just verifies the reliability of that disclosure"); *compare State v. Baymon*, 336 N.C. 748 (1994) (an expert witness may not testify that a child is believable or is not lying, but otherwise inadmissible evidence may become admissible if the door has been opened by the opposing party's cross-examination of the witness; because the

defendant's cross-examination of the doctor suggested that the child had been coached by others, the doctor could testify that she did not perceive that the child had been coached or told what to say); *State v. Thaggard*, 168 N.C. App. 263 (2005) (noting *Baymon* but finding that the State improperly elicited the expert's opinion on credibility on direct examination); *see also State v. Ryan*, 223 N.C. App. 325 (2012) (reading *Baymon* as holding that expert testimony that a child had not been coached is admissible and not an impermissible comment on credibility; also holding under *Baymon* that defendant's opening statement, cross-examination of other witnesses, and general cross-examination questions of expert did not open door to testimony by expert that child's story was not fictitious, which is inadmissible testimony on credibility).

The courts have applied this principle in cases decided after the amendment of Evidence Rule 702. *See State v. Warden*, 836 S.E.2d 880 (N.C. Ct. App. 2019) (testimony that DSS had substantiated sexual abuse by defendant constituted improper vouching for credibility of victim's allegations); *State v. Crabtree*, 249 N.C. App. 395 (2016) (expert's testimony was improper comment on child's credibility; opinion does not discuss *Daubert* test), *aff'd per curiam*, 370 N.C. 156 (2017).

An expert also may not testify about the character of a particular child (or other person) for truthfulness. *See* N.C. R. EVID. 405(a) (so stating); *compare* section 11.8.B.3, above (discussing admissibility of lay opinion on character). Experts have been allowed to testify generally, however, that children do not lie about sexual abuse. *See State v. Worley*, 836 S.E.2d 278 (N.C. Ct. App. 2019); *State v. Oliver*, 85 N.C. App. 1 (1987); *see also State v. Speller*, 102 N.C. App. 697, 702 (1991) (holding that it was permissible for the state's expert to testify that mothers of abused children generally do not believe their children). For a discussion of expert testimony on the suggestibility of children, see section 11.10.D.11, below.

Expert testimony about a child's statements also may be admissible if it does not amount to a comment on the child's credibility, but the line may be difficult to draw. *See* 1 BRANDIS & BROUN § 96, at 332–33 ("courts have found numerous ways to permit expert comment on truthfulness, particularly of child witnesses, under various guises"); *State v. O'Hanlan*, 153 N.C. App. 546, 555 (2002) ("[T]he cases dealing with the line between discussing one's expert opinion and improperly commenting on a witness' credibility have made it a thin one."). The expert's testimony must be examined in each case to determine whether it crosses the line into impermissible opinion about credibility. *Compare, e.g., State v. Frady*, 228 N.C. App. 682 (2013) (trial court erred in allowing expert to testify that child's disclosure was consistent with sexual abuse; this testimony essentially expressed an opinion that the child was credible, which is impermissible), *with State v. Dew*, 225 N.C. App. 750 (2013) (finding that expert's testimony was devoid of direct comment on credibility).

2. Legal conclusions. An expert may testify about the ultimate issue to be decided in the case but not in the form of a legal conclusion. *See State v. Smith*, 315 N.C. 76, 100 (1985) (stating this principle and finding that it was permissible for an expert to testify that injuries were caused by a male sex organ or object of similar size or shape but that it would have been improper for the expert to testify that the victim had been raped, a legal conclusion).

3. Identity of perpetrator. An expert may not testify that a particular person is the perpetrator or is guilty. *See State v. Figured*, 116 N.C. App. 1, 8–9 (1994) (explaining that such testimony is improper under Evidence Rules 405, 608, and 702); *accord State v. Ryan*, 223 N.C. App. 325, 734 S.E.2d 598 (2012); *State v. Brigman*, 178 N.C. App. 78, 91 (2006).

An expert may testify, however, that a child said that a particular person was the perpetrator if the statement is admissible under the hearsay exception for statements for purposes of medical diagnosis or treatment. See section 11.6.E.9, above (discussing this issue).

4. Physical injuries and their causes. A qualified expert has been permitted to give an opinion about the cause of injuries, such as "injuries were caused by insertion of blunt object," "injuries were intentionally inflicted, not accidental or self-inflicted," or possibly even "injuries were caused by sexual abuse." (The last phrase is not preferred because it approaches a legal conclusion, but the admission of such testimony has been found not to be error when used as a shorthand statement of matters that have already been described specifically.) *See, e.g.*, *State v. Jacobs*, 370 N.C. 661 (2018) (trial judge erred in refusing to allow expert to testify about presence of STDs in victim and absence of same STDs in defendant, which supported inference that defendant did not commit charged crime); *State v. Kennedy*, 320 N.C. 20, 32–33 (1987) (permitting testimony by a medical expert that injuries were not self-inflicted or accidental); *State v. Smith*, 315 N.C. 76, 99–100 (1985) (permitting testimony by a medical expert that injuries were caused by a male sex organ or an object of similar size and shape); *State v. Pearce*, 296 N.C. 281, 285–86 (1979) (explaining that testimony by the victim that she was "raped" was a shorthand reference to otherwise detailed testimony and permissible); *State v. Orellana*, 817 S.E.2d 480 (N.C. Ct. App. 2018) (permissible for nurse to testify that erythema, or redness, in vaginal area could be caused by and was consistent with touching, improper hygiene, or other causes); *State v. Dye*, 254 N.C. App. 161 (2017) (in case decided after the revisions to Evidence Rule 702, the court held that it was permissible for an expert to testify that the results of a physical examination were suspicious of vaginal penetration and sexual abuse; the court cited *McGrady* but did not apply the *Daubert* test); *State v. Ryan*, 223 N.C. App. 325 (2013) (not error to allow expert to give opinion that child had been sexually abused in light of physical evidence of an unusual deep hymenal notch, along with the presence of bacterial vaginosis that by itself could have other causes); *State v. Goforth*, 170 N.C. App. 584, 589–91 (2005) (hymenal tissues of the children reflected penetrating trauma and was sufficient physical evidence to support the doctor's opinion of repeated sexual abuse); *State v. Fuller*, 166 N.C. App. 548, 561 (2004) (court found that a SANE (sexual assault nurse examiner) nurse was properly qualified as an expert to offer an opinion about her examination of the child at the hospital emergency room; the court also found that the SANE nurse and doctor were properly permitted to testify that physical findings concerning the victim were consistent with vaginal penetration and someone kissing the child's breast); *State v. Dick*, 126 N.C. App. 312 (1997) (permitting a medical expert to testify that injuries were very likely the result of sexual mistreatment); *In re Hayden*, 96 N.C. App. 77, 82 (1989) (permitting a doctor to give an opinion that burns on a child were not accidental); *see also State v. Ford*, 314 N.C. 498, 503–04 (1985) (in a case in which a child had contracted gonorrhea in the throat, permissible for an expert to testify about how venereal disease is transmitted); *cf. State v. Perry*, 229 N.C. App. 304 (2013) (rejecting defendant's argument that state of medical science had changed and did not support expert's opinion that

child's brain injuries were caused by intentional acts and not accidental; court found no information in record concerning state of current medical science or degree to which significant doubt had arisen regarding the way brain injuries occur).

5. Battered child syndrome. Experts have been permitted to testify that a child suffers from battered child syndrome, which is a diagnosis that a pattern of physical injuries was the result of physical abuse and not accidental. *See* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996) (distinguishing battered child syndrome from other types of syndrome testimony not involving physical injuries); *see also State v. Stokes*, 150 N.C. App. 211, 225–27 (2002) (upholding the admission of expert testimony about battered child syndrome), *rev'd on other grounds*, 357 N.C. 220 (2003).

6. Opinion about abuse if no or inadequate evidence of physical injuries. If there is no evidence or inadequate evidence of physical injuries, an expert may not testify that a child was the victim of sexual or physical abuse. This view culminated in *State v. Stancil*, 355 N.C. 266 (2002), in which the court held that a doctor should not have been permitted to testify that a child was the victim of sexual abuse based on two examinations of the child in which no physical evidence of sexual abuse was observed and on the doctor's review of an in-depth interview of the child by a psychologist.

Numerous cases have followed *Stancil*. *See State v. Towe*, 366 N.C. 56, 61–64 (2012) (finding that admission of testimony amounted to plain error); *State v. Casey*, 823 S.E.2d 906 (N.C. Ct. App. 2019) (granting motion for appropriate relief and new trial); *State v. Black*, 223 N.C. App. 137 (2012) (holding that clinical social worker's testimony that child was sexually abused was improper where there was no physical evidence to support testimony); *State v. Treadway*, 208 N.C. App. 286, 292–95 (2010) (to same effect); *State v. Delsanto*, 172 N.C. App. 42, 45–47 (2005) (holding it was error to allow a doctor's opinion that the child was sexually abused where the only physical manifestation of injury was the child's statement of pain, which is subjective and not independently verifiable); *State v. Couser*, 163 N.C. App. 727, 729–32 (2004) (holding it was error to allow the state's medical expert to offer an opinion that the victim had suffered "probable sexual abuse" where the physical evidence consisted of two abrasions on either side of the introitus, which the expert admitted could have been caused by something other than sexual abuse); *State v. Bush*, 164 N.C. App. 254, 258–60 (2004) (in the absence of physical evidence, it was plain error to allow a doctor's opinion that the victim had been sexually abused; the opinion was not rendered admissible by the doctor's testimony that physical evidence is not always present and that its absence is absolutely consistent with abuse of a prepubertal child); *In re Morales*, 159 N.C. App. 429 (2003) (expert opinion that sexual abuse had occurred was improper absent any evidence of physical injury, but admission of the testimony was not prejudicial because the judge did not rely on it). *But see In re B.D.*, 174 N.C. App. 234 (2005) (assuming that the interpretation of evidence rules in criminal cases applies to termination of parental rights proceedings, the court found that they did not bar admission of experts' opinions of sexual abuse based on the child's statements, reports from other sources of sexualized behavior, and his medical history; the court's opinion does not refer to physical injuries other than bruising on the lower legs of the child).

This prohibition is based on concerns about scientific reliability and vouching for the credibility of the child. It applies to opinions of both medical and psychological experts. Earlier decisions allowing an expert to testify that a child was the victim of sexual abuse in the absence of physical injuries are no longer good law. *See, e.g.*, *State v. Bailey*, 89 N.C. App. 212, 219 (1988) (allowing expert in the field of social work specializing in child development and family relations to give opinion that a child had been sexually abused based on several interviews with child; case decided before *Stancil*).

Experts have been permitted to testify that the absence of physical evidence of abuse does not establish that no abuse occurred. In *State v. Jennings*, 209 N.C. App. 329, 333–35 (2011), the court held it was permissible for an expert to testify that the lack of physical evidence of sexual abuse did not mean that the victim had not been sexually abused. The expert testified that had there been a tear in the victim's hymen, it would have healed by the time of the expert's medical examination a year after the alleged sexual abuse. The court found that this testimony did not amount to an impermissible opinion, without supporting physical evidence, that the victim had been sexually abused. *See also State v. Peralta*, 836 S.E.2d 254 (N.C. Ct. App. 2019) (to same effect); *State v. Pierce*, 238 N.C. App. 537 (2014) (to same effect).

Experts must remain cautious, however, about crossing the line into impermissible testimony that sexual abuse occurred. *See State v. Towe*, 366 N.C. 56 (2012) (admission of doctor's expert testimony that victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse was improper); *State v. Davis*, 828 S.E.2d 570 (N.C. Ct. App. 2019) (nurse improperly permitted to testify that lack of physical indicators was consistent with someone reporting a sexual assault; testimony did not aid trier of fact as required by Evidence Rule 702(a)).

7. Psychological syndromes. With a proper foundation, qualified experts have been permitted to testify that a child suffered from post-traumatic stress syndrome. *See State v. Stancil*, 355 N.C. 266 (2002). Such opinion testimony has been found admissible, without evidence of physical injuries, to explain or corroborate only, not as substantive evidence that sexual abuse occurred. *See State v. Hall*, 330 N.C. 808, 817 (1992) (explaining that such testimony is admissible to assist the jury in understanding behavior patterns of sexually abused children and to aid the jury in assessing the complainant's credibility); *State v. Hicks*, 239 N.C. App. 396 (2015) (testimony about PTSD was not admitted as substantive evidence but rather to rebut inference, elicited on cross-examination, that victim's psychological problems were caused by something other than sexual assault); *State v. Brigman*, 178 N.C. App. 78, 92–93 (2006) (holding that it was error to admit expert testimony about PTSD for substantive purposes); *see also* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996) (psychological syndrome evidence has not been proven to be diagnostic—that is, to establish cause—but it may be useful in explaining typical human behavior in response to certain conditions).

Testimony about child sexual abuse accommodation syndrome, if based on a proper foundation, has likewise been found admissible to corroborate or explain. *See State v. Stallings*, 107 N.C. App. 241, 248–51 (1992).

8. Characteristics of abused children. Testimony about the characteristics of abused children is expert testimony, subject to the requirements for expert opinion. *See State v. Davis*, 368 N.C. 794 (2016) (recognizing that such testimony is subject to expert disclosure requirements in discovery).

With a proper foundation, qualified experts have been permitted to testify, without identifying a particular syndrome and without evidence of physical injuries, that a child exhibited characteristics consistent with sexual abuse. *See State v. Stancil*, 355 N.C. 266 (2002); *State v. Davis*, 828 S.E.2d 570 (N.C. Ct. App. 2019) (nurse improperly permitted to testify that lack of physical indicators was consistent with someone reporting a sexual assault; nurse's testimony was not based on any science or other medical knowledge but rather on assumption that all people she examined were telling the truth about being sexually abused); *State v. Khouri*, 214 N.C. App. 389 (2011) (allowing such testimony); *State v. Chavez*, 241 N.C. App. 562 (2015) (finding no error in admission of doctor's testimony that victim's "cutting behavior" was common among children who have been sexually abused); *State v. Couser*, 163 N.C. App. 727, 729–32 (2004) (it was error to allow a medical expert's opinion under this principle; the expert testified that the victim had suffered "probable sexual abuse" when there was insufficient physical evidence to support the opinion given and there was no evidence to support that the victim's behavior or symptoms were consistent with being sexually abused); *State v. Wade*, 155 N.C. App. 1 (2002) (it was permissible for a professional psychologist, who had treated the child on a weekly basis for ten months, to testify that the child exhibited characteristics consistent with sexual abuse; the two-judge concurrence found that the psychologist's testimony that the child had in fact been sexually abused was improper in the absence of evidence of physical injuries but that the admission of the testimony was not plain error).

The courts have held that an expert may give this opinion testimony without examining the child as long as the expert is otherwise qualified to give the testimony. *State v. Ragland*, 226 N.C. App. 547 (2013) (expert interviewed but did not physically examine child); *State v. McCall*, 162 N.C. App. 64 (2004) (expert did not interview or examine child and based her opinion on DSS report, police reports, and interviews by medical personnel of child).

The courts have held that the expert's testimony must concern the characteristics of sexually abused children and not cross into impermissible opinion about whether a child is credible or, in the absence of physical evidence, whether sexual abuse occurred. *See State v. Frady*, 228 N.C. App. 682 (2013) (trial court erred in allowing expert to testify that child's disclosure about incident was consistent with sexual abuse; testimony neither addressed characteristics of sexually abused children nor spoke to whether child exhibited symptoms consistent with those characteristics).

As with syndrome testimony, the cases have indicated that an opinion about symptoms or characteristics is admissible to explain or corroborate but not as substantive evidence. *See State v. Kennedy*, 320 N.C. 20, 31–32 (1987) (such testimony "could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim"); *State v. Hall*, 330 N.C. 808, 817 (1992) (reaffirming *Kennedy*); *State v. Ewell*, 168 N.C. App. 98, 102–05 (2005) (testimony about profiles and symptoms of abused children is

permissible to inform the jury that the absence of physical evidence is not conclusive, but it was error to allow testimony by a doctor that it was "probable" that the child was a victim of sexual abuse); *State v. Kelly*, 118 N.C. App. 589, 595 (1995) ("Explanations of the symptoms and characteristics of sexually abused children are admissible only through expert testimony for the limited purpose of assisting the jury in understanding the behavior patterns of abused children."); North Carolina Pattern Jury Instruction—Criminal 104.96 (June 2011) (pattern jury instruction limits such evidence to corroboration or impeachment); *see also State v. Ware*, 188 N.C. App. 790, 798 (2008) (licensed clinical social worker was sufficiently qualified as an expert to give an opinion that it was common for children who have been abused by a parental figure to "have a dilemma" about reporting the abuse). *But see State v. Isenberg*, 148 N.C. App. 29, 39–40 (2001) (court rejected the defendant's argument that the trial court erred in failing to give an instruction limiting the jury's consideration of an expert's testimony to corroborative, not substantive, purposes because the defendant did not ask for a limiting instruction at trial; the court also stated that the defendant was not entitled to a limiting instruction when the testimony is about the general characteristics of abused children, not about a specific profile or syndrome, relying on *State v. Richardson*, 112 N.C. App. 58 (1993) [note, however, that the court in *Richardson* found the testimony permissible because it was *not* offered for the substantive purpose of showing that a sexual assault occurred]).

9. Delayed disclosure. Applying revised Evidence Rule 702, the court in *State v. Shore*, 814 S.E.2d 464 (N.C. Ct. App. 2018), found it permissible for the trial court to allow the State's witness to testify as an expert in clinical social work, specializing in child sexual abuse cases. The witness testified that it was not uncommon for children to delay disclosure of sexual abuse. She explained some of the reasons for such delays, such as fear and self-guilt; she was not allowed to testify about why the alleged victim in this case delayed in reporting abuse. The court found that the witness's testimony was based on sufficient facts and data under Rule 702(a)(1) and her testimony was the product of reliable principles and methods under Rule 702(a)(2). Prior cases have reached a similar result. *State v. Purcell*, 242 N.C. App. 222 (2015) (medical doctor testified as to why children may delay reporting sexual abuse and did not opine on child's credibility); *State v. Carpenter*, 147 N.C. App. 386 (2001) (to same effect). Like testimony about other characteristics of abused children, discussed in subsection 8, above, such testimony is to explain or corroborate, not as substantive evidence.

10. Repressed memory. In *State v. King*, 366 N.C. 68 (2012), *modifying and aff'g* 214 N.C. App. 114 (2011), the North Carolina appellate courts addressed the admissibility of testimony about repressed memory—that is, testimony about delayed recall of traumatic events such as sexual abuse.

The Court of Appeals in *King* considered the scope of the trial court's discretion under *Barrett v. Hyldburg*, 127 N.C. App. 95 (1997), which held that testimony about repressed memories by an alleged victim of sexual abuse is admissible only if (1) the testimony is accompanied by expert testimony explaining the phenomenon of memory repression, and (2) the expert testimony has sufficient scientific assurance of reliability that the repressed memory is an indicator of what actually transpired in the past. The State argued that because *Barrett* requires that evidence of delayed recall of traumatic events be accompanied by expert testimony about repressed memory, the trial judge abused his discretion in excluding the

State's expert testimony on the subject. The majority of the Court of Appeals held that *Barrett* did not obviate the gatekeeping function of trial judges to assess the reliability of expert testimony or remove their discretion to weigh the admissibility of evidence under N.C. Rule of Evidence 403. The majority upheld the trial court's determination that even if the State's expert testimony about repressed memory technically satisfied the requirements for admission of expert testimony [under the then-applicable *Howerton* test], the testimony was inadmissible under Evidence Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

The Supreme Court in *King* affirmed the Court of Appeals' ruling that the trial court did not abuse its discretion by excluding the State's expert testimony on repressed memory under Evidence Rule 403. The court stated further: "We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702." 366 N.C. at 77. The Supreme Court disavowed the part of the Court of Appeals' opinion that concluded, in reliance on *Barrett v. Hyldburg*, 127 N.C. App. 95 (1997), that all testimony based on recovered memory must be excluded unless it is accompanied by expert testimony. The Supreme Court agreed with the holding in *Barrett* that a lay witness may not express the opinion that he or she has experienced repressed memory. The court stated, however, that *Barrett* "went too far" when it added that even if the witness in that case had avoided use of the term "repressed memory" and simply testified that she suddenly remembered traumatic incidents from her childhood, such testimony had to be accompanied by expert testimony. 366 N.C. at 78. The Supreme Court concluded that a lay witness may not testify that memories were repressed or recovered but may testify, in essence, that for some time period he or she did not recall, had no memory of, or had forgotten the incident. The court added that a defendant facing a witness who claims to have recently remembered long-ago events could seek to present an expert to address or refute the witness's purported sudden recall, thereby requiring the trial court to determine the admissibility of the witness's testimony.

11. Suggestibility of children. In *State v. Walston*, 244 N.C. App. 299 (2015), *rev'd on other grounds*, 369 N.C. 547 (2017), the North Carolina Court of Appeals and North Carolina Supreme Court considered the admissibility of expert testimony offered by the defendant about the suggestibility of children, including the alteration or creation of memories through questioning, gestures, or other suggestive acts. The opinions recognize that such testimony is permissible if, as with other expert testimony, the trial court determines that the testimony meets the criteria for admissibility under amended Evidence Rule 702. The Court of Appeals in *Walston* cautioned that an expert testifying about suggestibility may not express an opinion about the credibility of the particular child in the case. *See also State v. Carter*, 216 N.C. App. 453 (2011) (upholding exclusion of testimony by social worker on respondent's behalf that victim was "overly dramatic," "manipulative," and exhibited "attention seeking behavior," which court found was inadmissible commentary on child's credibility, was not about the profiles of abused children, and was not a subject on which the witness was qualified to render an opinion), *rev'd on other grounds*, 366 N.C. 496 (2013); *cf. State v. Peralta*, 836 S.E.2d 254 (N.C. Ct. App. 2019) (upholding exclusion of testimony that mother talked about sexual acts in front of child; court finds that testimony was too speculative to show that mother's

comments were the origin of child's ability to graphically describe sex acts against her); *State v. Steen*, 826 S.E.2d 478 (N.C. Ct. App. 2019) (finding that trial judge's exclusion of defense expert testimony about "induced confabulation," if error, was not reversible error; judge allowed expert to define the condition, explain how it could affect memories of a person with amnesia after a traumatic injury, and testify that witness in this case was at risk of condition based on her injuries, but judge prohibited expert from testifying as to relationship between questions asked by officers and potential for confabulation regarding identification of defendant as attacker).

12. Examination of child by respondent's expert. In *Walston*, in 11., above, the Supreme Court held that the Court of Appeals was correct in holding that the respondent's expert was not required to examine or interview the children as a condition of giving expert testimony. The Supreme Court stated, "Such a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." 369 N.C. at 553. The opinions recognized that prior cases did not establish a per se requirement of an examination but rather held that the trial court did not abuse its discretion in excluding the proffered testimony on the facts of the case. *See State v. Robertson*, 115 N.C. App. 249, 260–61 (1994). The Supreme Court determined that the trial court did not abuse its discretion in excluding the proffered testimony on the facts of this case on the grounds that it did not meet the requirements for expert testimony under Rule 702 as well as the balancing test under Rule 403 (probative value of testimony weighed against danger of unfair prejudice, confusion of issues, or misleading of jury). *See also In re J.L.*, 826 S.E.2d 258 (N.C. Ct. App. 2019) (permissible for trial judge at permanency planning hearing to allow non-party foster parent to call expert witness to testify about attachment relationship and impact of removing child from foster home without having examined child); *In re K.G.W.*, 250 N.C. App. 62 (2016) (recognizing that expert witness need not personally examine person before being permitted to testify as expert about person's condition, but holding that trial court did not abuse discretion in finding that respondent's expert testimony would not be helpful where expert had not worked with juvenile and had no experience in juvenile cases).

E. Expert Testimony about Parents

1. Generally. The following cases involve expert testimony about parents. All were decided before the adoption of revised Evidence Rule 702.

State v. Faulkner, 180 N.C. App. 499, 507–09 (2006) (permissible for a developmental and forensic pediatrician to testify, in rebuttal of the defense claim that child abuse is over diagnosed, about the profile of normal caretaker behavior as one of the indicators of whether a child's injuries are accidental or inflicted).

Tate v. Hayes, 127 N.C. App. 208 (1997) (substance abuse counselor was properly allowed to testify that the mother had a substance abuse problem in reliance on the "Sassy" [*sic*] test, which is accepted by the State of North Carolina for substance abuse assessments and is of a type reasonably relied on by experts in that field).

In re Carr, 116 N.C. App. 403, 408 (1994) (trial court did not err in refusing to allow an expert witness to testify about the mother's mental health and parenting capacity where the witness was an expert in clinical social work specifically dealing with adolescents and there was no evidence she was an expert in mental health issues).

In re Chasse, 116 N.C. App. 52, 59–60 (1994) (trial court erred in refusing to allow a psychologist to testify about the treatment of adult sexual offenders because of his lack of clinical experience with adults; "[h]is acknowledged expertise in the field of adolescent sex offenders and his study of the 'entire psychological literature, which included the review articles on treatment of adult sexual offenders,' made him better qualified than the trial court to render an opinion on the length and efficacy of adult sexual offender therapy . . . .").

In re Byrd, 72 N.C. App. 277, 280–81 (1985) (in a termination of parental rights proceeding, it was not error to admit expert testimony of witnesses tendered as experts in juvenile protective services, infant development, and permanency planning; although the witnesses should have refrained from giving an opinion about whether parental rights should be terminated [a legal conclusion and therefore an improper subject of expert testimony, as discussed in section 11.10.D.2, above], the substance of the testimony was that the child was in need of a permanent placement and a stable home environment).

In re Pierce, 67 N.C. App. 257, 260 (1984) (trial court did not err in permitting a social worker to give an opinion as to the parents' capacity to provide a stable home environment; although the proponent did not tender the social worker as an expert and the better practice is for the proponent to do so, the record was clear that the trial court treated the witness as an expert).

In re Peirce, 53 N.C. App. 373, 384–85 (1981) (trial court did not err in finding that a social worker was sufficiently qualified to give an expert opinion about whether the parents' actions were indicative of good parenting skills; although the proponent did not tender the social worker as an expert and the better practice is for the proponent to do so, the record was clear that the trial court treated the witness as an expert).

2. Polygraph evidence. The North Carolina Supreme Court has held that polygraph evidence is inherently unreliable and therefore inadmissible at trial. *State v. Grier*, 307 N.C. 628 (1983) (also expressing concern that jury would be unduly persuaded by polygraph evidence); 1 BRANDIS & BROUN § 113, at 416–18; *see also State v. Spencer*, 119 N.C. App. 662 (1995) (penile plethysmograph results were not sufficiently reliable to provide basis for expert opinion that defendant was not sexually aroused by children, thereby making it less likely that he committed the acts charged).

11.11 Evidentiary Privileges

Several statutes address the applicability of evidence privileges in juvenile proceedings. The statutes are not entirely consistent, but taken together they override most evidentiary privileges. The few privileges not overridden appear to apply to disposition as well as

adjudication proceedings. *See generally* MOSTELLER § 8-2, at 8-3 (general rule is that privileges apply in any proceeding in which testimony can be compelled unless there is an exception overriding the privilege).

A. In Abuse, Neglect, and Dependency Proceedings

1. Effect of broad negation of privileges in G.S. 7B-310. G.S. 7B-310 is the broadest of the statutes on evidentiary privileges in juvenile cases, providing that no evidentiary privilege other than the attorney-client privilege is ground "for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse, neglect, or dependency is in issue nor in any judicial proceeding resulting from a report submitted under this Article." Because of its reference to abuse, neglect, and dependency, this statute applies at least to all hearings in abuse, neglect, and dependency cases.

2. Effect of specific negation of privileges in G.S. Chapter 8. Various communications are protected from compelled disclosure in court proceedings by G.S. Chapter 8, Article 7 (Competency of Witnesses). Several but not all of those statutes provide that a particular protection created by that Chapter is not a ground for excluding evidence of abuse or neglect in judicial proceedings. Thus, G.S. 8-53.1 states that the protection for physician-patient and nurse-patient communications is not a ground for excluding evidence of abuse or neglect of a child under age 16. Similar, although not identical language, appears in G.S. 8-53.3 (psychologists), G.S. 8-53.10 (peer support group counselors), and G.S. 8-57.1 (spouses). *See State v. Godbey*, 250 N.C. App. 424 (2016) (by operation of G.S. 8-57.1, marital privilege did not apply in criminal prosecution for indecent liberties with child); *State v. Knight*, 93 N.C. App. 460, 466–67 (1989) (by operation of G.S. 8-53.3, the psychiatrist-client privilege did not apply in a criminal prosecution for a sexual offense against a child); *see also* G.S. 8-57.2 (negating spousal privilege for paternity determinations).

No such language accompanies other privileges in G.S. Chapter 8. *See, e.g.*, G.S. 8-53.4 (school counselors), 8-53.5 (marital and family therapists), 8-53.7 (private social workers). The absence of limiting language in those statutes is likely of no consequence in abuse, neglect, and dependency proceedings (except possibly for communications between clergy and communicants, discussed next) because G.S. 7B-310 is so broad that it likely overrides the incomplete treatment in G.S. Chapter 8. *See generally State v. Byler*, 167 N.C. App. 109 (2004) (unpublished) (reading G.S. 7B-310 and G.S. 8-53.1 together).

3. Attorney-client and clergy-communicant protections. G.S. 7B-310 explicitly protects information subject to the attorney-client privilege. The privilege may be asserted as grounds for excluding evidence—including evidence of abuse, neglect, or dependency—in any court action. In its technical sense, the attorney-client privilege protects only communications between attorney and client, but the statute likely protects information gained in the course of the attorney-client relationship and subject to attorney work product and confidentiality obligations. *See* N.C. REVISED RULES OF PROF'L CONDUCT R. 1.6 & comment (providing that a lawyer shall not reveal information acquired during the professional relationship with a client). A narrower reading could infringe on the respondent's constitutional and statutory right to counsel.

Note: For purposes of the duty to report suspected child abuse, neglect, or dependency, G.S. 7B-310 does not protect all information that is subject to the attorney-client privilege. The exemption states that it applies only to knowledge or suspicion the attorney gains from the client during representation in the abuse, neglect, or dependency case. *See* N.C. State Bar Ethics Opinion, RPC 175 (1995) (ruling that a lawyer ethically may exercise discretion as to whether to reveal confidential information pursuant to the child abuse, neglect, and dependency reporting law). The right to counsel guaranteed by the U.S. and N.C. Constitutions may require a broader attorney exception, however. See Chapter 5.1.A.2.

G.S. 8-53.2 recognizes a privilege for clergy-communicant communications and does not indicate any circumstances negating the privilege. G.S. 7B-310, however, does not exempt clergy-communicant communications from the broad override of privileges in that statute. Nevertheless, the protections for religion in the First Amendment of the U.S. Constitution and Art. I, Sec. 13 of the North Carolina Constitution may protect such communications. *Cf. In re Huff*, 140 N.C. App. 288, 294–99 (2000) (discussing the applicability of these limits on the questioning of parents about religious practices); *see also* JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA at 61–62 (UNC School of Government, 3d ed. 2013) (discussing application of reporting requirement to confidential communications with clergy).

4. Protections against disclosure of confidential information. G.S. 7B-310 overrides "privileges" only. In its technical sense, a privilege protects a witness from being compelled to testify in court proceedings or bars a witness from testifying without another person's consent. Many other provisions of law, while not establishing a "privilege" not to testify, make information confidential, such as provisions on mental health and substance abuse records, school records, and the like. *See* 1 BRANDIS & BROUN § 125, at 462 ("There are many statutes that while perhaps short of creating a privilege in the technical sense, provide, to varying extent, for confidentiality of specified records, reports or information."). G.S. 7B-310 probably should be interpreted as providing that confidentiality provisions are likewise not grounds for excluding evidence of abuse, neglect, and dependency.

Confidentiality laws still may pose barriers to admissibility in the sense that, to obtain protected information, a party must comply with the particular statute or other law governing production and disclosure of the information. GALs and DSSs have broad access to confidential information, but some information may have special state and federal law protections allowing disclosure only if certain conditions are met. See Chapter 14.1 (discussing access to confidential information); *see also In re J.S.L.*, 177 N.C. App. 151, 156–57 (2006) (admission of mental health records was proper where the respondent failed to request an in camera review of the records when the records were ordered disclosed and lodged only a general objection when the records were offered in evidence). Once obtained, the records still must satisfy the applicable evidence rules, such as authenticity and hearsay requirements, to be admissible. See, e.g., section 11.6.F, above (discussing the admissibility of business records).

B. In Termination of Parental Rights Proceedings

G.S. 7B-1109(f) addresses termination of parental rights proceedings, providing that "[n]o husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights." The impact of this language, which is narrower than in G.S. 7B-310 (discussed in section 11.11.A, above), appears to be as follows:

- By its terms, G.S. 7B-1109(f) disallows the husband-wife and physician-patient privilege as grounds for excluding evidence in termination of parental rights proceedings.
- The provisions in G.S. Chapter 8 that override specific privileges, in addition to the two privileges specified in G.S. 7B-1109(f), apply to termination of parental rights proceedings as well. *See* G.S. 8-53.1 (nurses), 8-53.3 (psychologists), 8-53.10 (peer support group counselors).
- G.S. 7B-310 may preclude the assertion of other privileges in termination of parental rights proceedings when asserted to exclude evidence of abuse, neglect, or dependency. A counter-argument can be made that G.S. 7B-1109(f), which applies specifically to termination of parental rights proceedings, supersedes the more general G.S. 7B-310.

11.12 Right against Self-Incrimination

A. Right Not to Answer Incriminating Questions

Under the Fifth Amendment of the U.S. Constitution and Art. I, Sec. 23 of the North Carolina Constitution, a person has the right not to "incriminate" himself or herself—that is, not to give testimony that might make the person subject to criminal prosecution under state or federal law. *See* 1 BRANDIS & BROUN § 126, at 463. The Fifth Amendment privilege is the same in civil and criminal cases in the sense that a witness called to testify in either type of case, including in juvenile proceedings, has the right to refuse to answer questions that might incriminate him or her in future criminal proceedings. *See In re L.C.*, 253 N.C. App. 67 (2017) (so holding in abuse and neglect proceeding). A court may not override the assertion of the privilege and compel a witness to testify unless the court finds no possibility that answering might tend to incriminate the witness. *See* 1 BRANDIS & BROUN § 126, at 480. This right is not inconsistent with the statutes discussed in section 11.11, above, which negate most evidentiary privileges but do not appear to apply to constitutional rights. *See also* G.S. 7B-802 (providing that in an adjudicatory hearing, the court must protect the rights of the juvenile and the juvenile's parent to assure due process of law). To the extent inconsistent, those statutes must yield to constitutional protections. *See generally In re Davis*, 116 N.C. App. 409, 412–13 (1994) (recognizing the right of the respondent in a termination of parental rights case to refuse to answer questions that might subject her to criminal responsibility).

The judge may, but is not required to, advise a witness of his or her right not to answer incriminating questions. *See State v. Poindexter*, 69 N.C. App. 691, 694 (1984) (finding no requirement that the court advise a pro se defendant of the defendant's Fifth Amendment

right); *State v. Lashley*, 21 N.C. App. 83, 84–85 (1974) (same); 1 MCCORMICK § 131, at 840–41 (generally, a witness has no right to a warning, but the judge is not barred from alerting the witness to the right against self-incrimination). The Court of Appeals has found that this rule has been altered by statute for juvenile delinquency proceedings. *See In re J.R.V.*, 212 N.C. App. 205 (2011) (holding that G.S. 7B-2405 requires the judge to advise a juvenile alleged to be delinquent of his or her privilege against self-incrimination before permitting the juvenile to testify).

For a further discussion of Fifth Amendment principles, see Robert L. Farb, *Fifth Amendment Privilege and Grant of Immunity*, NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (UNC School of Government, May 2014).

B. No Right Not to Take Stand

The Fifth Amendment protection differs in criminal and civil proceedings in that a criminal defendant has the right to refuse to take the stand and may not be called as a witness by the State, the court, or another party. *See Jones v. State*, 586 A.2d 55 (Md. Ct. Spec. App. 1991) (co-defendant may not call another defendant as a witness at their joint trial). In contrast, in a civil proceeding such as a juvenile proceeding, a respondent does not have the right to refuse to take the stand, and one party may call another party to testify. *See* 1 BRANDIS & BROUN § 126, at 478–79; *see also In re Davis*, 116 N.C. App. at 412–13 (DSS was free to call the respondent mother as a witness, without a subpoena, where the mother was present at the termination of parental rights proceeding).

In *In re L.C.*, 253 N.C. App. 67 (2017), the court distinguished between a witness who voluntarily takes the stand and a witness who is compelled to take the stand. When a witness voluntarily takes the stand, the Fifth Amendment does not provide a shield to questions about matters that the witness puts in issue. When a witness is compelled to take the stand, as in this case in which DSS called the respondent parent as a witness, the witness's right to assert the Fifth Amendment is preserved until asked a question that would be incriminating. Therefore, a compelled witness who answers some questions about the matter in question does not waive the right to refuse to answer later questions that call for incriminating information. The court in *L.C.* distinguished *Herndon v. Herndon*, 368 N.C. 826 (2016), a case in which the defendant voluntarily took the stand. In *Herndon*, the Supreme Court found that the defendant was a voluntary witness and the Fifth Amendment was not available in response to questions within the scope of matters that the defendant put in dispute on direct examination.

Note: Although *L.C.* treats a party called by the opposing party as a compelled witness—and holds that the witness may wait until an incriminating question is asked before asserting the Fifth Amendment privilege—the safer course is for the witness to assert the privilege as soon as he or she is asked about any aspect of the matter in question. Such a course may avoid disputes about whether the witness failed to timely assert the privilege and waived the Fifth Amendment privilege. *See generally Minnesota v. Murphy*, 465 U.S. 420 (1984). An early assertion of the privilege also may protect against disclosure of information that could be used in a later prosecution.

C. Drawing Adverse Inference from Refusal to Answer

In a civil proceeding, the Fifth Amendment does not forbid the drawing of an adverse inference against a party who refuses to answer in reliance on the privilege. *See In re Estate of Trogdon*, 330 N.C. 143, 151–52 (1991) (finder of fact in a civil case may use a witness's invocation of the Fifth Amendment privilege against self-incrimination to infer that truthful testimony would have been unfavorable to the witness); *accord McKillop v. Onslow County*, 139 N.C. App. 53, 63–64 (2000); *see also In re B.W.*, 190 N.C. App. 328, 338–39 (2008) (permitting the trial court to rely on, among other things, the mother's silence at the disposition hearing in support of its decision to cease reunification efforts). (The court's general statement in *In re B.W.* that the Fifth Amendment does not apply is correct in the limited sense that a court may draw an adverse inference from silence.)

A refusal to answer, and an adverse inference from the refusal, apparently may not be the sole basis for an adverse action against the party refusing to answer. There must be some other evidence to support the adverse action. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (suggesting this result in finding that an inmate's refusal to answer questions was not treated as a final admission of guilt of a disciplinary infraction). *But see* 1 MCCORMICK § 136, at 862–63 (discussing later U.S. Supreme Court cases that may cast doubt on whether the automatic imposition of an adverse action for a refusal to answer is necessarily improper).

11.13 Evidence Procedures

This section briefly reviews the procedures for offering and objecting to evidence. For the most part, the procedures are not unique to juvenile cases. Counsel should consult local rules in their district to determine whether additional or different requirements apply. For local rules, see Local Rules and Forms on the North Carolina Court System webpage.

A. Production of Witnesses and Documents

The parties have the right to subpoena witnesses and documents to juvenile hearings in accordance with Rule 45 of the North Carolina Rules of Civil Procedure. A party or other person or organization receiving a subpoena has the right to object to or move to quash a subpoena as provided in that rule. For a brief discussion of motions to quash a subpoena to testify for a child witness, see section 11.2.A.5, above. For a further discussion of subpoena procedure, see John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (UNC School of Government, Sept. 2005) (bulletin addresses subpoenas for health department records but describes procedures generally applicable to subpoenas for documents, including subpoenas for confidential information).

The parties may have the right to obtain records without a subpoena. See Chapter 14.1 (discussing access to documents and other information). But, without a witness or other evidence establishing a foundation for the record, the party offering the record may not be able to establish its admissibility.

B. Pretrial Motions in Limine, Objections, and Other Notices

A party may, but generally is not required to, make a motion in limine to obtain a preliminary ruling on the admissibility of evidence. If a party makes a motion in limine to exclude evidence and the court denies the motion, the party who made the motion still must object when the evidence is offered at trial to preserve the issue for appeal. In 2003, the General Assembly amended Evidence Rule 103 to do away with the requirement that a party object at trial if the court had already denied a motion in limine. The appellate courts found this revision invalid on the ground that it conflicts with North Carolina Appellate Rule 10(b)(1), which has been consistently interpreted as providing that an evidentiary ruling on a pretrial motion is not sufficient to preserve the issue for appeal and that the objection must be renewed at trial. *See State v. Oglesby*, 361 N.C. 550, 553–55 (2007). Likewise, if the court grants a motion in limine to exclude evidence, the party still must offer the evidence at trial and, if the court excludes the evidence, make an offer of proof to preserve the issue for appeal unless the record otherwise shows what the substance of the excluded evidence would have been. *See In re A.H.*, 250 N.C. App. 546 (2016).

A party may request a voir dire hearing to determine whether a witness's testimony is admissible—for example, whether a witness is qualified as an expert, see section 11.10, above, or a witness is competent to testify. See section 11.2, above. A voir dire hearing may be conducted before or during trial.

Some local rules provide that objections are waived if not raised before the hearing. For a brief discussion of these rules, see section 11.1.A.4, above.

A party who intends to offer hearsay under the residual hearsay exception must give notice as required by that exception. See section 11.6.H.3, above.

C. Pre-Adjudication Conference

Local rules for pre-adjudication conferences may require the parties to exchange witness lists and exhibits that they intend to offer at the adjudication hearing. Counsel should consult their local rules to determine the effect of failing to produce an exhibit as required at the pre-adjudication conference. *See also* G.S. 7B-800.1 (requiring pre-adjudication hearings in abuse, neglect, and dependency proceedings); G.S. 7B-1108.1 (requiring pretrial hearings in termination of parental rights cases). For a discussion of pre-adjudication conferences, see Chapter 5.7.

D. Objections at Trial

The North Carolina appellate courts have strict waiver rules requiring that a party timely and specifically object to the admission of evidence to preserve the issue for review on appeal. *See, e.g., In re E.M.*, 249 N.C. App. 44 (2016) (respondent failed to preserve issue for appeal by failing to object to evidence). The North Carolina appellate courts have declined to extend to juvenile cases the plain error doctrine, which allows review of errors to which a party did not object at trial if injustice would otherwise result. *See, e.g., In re B.D.*, 174 N.C. App. 234,

245 (2005) (declining to adopt the plain error doctrine in termination of parental rights proceedings); *In re Gleisner*, 141 N.C. App. 475, 479 (2000) (to same effect for neglect proceeding). The failure to make appropriate objections, however, may amount to ineffective assistance of counsel. *In re S.C.R.*, 198 N.C. App. 525, 531 (2009).

Even if a proper objection is made, it is presumed that the trial court did not rely on incompetent evidence unless it affirmatively appears to the contrary. *See, e.g.*, *In re A.L.T.*, 241 N.C. App. 443 (2015) (the trial court was presumed to have disregarded hearsay evidence because it made no findings pertaining to the evidence in support of its adjudication order). However, "'this presumption is weakened when, over objection, the judge admits clearly incompetent evidence.'" 1 BRANDIS & BROUN § 5, at 14–15 (quoting *State v. Davis*, 290 N.C. 511, 542 (1976)).

In brief, to preserve an evidentiary issue fully for review on appeal, a party must do the following.

1. Timely objection. Evidence Rule 103(a) provides that the party opposing the introduction of evidence must make a timely objection to the evidence in question. Generally, to be timely, the objection must be made when the evidence is first offered and must be repeated thereafter each time the evidence is offered. *See In re Morales*, 159 N.C. App. 429 (2003) (parents waived their objection to the admission of a social worker's opinion that the daughter was sexually abused where a physician later gave the same opinion without objection). The party making the objection also must obtain a ruling from the court on the objection. N.C. R. APP. P. 10(a).

A party is not required to repeat an objection if the court allows a standing, or line, objection to a particular line of questions. *See* N.C. R. CIV. P. 46. To ensure that a line objection is preserved, the party should ask the trial court's permission for a standing or line objection to the particular evidence. If a question within a line of questioning is objectionable on additional grounds, the party must object to that question on the additional ground.

A party is not required to object to each question if the initial ground for objection is that the witness is incompetent or otherwise disqualified from testifying. *Id.*

2. Grounds for objection. The opposing party must state all grounds for the objection, including any constitutional grounds. *See In re K.D.*, 178 N.C. App. 322, 326 (2006) ("A party may not assert at trial one basis for objection to the admission of evidence, but then rely upon a different basis on appeal."); N.C. R. APP. P. 10(a)(1) ("[A] party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

3. Evidence for limited purpose. The party offering evidence is not required to specify the purpose for which it is offered unless the evidence is challenged. *See State v. McGraw*, 137 N.C. App. 726, 730 (2000) (explaining that the better practice is for the offering party to specify the purpose, but it is not required). It is therefore incumbent on the opposing party to

raise the issue and, if the evidence should be considered for a limited purpose only, request that the evidence be considered for that purpose only. *See In re A.S.*, 190 N.C. App. 679, 688–89 (2008) (holding that since the respondent did not object to the admission of the report or request that its use be limited, the report could be treated as substantive evidence), *aff'd per curiam*, 363 N.C. 254 (2009).

4. Motion to strike. If a party's question is not objectionable but the witness's answer is improper, the opposing party must make a timely motion to strike. *See* 1 BRANDIS & BROUN § 19, at 90.

5. Offers of proof. If evidence is excluded, the proponent of the evidence must make an offer of proof to preserve the issue for appeal unless the record otherwise shows what the substance of the excluded evidence would have been. *See* N.C. R. EVID. 103(a); *In re Montgomery*, 77 N.C. App. 709, 713 (1985); *see generally* 1 BRANDIS & BROUN § 18, at 78–83. This requirement applies to evidence a party offers and also when a witness is not permitted to testify. *See* 1 BRANDIS & BROUN § 18, at 83 (explaining that the substance of what an excluded witness would say should appear in the record).

The trial court must allow a party's request to make an offer of proof. *See In re A.H.*, 250 N.C. App. 546, 559-61 (2016). The preferred, and most complete, approach is to make a formal offer of proof by eliciting the testimony from the witness on the record or, if the evidence is an exhibit, by filing the document with the trial court. *See State v. Martin*, 241 N.C. App. 602, 605 (2015). The trial court may deem an informal offer of proof to be appropriate, in which the party forecasts the evidence that would have been presented. To be sufficient, an informal offer of proof must include a specific forecast of the testimony and must be made with particularity. *Id.* at 605–06 (describing informal offer of proof).

6. Importance of complete recordation. When conversations or proceedings take place at the bench or in chambers, extra steps may need to be taken to ensure that the conversations or proceedings, including any objections, appear in the record. A party may request the court to have the conversations or proceedings recorded or, if not recorded at the time, to summarize them for the record afterward.

Resource: For a fuller discussion of preserving the record for appeal, see JULIE RAMSEUR LEWIS & JOHN RUBIN, NORTH CAROLINA DEFENDER MANUAL, Vol. 2, Trial, Appendix B: Preserving the Record on Appeal (UNC School of Government, 2d ed. 2012). The discussion focuses on criminal cases, but many of the principles also apply to juvenile cases. See also Chapter 12.3 (discussing preservation of the record for appeal).
