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1. Source for some content in this chapter: KELLA HATCHER, NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL (2007).

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2.1 Juvenile Court Players: Who's Who in the System

A. Introduction

Many people may become involved in a juvenile proceeding,[2] some playing a role inside the courtroom and others functioning in supporting and service roles outside the courtroom.

2. Unless the context requires otherwise, the term "juvenile proceeding" is used throughout this manual to refer to cases in juvenile court involving abuse, neglect, dependency, or termination of parental rights. In other contexts, of course, the term also may refer to cases involving undisciplined or delinquent juveniles.

Understanding the roles of these various "players" in the system is critical and can affect both the proceedings and the quality of advocacy or decision-making in a case.

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

Note: The term "county department of social services," as used in this Manual, includes consolidated county human services agencies created pursuant to G.S. 153A-77 that carry out social services functions.

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

Of course, district court judges and clerks of superior court, often through assistant and deputy clerks, are key participants in every juvenile court proceeding.

B. The People: Explanation of Roles

1. The juvenile court judge. A district court judge presides over every juvenile court proceeding, without a jury, and handles requests for ex parte orders. Any district court judge may preside in juvenile cases, and assignments of judges to juvenile court are made by the chief district court judge (*see supra* § 1.3.B.12 relating to judicial assignments). The judge has a significant role in individual juvenile court proceedings, as well as in juvenile court management and improvement generally. Although special training is not a prerequisite for holding juvenile court, the Administrative Office of the Courts (AOC) encourages appropriate training and provides certificates to judges who complete an approved series of courses related to juvenile court and satisfy experience requirements set by the AOC. *See* G.S. 7A-147. In districts designated as family court districts all of one family's legal matters (including matters other than abuse, neglect, dependency, and TPR) are scheduled and heard before the same judge, while other districts allow for different judges to hear different proceedings involving the same case. For more information about family court, see *supra* § 1.3.B.2.

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

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2. The chief district court judge. The chief district court judge has the authority to issue various administrative orders related to juvenile court. For example, the judge may issue an administrative order authorizing someone other than a district court judge to issue nonsecure custody orders (*see infra* § 5.5.C.2, relating to issuing nonsecure custody orders) or adding a local agency to the state list of agencies that are required to share confidential information

relating to juveniles (*see infra* § 2.7.B.6, relating to agency sharing of information). The chief district court judge may also adopt local rules related to discovery and other procedures in juvenile cases (*see infra* appendix 2, relating to responsibilities of the chief district court judge).

3. The juvenile court clerk. The clerk of superior court is responsible for maintaining the official court record and generally designates one or more assistant or deputy clerks to act as juvenile court clerks. Juvenile records include paper filings, audio recordings of hearings, and an automated index (JWise, explained further *infra* appendix 3). The clerk has specific statutory responsibilities related to juvenile proceedings: for example, the clerk must issue summonses, appoint provisional counsel, and give written notice of some hearings. The clerk generally distributes the hearing calendar, but does not manage it. The clerk also operates electronic recording systems for juvenile hearings and, when a case is appealed, creates duplicate recordings and delivers them to a transcriptionist.

4. Social services caseworkers. Caseworkers with the county department of social services assess the case and, with others in the department, determine whether to file a petition and/or provide services to the family. Caseworkers carry out many of the statutory responsibilities of the county social services director. Caseworkers are involved in coordinating services for the family, gathering information to present in court, making recommendations to the court, and monitoring the family situation until DSS services are no longer needed. *See infra* § 2.2 (discussing details related to DSS's role, responsibilities, and policies).

5. Social services attorney. The DSS attorney works with the DSS case worker(s) assigned to a particular case. Because DSS is the petitioner in every abuse, neglect, or dependency case and in some termination of parental rights cases, the DSS attorney is responsible for the initial presentation of evidence at many hearings. In addition to advising and representing DSS in individual cases, the DSS attorney may provide counsel, advice, and training about court procedures, relevant changes in the law, liability, and other matters. *See infra* § 2.2 (discussing details of the role and responsibilities of DSS). DSS attorneys across the state are a mix of in-house agency attorneys, county or assistant county attorneys, and private attorneys under contract to represent DSS. The source of direction and supervision a DSS attorney receives may vary depending on which arrangement is in place. Because DSS is not a legal entity separate from the county, however, the DSS attorney's ultimate client is the county.

6. The child or juvenile. In this manual these terms are used interchangeably. The child is the subject of any petition in juvenile court and is a party to the case. A child or juvenile is anyone under the age of eighteen who is not married, emancipated, or in the armed services. G.S. 7B-101(14). In North Carolina, a minor—someone under the age of 18—may become emancipated only by marriage or by court order. G.S. 7B-3500 through 7B-3509.

The child may or may not be a source of information relating to the allegations in the petition, and may or may not be called to testify in the adjudication or disposition phases of the case. The child's age and situation, as well as local practice and the court's and parties' preferences, will influence the nature of the child's participation in the case. In all abuse and neglect cases and in most dependency and TPR cases the child is appointed a guardian ad litem (GAL), who

advocates for the child's best interests, and an attorney advocate. *See infra* §§ 2.3, 2.4 (explaining guardian ad litem representation and the child's rights).

7. Guardian ad litem volunteer and attorney advocate for child. When a petition alleges that a child is abused or neglected, the court *must* appoint a guardian ad litem (GAL) for the child; when a petition alleges only that the child is dependent, the court *may* appoint a GAL. A GAL is also required to represent a child who is the subject of a termination of parental rights proceeding in certain circumstances. Any time the court appoints a GAL who is not an attorney, the court also must appoint an attorney advocate to protect the child's legal interests. (*Note:* If a volunteer GAL is an attorney who is not practicing law or who practices in an area unrelated to juvenile court, the court still would appoint an attorney advocate.) The GAL volunteer, staff, and attorney advocate work as a team, and their role is to represent the best interests of the child. *See infra* § 2.3 (discussing details related to the Guardian ad Litem Program and the appointment, role, and responsibilities of GALs).

8. Parent. The child's parents are parties to all proceedings involving the child unless a parent's rights have been terminated or the parent has been convicted of first or second degree rape that resulted in the conception of the child. A parent who has relinquished the child for adoption ordinarily is not a party, but the court may order that he or she be made a party. G.S. 7B-401.1. Parents who are parties are entitled to notice and an opportunity to be heard, although an abuse, neglect, or dependency case can proceed after service of process on only one parent. *See infra* § 3.4.A.1(b). Because abuse, neglect, and dependency cases are about the child, not "against" a parent, and because both parents' rights may be affected by the court's intervention, every effort should be made to serve both parents and involve both parents in the proceeding. A parent who had no involvement in the circumstances leading up to the petition has the same rights as a parent alleged in a petition to have abused or neglected the child.

The term "parent" is not defined in the Juvenile Code, but generally is considered to be a child's legal or biological parent. If paternity of a child has not been established legally or if a child has both a legal and a putative father, a determination of paternity in the juvenile proceeding may be necessary. See G.S. 7B-506(h)(1), G.S. 7B-800.1 and G.S. 7B-901 for a requirement that the court inquire about efforts to locate missing parents and to establish paternity if paternity is an issue, and for the court's authority to require efforts aimed at establishing paternity.

See infra § 2.5 (related to parent's rights, including right to counsel); *infra* § 5.4.B.4 (discussing GAL for parent in abuse, neglect, dependency case); *infra* § 9.4.B (discussing GAL for parent in TPR); and *supra* § 1.4 (related to parent's involvement in overlapping proceedings).

9. Parent's attorney. In juvenile cases each parent has a statutory right to counsel and to court-appointed counsel if indigent, unless the parent waives that right. G.S. 7B-602 and G.S. 7B-1101.1. *See also Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (holding that the Due Process Clause of the U.S. Constitution does not require appointment of counsel for indigent parents in every termination of parental rights case and discussing the analysis for

determining on a case by case basis whether appointment of counsel is constitutionally required). The parent's attorney represents the expressed interests of the parent. *See infra* § 2.5.D (giving details related to counsel for parents).

10. Parent's guardian ad litem. The Juvenile Code requires the appointment of a guardian ad litem pursuant to Rule 17 of the N.C. Rules of Civil Procedure for a parent who is an unemancipated minor. The court has discretion to appoint a Rule 17 guardian ad litem for a parent who is not a minor and is incompetent. Rule 17 guardians ad litem are not the same as GALs appointed for children under G.S. 7B-601, and they have no affiliation with the Guardian ad Litem Program. *See infra* § 5.4.B.4 (discussing GAL for parent in abuse, neglect, dependency case); *infra* § 9.4.B (discussing GAL for parent in TPR).

11. Custodians, guardians, and caretakers. Often people other than a child's parents are responsible for or involved with caring for the child. The Juvenile Code classifies these persons, for purposes of determining their legal role and significance in a juvenile case, as "custodians," "guardians," or "caretakers." It is important to understand the definition of each term in order to determine which applies in a particular circumstance. *See In re A.P.*, 165 N.C. App. 841 (2004) (holding that step-grandfather was a caretaker, not a custodian, and thus was not entitled to appeal under G.S. 7B-1002). A custodian, guardian, or caretaker who is a party to the case has most but not all of the same rights as a parent. For example, only parents have a statutory right to appointed counsel if indigent. However, the Office of Indigent Defense Services has a policy addressing the appointment and payment of counsel for non-parents. *See* N.C. Office of Indigent Defense Services, *Appointment of Counsel for Non-Parent Respondents in Abuse, Neglect, and Dependency Proceedings* (July 2, 2008).

When a guardian, custodian, or caretaker is a party (explained below), the court may remove that person from a proceeding, removing his or her status as a party, if the court finds that the person does not have legal rights that may be affected by the action and that the person's continuation as a party is not necessary to meet the juvenile's needs. G.S. 7B-401.1(g).

For more information on the role and status of persons who become custodians and guardians as a result of dispositional proceedings, see *infra* § 7.4.

(a) Custodian. A custodian is a person or agency that has been awarded legal custody of the child by a court. G.S. 7B-101(8). The custodian of a child at the time a petition is filed is a party to the juvenile case, and a custodian awarded custody during the juvenile proceeding automatically becomes a party if the custody arrangement is a permanent plan for the child. G.S. 7B-401.1(d).

(b) Guardian. In a juvenile case the court may appoint a guardian of the person for the juvenile when no parent appears in a hearing with the juvenile or any time the court finds it would be in the best interests of the juvenile. The guardian operates under the supervision of the court and has the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile. G.S. 7B-600. *See infra* § 7.4.G (giving details related to the appointment and duties of a guardian). The term also encompasses a guardian of the person or general guardian appointed pursuant to G.S. Chapter 35A for (i)

a minor who has no natural guardian, i.e., no parent; or (ii) a minor who is within six months of reaching age eighteen, is expected to require a guardian as an adult, and has been adjudicated incompetent. (The term "guardian," by itself, does not include a guardian ad litem.) A court-appointed guardian of the person or general guardian of the child when the petition is filed is a party to the juvenile case, and a person appointed as a guardian pursuant to G.S. 7B-600 automatically becomes a party if the court has found guardianship to be the permanent plan for the child. G.S. 7B-401.1(c).

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

- a stepparent,
- a foster parent,
- an adult member of the juvenile's household,
- an adult relative entrusted with the juvenile's care,
- a house parent or cottage parent in a residential facility, or
- any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services (DHHS).

G.S. 7B-101(3). The term "caretaker" also includes any person responsible for caring for a child in a child care facility (as defined in G.S. 110-86). G.S. 7B-101(3). A caretaker is a party to the juvenile case only if the petition includes allegations relating to the caretaker, the caretaker has assumed the status and obligation of a parent, or the court orders that the caretaker be made a party. G.S. 7B-401.1(e).

In determining whether an adult relative is "entrusted with the juvenile's care," the court of appeals has stated that the totality of the circumstances must be considered. In a case in which a child was sexually abused while on an overnight visit with her stepfather's cousin, the court examined the issue of whether the stepfather's cousin was a caretaker as defined by the statute. The court reasoned that an adult relative is not "entrusted" with a juvenile's care unless there is an extended-care situation, and pointed out that in a sleepover situation a parent does not relinquish responsibility over the child's health and welfare. Because this situation did not involve extended care, the court held that the stepfather's cousin was not a caretaker within the meaning of the statute. *In re R.R.N.*, __ N.C. App. __, 757 S.E.2d 503 (2014). However, this case has been stayed by the N.C. Supreme Court. Oral arguments were heard on February 16, 2015.

12. Law enforcement. It is not uncommon for law enforcement to be the source of reports to DSS of suspected abuse, neglect, or dependency. A DSS assessment may reveal facts that DSS is required to report to law enforcement, which then has a duty to initiate a criminal investigation. See G.S. 7B-307. *See also infra* § 5.1.F (discussing law enforcement involvement in the pre-adjudication stage of a case). At the request of DSS, law enforcement officers are required to assist DSS in the assessment and evaluation of the seriousness of a report. G.S. 7B-302(e). Sometimes law enforcement and DSS coordinate interviews and other aspects of the criminal investigation and social services assessment, and in some counties the

agencies have developed protocols to facilitate this type of coordination. *See supra* § 1.4 (discussing overlapping juvenile and criminal proceedings).

13. District attorney or prosecutor. In some circumstances, DSS must notify the prosecutor regarding information it obtains. Whether criminal charges will be filed is always up to the prosecutor. *See supra* § 1.4 (discussing overlapping juvenile and criminal proceedings). In addition, the prosecutor may be called on to review a decision by DSS not to file a petition. *See infra* § 5.1.E (discussing the review of a DSS decision not to file a petition).

14. Area professionals and their agencies. Often various professionals and agencies are involved in evaluating or treating children or parents. Agencies and individuals also may be involved in caring for a child or assisting the parent in addressing issues related to employment, housing, education, etc. Professionals and individuals who speak on behalf of agencies are not parties to the proceedings and generally are not subject to orders of the court absent specific statutory authority. They may be subpoenaed as witnesses or called on to provide affidavits, written reports, or other information. *See infra* § 2.7.B.6 (relating to agencies sharing information in juvenile cases). If qualified as experts, professionals may also be called on to provide expert opinion testimony. *See infra* § 11.10 (relating to expert testimony).

15. Juvenile court case manager or coordinators. Some judicial districts have court staff whose role is to provide case management for juvenile abuse, neglect, dependency, and termination of parental rights cases. *See infra* appendix 5, "Case Management for Abuse, Neglect, Dependency, and Termination of Parental Rights Cases in NC Juvenile Courts."

16. Other officials and providers. Parents and children involved in a juvenile case may also be involved in juvenile delinquency proceedings, adult criminal court, domestic violence proceedings, child support proceedings, or other court actions. In those situations, there may be juvenile court counselors, probation officers, domestic violence counselors, and others with interest in the juvenile court case, information that might assist the juvenile court, or both. *See infra* § 2.7.B.6 (relating to agencies sharing information in juvenile cases), *supra* § 1.4 (relating to overlapping proceedings).

2.2 The Role of Social Services[3]

A. DSS-DHHS Structure and Relationship

North Carolina's social services system is county-administered and state-supervised. Each county has either a department of social services (DSS) or a consolidated human services agency that includes social services.[4] The State Department of Health and Human Services

3. Source for some content for this section: DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL (Family Support and Child Welfare chs.).

4. In this manual, "DSS" will be used to refer to both structures. For information about how the structure is determined, see G.S. 108A-1 and G.S. 153A-77. For more information on the structures, see Aimee N. Wall, *Social*

(DHHS), via its Division of Social Services, has an oversight role and provides some training, technical assistance, and consultation for county DSS agencies.

The State Division of Social Services has a Family Support and Child Welfare Section that includes policy consultants in Raleigh and regional "children's program representatives" to provide assistance to county DSS agencies. The Division develops extensive state child welfare policies, published primarily as on-line manuals, and monitors counties' compliance and performance.

Resources: For additional information regarding the Division of Social Services, see "General Information" on the Division of Social Services, N.C. Department of Health and Human Services website.

For additional information about DSS agency structure, see Aimee N. Wall, *Social Services*, *in* COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA, (UNC School of Government, 2d ed. forthcoming 2014); 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. VIII § 1406 (2008).

For additional information about programs and services within the State Division of Social Services, including child protective services, foster care, etc., see "NC DSS Programs and Services" on the Division of Social Services, N.C. Department of Health and Human Services website.

For more information about DSS funding, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. XIII (Child Welfare Funding Manual) (2010).

Each county has a county social services board, a consolidated human services board, or a board of county commissioners that has assumed the powers and duties of a county social services board. *See* Article I of G.S. Chapter 108A and G.S. 153A-77. County social services boards select DSS directors, who hire staff and administer county programs. In counties with a consolidated human services board, the county manager appoints and supervises a county director of human services, who appoints staff only on approval of the county manager.

County DSS and human services agencies are departments within county government, and their directors and employees are county employees. However, the director and agency are also guided by and accountable to the state in many respects. For example, if DHHS determines that a county is failing to provide child welfare services in accordance with applicable laws and regulations, G.S. 108A-74 provides procedures through which DHHS may intervene in and, in the most extreme cases, take control of the county's delivery of child welfare services. State appellate courts have held in several child welfare contexts that the county DSS operates as an agent of the state. *See, e.g., Gammons v. N.C. Dep't of Human Res*., 344 N.C. 51 (1996) (child protective services); *Vaughn v. N.C. Dep't of Human Res*.,

Services, *in* COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA, (UNC School of Government, 2d ed. forthcoming 2014).

296 N.C. 683 (1979) (foster care); *In re Z.D.H*, 184 N.C. App. 183 (2007) (appeal in a juvenile case); *Parham v. Iredell County Dep't of Soc. Servs*., 127 N.C. App. 144 (1997) (adoption). On a day-to-day basis, however, county DSSs operate relatively independently.

County DSS agencies are represented in court by an in-house agency attorney, a county attorney or assistant county attorney, or retained counsel. In all juvenile cases, the attorney works with DSS case workers. *See supra* § 2.1.B.5 (relating to the DSS attorney).

Resources: For more information on social services boards, see JOHN L. SAXON, HANDBOOK FOR COUNTY SOCIAL SERVICES BOARDS (UNC School of Government, 2009).

For further information about social services, see also JOHN L. SAXON, SOCIAL SERVICES IN NORTH CAROLINA (UNC School of Government, 2008).

For information about consolidated human services agencies, see "Types of Local Public Health Agencies: Consolidated Human Services Agencies" on the UNC School of Government website.

B. DSS Policies and Procedures

1. Sources of policy and procedure. Individual county DSS agencies may have local policies and procedures developed by the county social services or human services board or director. However, most policies and procedures related to child welfare are determined by statutory requirements, administrative rules adopted by the State Social Services Commission (found in 10A N.C.A.C. 70A), and policies adopted by the State Division of Social Services.

2. DHHS Family Support and Child Welfare Manual. Child welfare policies and procedures set by the State Division of Social Services interpret and carry out statutory requirements and administrative rules. These policies and procedures are contained in the *DHHS Family Support and Child Welfare Manual*, a part of the *Family Services Manual*, available online. The DHHS manual is an extensive resource for anyone who deals with or is interested in abuse, neglect, dependency, and termination of parental rights proceedings in North Carolina.

C. DSS Role and Responsibilities

Child welfare services provided by DSS include intake and assessment of abuse, neglect, and dependency reports, initiation of and participation in juvenile court proceedings, provision of reunification and permanency planning services related to those proceedings, foster care and other placement services, and adoption services. For purposes of this manual, these services will be discussed in two broad categories: protective services and child placement.

Note*:* Laws and regulations related to DSS responsibilities usually reference "the director" as the one carrying out DSS responsibilities. However, the social services "director" is defined as the director of the county department of social services, *or the director's representative*. G.S. 7B-101(10). The director's duties and authority to delegate responsibilities to staff are set out in G.S. 108A-14. It is therefore understood that most responsibilities belonging to the

"director" are carried out through authorized representatives of the director. (In this manual, the term "DSS" typically refers to the director of a county department of social services or consolidated human services agency and the staff members to whom he or she delegates.)

1. Protective services. DSS's responsibility for protective services includes:

- screening reports of suspected abuse, neglect, and dependency;
- performing assessments;
- providing casework services; and
- providing other counseling services to parents, guardians, or other caretakers to help those people and the court prevent abuse or neglect, improve the quality of child care, be more adequate parents, guardians, or caretakers, and preserve and stabilize family life.

G.S. 7B-300.

For the purpose and philosophy of DSS child protective services, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. VIII § 1400 (2008).

(a) Intake and screening. DSS has the duty to screen reports of child abuse, neglect, or dependency to determine whether the facts reported, if true, meet the statutory definitions of abuse, neglect, or dependency. *See* G.S. 7B-301 and 7B-403. If they do, DSS must determine what type of assessment response is appropriate. *See* G.S. 7B-302. Statutory requirements for the intake and screening process are detailed *infra* § 5.1. For DSS policies and procedures related to intake and screening, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. VIII § 1407 (June 2008).

(b) Assessment. A multiple response system (MRS) provides different responsive procedures for different types of situations. A "family assessment" response is used for reports meeting the statutory definitions of neglect and dependency. A more formal "investigative assessment" response is used for reports containing allegations meeting the statutory definitions of abuse and serious neglect. At the end of an investigative assessment, DSS either substantiates or "unsubstantiates" (i.e., does not substantiate) abuse or serious neglect. A family assessment determines whether the family needs services because a child is neglected or dependent. If DSS substantiates a report or determines that the family is in need of services, DSS must provide protective services and may file a petition with or without requesting a nonsecure custody order removing the child from the home immediately. Without substantiation or a finding of a need for services, DSS may make appropriate referrals for the family but must close its protective services case. Both types of assessments as well as the statutory requirements of the assessment stage are discussed *infra* § 5.1.B. For an explanation of DSS policies and procedures related to assessments and the MRS, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. VIII § 1408 (Dec. 2009).

(c) Case work and other services. After substantiation or a finding that a family requires services, DSS is responsible for determining what the family would benefit from in order to meet the child's basic needs, keep the child safe, and prevent future maltreatment. DSS must determine and arrange for the most appropriate services, focusing on the child's safety and, in cases where a child has been removed from the home, returning the child to a safe home. Case work and other services occur within the framework of DSS policies and procedures and, for cases in which a juvenile petition is filed, within the framework of juvenile court. For cases under juvenile court jurisdiction, the Juvenile Code sets out various criteria, timelines, and other requirements that must be met during the course of a juvenile case. These are discussed in relevant sections of this manual. For a discussion of DSS services and related policies and procedures, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. VIII (Protective Services). For different categories of DSS services, see the table of contents of Chapter VIII (Protective Services) in the DHHS manual.

2. Child placement. Occasionally a parent and DSS will enter into a voluntary foster care placement agreement. *See infra* § 8.6 (voluntary placements). If a parent relinquishes a child to DSS for adoption, DSS assumes placement responsibility for the child under the adoption law. *See* G.S. 48-3-705. Otherwise, DSS's role in placing children is based on the Juvenile Code and court orders giving DSS custody or placement responsibility for children. These may be pre-adjudication orders for nonsecure custody, disposition or review hearing orders, or termination of parental rights orders that have the effect of vesting custody and placement responsibility in DSS. *See* G.S. 7B-1112(1). DSS also plays a role in the state's foster care licensing process and is responsible for supervising foster care placements. *See* G.S. 108A-14(12). Some of DSS's authority in relation to children in DSS custody is specified by statute. *See, e.g.*, G.S. 7B-903(a)(2)(c) and 48-3-705. Individual court orders may include provisions relating to the child's placement and DSS's authority and duties. For detailed provisions relating to DSS placement responsibilities, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. VIII (Protective Services). *See also infra* § 7.4 (relating to out-of-home placements in the dispositional phase of the case).

D. DSS Funding

Funding for child protective services, foster care placements, and other child welfare services provided by county departments of social services comes from a complicated mix of federal, state, and county sources. Federal funding is based on various titles of the Social Security Act. Some, such as Social Services Block Grant (SSBG) funds under Title XX, is capped at an amount determined by federal legislation. Other federal funding, such as foster care payments provided under Title IV-E, is uncapped, meaning that total funding depends on the number of eligible children in the state. These and other sources of federal funding require some matching funds from the state as well as compliance with numerous program requirements contained in federal laws and regulations. See *infra* Chapter 13 for an explanation of some of these federal laws.

The state legislature determines how the state and counties share responsibility for the non-federal share of the cost of federally funded programs. The General Assembly appropriates

state funds for the state's portion of the non-federal share, allocates federal block grant funds, and appropriates additional state funds for child welfare services and programs.

Counties' primary funding responsibilities for child welfare fall into two categories:

- matching funds and maintenance of effort funds required by the state, and
- any amounts above those available from federal and state funds and required matches that are necessary in order for the county to carry out its statutory duties to provide child welfare services.

Both are the responsibility of boards of county commissioners. A county that failed to provide services due to insufficient county funding could become subject to intervention by the state Department of Health and Human Services, the withholding of state funds, and eventually a takeover by the state of the county's child welfare programs. G.S. 108A-74.

For information about Medicaid, see the Medicaid section of the website for the N.C. Division of Medical Assistance.

Resource: For a detailed explanation of child welfare funding in North Carolina, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. XIII (Child Welfare Funding Manual).

2.3 The Role of the Child's Guardian ad Litem

A. Introduction

The foundation of widespread guardian ad litem ("GAL") representation for children in juvenile proceedings is the federal Child Abuse Prevention and Treatment Act of 1974, as amended, which requires states receiving federal funds for the prevention of child abuse and neglect to provide a guardian ad litem for each child involved in abuse and neglect proceedings. *See* 42 USC § 5106a(b)(2)(B)(xiii). Federal law gives states leeway in exactly how to do this, but requires that GALs have appropriate training and that their responsibilities include obtaining first-hand a clear understanding of the child's situation and needs and making recommendations to the court regarding the child's best interests. In some states, GALs are attorneys, and in some they are trained volunteers (often called Court Appointed Special Advocates or "CASAs"). Other states, like North Carolina, provide a combination of attorneys and volunteers (supported by GAL program staff) to represent children.

GAL representation differs from state to state not only in the structure of the GAL programs, but also in the type of representation provided to children. In some states, representation is focused on the best interests of the child and in others representation is focused on the child's wishes (or expressed interests). In North Carolina, the GAL represents the best interests of the child, but also considers the child's wishes and conveys them to the court.

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

For more information about the GAL Program in general, see also the "Guardian ad Litem" homepage on the website for the North Carolina Administrative Office of the Courts.

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

The National Court Appointed Special Advocate Association (National CASA) works with community program offices nationwide that support volunteers (guardians ad litem or GALs) advocating for abused and neglected children in court. National CASA provides training and training curriculum for programs and advocates, as well as technical assistance to programs, national volunteer recruitment programs, and grant funding to local and state programs.

B. North Carolina GAL Program Establishment and Structure

In North Carolina, the GAL Program was established by statute in 1983. Current provisions for the implementation and administration of the program are found in G.S. 7B-1200 through 7B-1204. The program exists within the state's Administrative Office of the Courts. (See the "Guardian ad Litem" homepage on the website for the North Carolina Administrative Office of the Courts.) A GAL state administrative office (frequently referred to in this manual as the "GAL State Office") oversees GAL programs statewide, promulgating policy and providing supervision, training, support, and consultation to district programs. Every judicial district in the state has at least one GAL office, and some multi-county districts have more than one office. Each district program has a district administrator responsible for overseeing the program, and each office typically has one or more program supervisors and a program assistant. Local programs handle the recruiting and training of volunteers (using a statewide curriculum), manage the assignment of GALs to cases, and provide ongoing support to GALs. Volunteer GALs are screened, must meet specified qualifications, and receive at least thirty hours of training from GAL staff. After volunteers complete training, they are sworn in by the court. Local programs are also responsible for engaging the services of local attorneys to provide legal services for the program's clients. These attorneys, called "attorney advocates," are appointed by the court and paid from GAL program funds. Most attorney advocates are independent contractors, but in some districts with large caseloads, the GAL program has a staff attorney who is a state employee.

C. GAL Team Representation: Volunteer, Attorney Advocate, and Staff

In North Carolina, volunteers usually serve in the role of guardian ad litem, and if the volunteer is not an attorney, an attorney advocate must be appointed as well. G.S. 7B-601. (If a volunteer is not available, an attorney may serve in both roles.) An attorney advocate works as a partner with a guardian ad litem volunteer, and both are supported by the GAL program

staff. The attorney advocate, volunteer, and staff therefore act as a team to represent and promote the best interests of the child in abuse and neglect cases and in some dependency and termination of parental rights cases. (In this manual, use of the term "GAL" typically refers to the team.)

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

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

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

D. Role and Responsibilities of the GAL

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

If the child is represented by a GAL in an abuse, neglect, or dependency case when a petition or motion for termination of parental rights is filed, that GAL also represents the child in the termination action unless the court orders otherwise. In all other termination of parental rights cases, the court is required to appoint a GAL for the child only if the parent denies any material allegation of the TPR petition or motion. However, in every termination of parental rights action the court has discretion to appoint a GAL for the child at any stage of the proceeding.

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

***Practice Note*:** The AOC form (J-207) used for GAL appointments contains space to name both a GAL volunteer and a GAL staff person. This "dual appointment" ensures that a GAL staff person performs the duties of the GAL any time there is a gap between one GAL leaving and a new GAL being appointed.

The GAL and attorney advocate have standing to represent the juvenile in all actions related to abuse, neglect, dependency, and termination of parental rights. G.S. 7B-601. The court of appeals has examined the issue of standing in the context of GAL team representation. Relying on the N.C. Supreme Court case *In re J.H.K.*, discussed in C. above, the court held that a TPR petition signed by the GAL Program Specialist "by and through the undersigned Attorney Advocate" and not by the volunteer GAL directly involved in the action was not improper. *In re S.T.B.*, __ N.C. App. __, 761 S.E.2d 734 (2014). The GAL appointment terminates when the permanent plan has been achieved for the juvenile and is approved by the court, but the court may reappoint the GAL in its discretion or in response to a motion of any party showing good cause for reappointment. G.S. 7B-601.

Note: Individuals working as GAL Program volunteers or attorney advocates may be appointed only as authorized by statute in abuse, neglect, dependency, and termination of parental rights cases. *See* G.S. 7B-601. There is no statutory authority for GALs or attorney advocates working under the supervision of the GAL Program to be appointed in delinquency cases or cases in which a guardian ad litem is appointed pursuant to N.C. R. CIV. P. 17. The GAL Program cannot "consent" to represent a child when the representation is not authorized by statute. In TPR proceedings, the Juvenile Code authorizes the appointment of GALs who are trained and supervised by the GAL Program only when the child is or has been the subject of an abuse, neglect, or dependency petition, but makes an exception if the local GAL Program consents to the appointment for good cause. G.S. 7B-1108. Otherwise, a GAL appointed for a child in a TPR case that was not preceded by an abuse, neglect, or dependency case typically is an attorney not connected with the GAL Program.

2. Representation. The GAL volunteer and attorney advocate are responsible for protecting and promoting the best interests of the juvenile, and the attorney advocate is responsible for protecting the child's legal rights as well. G.S. 7B-601(a). This type of representation differs from traditional legal representation in which the focus is on a client's wishes or expressed interests. Guardians ad litem determine and consider the child's wishes and report those to the court. However, where the GAL's determination of best interests differs from the child's expressed wishes, the GAL advocates his or her perspective but also communicates the child's wishes to the court. For a further discussion of best interest representation, see *infra* § 2.4.A.

The North Carolina Supreme Court emphasized the concept of GAL team representation in assessing fulfillment of the statutory duties of GAL representation in a case in which the GAL attorney advocate, but not the volunteer, was present at the TPR hearing. In reversing and remanding the decision of the court of appeals that conducting the hearing without the volunteer was error, the Supreme Court found that the duties of the GAL specified in the statute were in fact fulfilled by the GAL program staff, the attorney advocate, and the volunteer as a team, and that the court of appeals had failed to recognize the concept of GAL team representation. The Supreme Court held that the volunteer's presence at the hearing was

required only if the attorney advocate or the trial court deemed the GAL's presence necessary to protect the child's best interest. *In re J.H.K.*, 365 N.C. 171 (2011). *See also In re A.N.L.*, 213 N.C. App. 266 (2011) (confirming appropriateness of GAL staff member's appointment as GAL and holding that GAL representation was adequate where attorney advocate but not appointed GAL was present in court for the hearing). The Supreme Court in *J.H.K.* distinguished the case from *In re R.A.H.*, 171 N.C. App. 427 (2005), in which the court of appeals found error where no GAL volunteer was appointed until three and a half days of testimony had taken place and there was no one fulfilling the statutory duty of investigating and determining the best interests of the child. The *J.H.K.* decision expressly interpreted the Juvenile Code to permit a GAL who is an attorney to perform the duties of both the GAL and the attorney advocate. However, the attorney's appointment to serve in both roles should be clear in the order of appointment. *See In re R.A.H.*, 171 N.C. App. 427 (2005) (holding that the GAL volunteer and attorney advocate may not "pinch hit" for one another). Appellate courts have rejected the notion of reversing a case for failure to appoint a GAL in a prior proceeding that is not on direct appeal. *See In re J.E.*, 362 N.C. 168 (2008), *rev'g per curiam for the reasons stated in the dissent*, 183 N.C. App. 217 (2007); *In re O.C.*, 171 N.C. App. 457 (2005).

3. Child as client. A common issue amid the complexities of GAL representation is identifying the attorney advocate's client. Is the client the volunteer, the program, or the child? G.S. 7B-601 states that "an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights," suggesting that the child is the client. In addition, RPC 249 (1997), a North Carolina State Bar ethics opinion discussing the need to obtain an attorney advocate's consent to speak to a child, implicitly recognizes the child as the attorney advocate's client. Although the child is the client, attorney advocate representation is unconventional since it is done in cooperation with the volunteer and is focused on the child's best interests, not wishes. For a discussion of the child's rights, see *infra* § 2.4.

Resources: The American Bar Association and the National Association of Counsel for Children have Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases; however, these standards are written for the attorney charged with representing a child's wishes, as opposed to best interests, so they have limited applicability to NC GAL attorney advocates. Nevertheless, the standards provide guidance on a number of matters related to dealing with child clients generally. See NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AMERICAN BAR ASSOCIATION STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (NACC REVISED VERSION) (1999).

Other sources of information regarding the complexities of representing children in child protective proceedings are available through the Child Welfare Information Gateway website. See "Representing Children" on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services.

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4. Duties and responsibilities. The Juvenile Code sets out specific duties of the GAL, including to:

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

G.S. 7B-601. (Note that these same duties are applicable in termination of parental rights cases pursuant to G.S. 7B-1108.)

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

See infra, 2.7.B.4 & 5, related to the GAL's access to confidential information and the required consent from a GAL attorney for another attorney to talk to the child.

Typically, the volunteer has the primary role of communicating with the child, interviewing family and others, collecting and reviewing records, and determining recommendations for the court as to needed services and placement for the child. The attorney advocate receives information from the GAL and handles the legal aspects of the case, including presenting the GAL's recommendations in court and advocating the GAL's position related to the child's best interests. *See In re R.A.H.*, 171 N.C. App. 427 (2005). However, the N.C. Supreme Court has emphasized the concept of GAL team representation, taking the focus off of which GAL duty is performed by which team member and instead focusing on whether all the duties are in fact performed. *In re J.H.K.*, 365 N.C. 171 (2011). See the discussion above in sections C and D.2 related to representation, which also addresses duties of the GAL as a team.

More information about the duties and division of roles of the GAL volunteer and attorney advocate is available in a chart entitled "Division of Responsibilities of the Guardian ad Litem Volunteer, Attorney Advocate, and Guardian ad Litem Staff" beginning at page 310 of the *Guardian ad Litem Attorney Practice Manual. See* KELLA HATCHER, NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL § 8.7 (2007 edition).

5. Conflicts of interest. If a conflict of interest prevents an attorney advocate from representing a child or if an individual GAL Program staff member has a personal conflict of interest, G.S. 7B-1202 authorizes the court to appoint a conflict attorney: "If a conflict of interest prohibits a local program from providing representation to an abused, neglected, or dependent juvenile, the court may appoint any member of the district bar to represent the juvenile." The GAL Program maintains lists of "conflict attorneys" who can represent children in conflict situations. For the GAL Program's policies and procedures relating to conflicts, see N.C. Administrative Office of the Courts, Policy and Procedures, Conflict Attorney Representation (effective July 1, 2009).

E. Fees for Child's GAL Attorney Advocate and Experts

Guardians ad litem for children are typically volunteers working under the supervision of the GAL Program without compensation. However, volunteer GALs are paired with attorney advocates who are compensated. In some cases, an attorney is appointed to act as both GAL and attorney advocate. The child's attorney, typically referred to as an attorney advocate whether or not he or she is also serving in the role of GAL, is paid as follows:

- Most often, the attorney advocate is paid by the GAL Program in the Administrative Office of the Courts, which either contracts with or employs GAL attorneys.
- When the GAL attorney advocate has a legal conflict or the Guardian ad Litem Program has a personal conflict that precludes representation, a guardian ad litem conflict attorney is appointed to represent the juvenile and is paid by the AOC through the GAL Program.
- In a private TPR proceeding where the juvenile has not previously been represented by the GAL Program (and the GAL Program does not consent to an appointment), an attorney advocate is appointed by the court and, if fees are not taxed as part of the costs, fees are paid by the AOC at the indigent defense rate.

See G.S. 7B-603(a), 7B-1110(e).

Whenever an attorney or GAL is appointed for a person under age eighteen, or eighteen or over but dependent on and domiciled with a parent or guardian, the court may require the parent, guardian, or a trustee to pay the fee, but only if a juvenile is adjudicated abused, neglected, or dependent or parental rights are terminated. G.S. 7B-603(a1) and G.S. 7A-450.1.

While not addressed in the statutes, the way the AOC handles payment for experts for the GAL is similar to the way experts are paid for indigent parents. *See infra* § 2.5.E. In order for the GAL program to use state funds to pay for an expert requested by the GAL/attorney advocate, a motion for funds must be made and granted by the court, utilizing AOC form J-485 for the application, and J-486 for the order.

2.4 Rights of the Child

Although children's rights in the juvenile justice (delinquency) system have long been recognized by courts and legislatures, children's rights in the context of custody and child protection proceedings are not as clear-cut. The U.S. Supreme Court has not defined the nature of a child's liberty interests in preserving family or family-like bonds. *See Troxel v. Granville*, 530 U.S. 57, 88 (2000) (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989), as reserving the question for a future case).

In North Carolina, children who are the subject of abuse, neglect, dependency, and termination of parental rights petitions (or motions) are parties to the proceedings (G.S. 7B-401.1(f), 7B-601, and 7B-1104), and most have rights related to representation of their best

interests and being heard through a GAL. Children are the intended beneficiaries of a child protection system that aims to keep them safe, protect family autonomy, prevent unnecessary or inappropriate separation of children from their parents, and ensure that they have safe permanent homes within a reasonable period of time. Juvenile Code provisions are the basis for expectations relating to case plans, review hearings, visitation, confidentiality, and other matters that can be enforced through juvenile proceedings even if they are not, strictly speaking, "legal rights" of the child. *See Suter v. Artist M.*, 503 U.S. 347 (1992) (holding that the "reasonable efforts" provisions in the federal Adoption Assistance and Child Welfare Act did not create an implied private cause of action on behalf of children).

A. Best Interest and Legal Rights Representation

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

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

When a child's express interest is made known to the court, it is not determinative; the court must make a determination based on the child's best interests. Where a sixteen-year-old child expressed his desire to be returned home to his mother, it was not error for the trial court to conclude that it was nevertheless in the child's best interest to appoint the foster father as the child's guardian. *In re L.M.*, __ N.C. App. __, 767 S.E.2d 430 (2014) (published, but originally reported as unpublished).

Resources: For additional information on the child's best interests, see JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN AND ANNA FREUD, THE BEST INTERESTS OF THE CHILD, THE LEAST DETRIMENTAL ALTERNATIVE (1996). (The publication is a trilogy of Beyond the Best Interests of the Child, Before the Best Interests of the Child, and In the Best Interests of the Child.)

For a discussion of best interest in the context of the court's dispositional decisions, see *infra* § 7.4.A.

B. Right to Be Heard

As a party in a juvenile case, the child has a right to participate, usually through a guardian ad litem and attorney advocate. *See supra* § 2.3 (regarding the role and duties of GAL and

attorney advocate). At a disposition hearing, the juvenile has a right to "present evidence . . . [and] advise the court" concerning the disposition. G.S. 7B-901. At review and permanency planning hearings, the court is required to "consider information from" both the juvenile and the guardian ad litem. G.S. 7B-906.1(c). The child's GAL has the right to notice and an opportunity to participate fully in the case. A juvenile who is twelve or older has a right to individual notice of review and permanency planning hearings. G.S. 7B-906.1(b). Every juvenile, acting through a GAL, has a right to appeal final orders. G.S. 7B-601, 7B-1002. Unless the child is subpoenaed by another party, in which case the child must appear, the GAL and attorney advocate use their discretion to determine how involved a child should be in the proceedings, including the circumstances under which it makes sense for a child to attend court hearings or testify. If the child is called to testify in a criminal action relating to abuse, the court may authorize the GAL to accompany the child to court in that case. G.S. 7B-601(b).

C. Foster Care Children's Bill of Rights

In 2013, the North Carolina legislature enacted a "Foster Care Children's Bill of Rights" (as an addition to G.S. 131D-10.1), which sets out promoted practices while children are in foster care. The law states that violation of the bill of rights may not be construed as creating a cause of action against DSS or a person or entity providing foster care. The statute states that "the General Assembly promotes the following in the provision of foster care":

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

with siblings if the child placed in foster care is separated from his or her siblings.

(11) Meaningful participation in a transition plan for those phasing out of foster care, including participation in family team, treatment team, court, and school meetings.

G.S. 131D-10.1.

2.5 Rights of the Parent

A. Protection of Parent-Child Relationship

1. Generally. The first stated purpose of the Juvenile Code is to "provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents." G.S. 7B-100(1). Unless a parent's rights have been terminated, the parent has relinquished the child for adoption, or the parent has been convicted of a first or second degree rape or rape of a child by an adult offender that resulted in the conception of the child, both parents should be named as parties to any juvenile proceeding concerning their child. That is true for a parent whose identity or whereabouts is unknown and regardless of whether the parent is alleged to have contributed to the child's condition of abuse or neglect. Unlike a custody action between parents or between a parent and a third party, an abuse, neglect, or dependency proceeding represents intervention by the state into a parent-child relationship that is constitutionally protected. A termination of parental rights action initiated by DSS represents the most severe form of state intervention—asking a court to completely sever the legal relationship between a child and parent.

2. U.S. Supreme Court. It is well-settled law that parents have the right to rear their children without the interference of the state. The Supreme Court has long recognized that parents have a liberty interest in the companionship, custody, care, and control of their children. *See Troxel v. Granville*, 530 U.S. 57 (2000) (declaring a nonparent visitation statute unconstitutional as applied where grandparents were awarded visitation rights based solely on the court's determination of the children's best interest, without a finding of parental unfitness or any special weight given to the parent's determination of the children's best interests). *See also Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981); *Quilloin v. Walcott*, 434 U.S. 246 (1978). This liberty interest, rooted in the Due Process Clause of the Fourteenth Amendment, continues throughout an abuse, neglect, dependency, and termination of parental rights proceeding. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that the parents' interest in the care, custody, and management of their children did not evaporate simply because they lost temporary custody to the state). The Court also has said that the rights of the parent are not absolute. There is a link between parental rights and parental duties, and the parent's protected interest is based on a presumption that the parent will act in the best interest of the child. *See, e.g., Lehr v. Robertson*, 463 U.S. 248 (1983); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

3. North Carolina. North Carolina case law affirms parents' liberty interest in the care and companionship of their children and recognizes that the state or other parties may interfere with the parent-child relationship only when the parent has acted inconsistently with the parent's superior right as a parent. In any custody dispute between a parent and a non-parent, the parent is entitled to custody unless there is proof that the parent is unfit, has neglected the child, or has acted inconsistently with the parent's protected status as a parent. *See Price v. Howard*, 346 N.C. 68 (1997); *Petersen v. Rogers*, 337 N.C. 397 (1994). Only upon that showing may the court apply a "best interest" test, which always applies in custody cases between parents, to determine a child's custody when the contest is between a parent and anyone who is not a parent. *Price v. Howard*, 346 N.C. 68, 79; *Petersen v. Rogers*, 337 N.C. 397, 401–02. Abuse, neglect, and abandonment by a parent would clearly constitute conduct inconsistent with the parent's protected status. *See Price v. Howard*, 346 N.C. 68. However, a finding of dependency alone is not sufficient to establish conduct that is inconsistent with one's parental status. *Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011).

The fact that the custody issue arises in a juvenile proceeding does not change the rule. *See In re D.M.*, 211 N.C. App. 382 (2011) (holding in a dependency case that where neither parent had been found to be unfit and there was no finding that the father acted inconsistently with his constitutional rights as a parent, the trial court erred in awarding permanent custody of the child to the grandmother). *See also In re B.G.*, 197 N.C. App. 570 (2009) (reversing order giving custody to relatives where court applied best interest standard without a showing that father was unfit, had neglected the child, or had acted inconsistently with his constitutionally protected status as a parent); *c.f.*, *In re T.P.*, 217 N.C. App. 181 (2011) (refusing to consider respondent's argument that trial court erred in applying the best interest standard, because respondent did not raise this objection at trial and constitutional issues not raised and addressed at trial will not be considered for the first time on appeal). The North Carolina Supreme Court has referred to "the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors." *In re T.R.P.*, 360 N.C. 588, 592 (2006) (holding that the court lacked jurisdiction where the petition was not verified).

North Carolina courts also have made clear that where a child's interest in being protected from abuse and neglect is weighed against a parent's constitutional interest in the custody of his or her child, the need to protect the child takes priority. "The justification for the [parent's] paramount status is eviscerated when a parent's conduct is inconsistent with the presumption" that a parent will act in the child's best interest. *Owenby v. Young*, 357 N.C. 142, 145 (2003).

A father in the military appealing an adjudication-disposition order argued that his case presented an opportunity for the court of appeals to determine what actions service members must undertake while deployed in order to avoid forfeiting their constitutionally protected rights as parents. The court of appeals declined, stating that it refused to establish a minimum standard of care by which service members may fulfill their parental responsibilities, noting precedent that there is no bright line rule to determine what conduct will result in forfeiture of parental rights. *In re A.S., III.* __ N.C. App. __, 753 S.E.2d 684 (2013).

B. Notice and Opportunity to Be Heard

1. Entitled to due process. As a party to the juvenile proceeding, a parent is entitled to procedural due process, including proper service of process, notice of proceedings, and fair procedures. *See Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) (holding that a state must provide respondents with fundamentally fair procedures when it moves to destroy weakened familial bonds); *see also In re H.D.F*. 197 N.C. App. 480 (2009) (reversing a neglect adjudication when the required notice of key events in the proceeding was not given to the *pro se* respondent parent). When one parent is served in an abuse, neglect, or dependency case, however, the other parent's due process rights are not necessarily violated if he or she is not served before the adjudication and disposition hearings. *In re Poole*, 151 N.C. App. 472 (2002) (Timmons-Goodson, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 357 N.C. 151 (2003) (holding that due process rights of father who was not served and to whom no summons was issued were adequately protected in light of state's interest in the welfare of children, the child's right to be protected, the father's ability to seek review of the court's order, and the potential for the child's return to him).

2. Participation in hearings. Parents have a right to participate in proceedings in a meaningful way. The summons in an abuse, neglect, or dependency case requires the parent to appear for a hearing at a specified time and place. G.S. 7B-406(a). In a termination of parental rights case, the summons or notice includes notice that the parents may attend the hearing. G.S. 7B-1106(b)(6), 7B-1106.1(b)(6).

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

The court's consideration of whether to issue a writ of habeas corpus ad testificandum or take other steps to facilitate a parent's participation in a hearing requires application of the balancing test articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In determining whether due process requires a particular procedure, the court must weigh three factors: (1) the private interests at stake, (2) the risk of deprivation posed by the use (or absence) of the procedure, and (3) the state's interest in providing (or not providing) the procedure. *Id*. at 335. North Carolina courts have applied the test in several juvenile cases. *See, e.g.*, *In re K.D.L*., 176 N.C. App. 261 (2006) (upholding trial court's denial of incarcerated father's motion to have his deposition taken); *In re Quevedo*, 106

N.C. App. 574 (1992) (holding that father's due process rights were not violated when court denied his motion for transportation to hearing and allowed hearing to proceed in his absence); *In re Murphy*, 105 N.C. App. 651, *aff'd per curiam*, 332 N.C. 663 (1992) (holding that the court did not violate the parent's statutory or due process rights by denying a motion for transportation from a correctional facility to the termination hearing).

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

> We note that the use of depositions is allowed in civil cases where a witness is unable to attend because of age, illness, infirmity or imprisonment. N.C. Gen. Stat. § 1A-1, Rule 32(a)(4). Therefore, when an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process.

106 N.C. App. at 582.

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

See AOC Form AOC-G-112, "Application and Writ of Habeas Corpus ad Testificandum," through the "Judicial Form Search" page on the North Carolina Administrative Office of the Court website.

(b) Testimony of parties or witnesses in other states. All abuse, neglect, dependency, and termination of parental rights proceedings are subject to the Uniform Child Custody Jurisdiction and Enforcement Act, G.S. Chapter 50A, which includes specific provisions for taking the testimony of parties or witnesses in other states.

> **§ 50A-111. Taking testimony in another state.**
>
> (a) In addition to other procedures available to a party, a party to a child-custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this State for testimony taken in another state. The court on its own motion may order that the testimony of

> a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.
>
> (b) A court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this State shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.
>
> (c) Documentary evidence transmitted from another state to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

C. DSS Perspective

Recognition of and respect for parents' rights are essential elements of good social work practice. The North Carolina Division of Social Services' *Child Protective Services Manual*, a part of the *Family Services Manual*, states that parents and other care providers involved in juvenile cases are entitled to the following:

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

1 DIV. OF SOC. SERVS., N.C. DEP'T OF HEALTH & HUMAN SERVS., FAMILY SERVICES MANUAL ch. VIII § 1400 (June 2008).

D. Representation

1. Right to counsel. Parents have a statutory right to counsel, and to court-appointed counsel if indigent, in all abuse, neglect, dependency, and termination of parental rights proceedings. G.S. 7B-602 and 7B-1101.1. A parent's eligibility and desire for appointed counsel may be reviewed at *any* stage of the abuse, neglect, dependency, or termination of parental rights proceeding. *See also infra* § 5.4.B.3 (relating to parent's right to counsel). A parent's right to counsel includes the right to the effective assistance of counsel. *See In re Oghenekevebe*, 123 N.C. App. 434 (1996) (holding that the right to counsel provided by then G.S. 7A-289.23 included the right to effective assistance of counsel).

2. Appointment of counsel. When an abuse, neglect, or dependency petition is filed, the clerk must appoint provisional counsel for the parent and indicate that appointment on the summons issued to the parent or a separate notice. G.S. 7B-602(a). When a termination of parental rights *petition* is filed, the clerk must appoint provisional counsel unless the parent is already represented by appointed counsel, in which case that appointment continues. G.S. 7B-1101.1(a). When a *motion f*or termination of parental rights is filed, the notice to the parent must state that the parent is entitled to appointed counsel if indigent and, if not already represented by an attorney, may contact the clerk to request counsel. G.S. 7B-1106.1(b)(4). Provisional counsel is not appointed; instead, an unrepresented indigent parent must either contact the clerk or request counsel when he or she appears in court. See G.S. 7B-1108.1 (providing for pretrial hearing) and G.S. 7B-1109(b) (requiring the court at adjudication to inquire whether a parent who is present and unrepresented is indigent and wants counsel).

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

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

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

G.S. 7B-602(a) and 7B-1101.1(a).

In the case *In re D.E.G.*, __ N.C. App. __, 747 S.E.2d 280 (2013), the court noted that while G.S. 7B-1101.1(a) requires the court to dismiss provisional counsel when the parent does not appear at the first hearing (or at the first hearing after service in a TPR case), counsel who was already representing the parent in the underlying proceedings was not "provisional counsel," making this statute inapplicable to require dismissal.

3. Waiver of counsel. Both G.S. 7B-601 (for abuse, neglect, and dependency cases) and 7B-1101.1 (for TPR cases) provide that when a parent qualifies for appointed counsel the court may allow the parent to proceed without counsel only after examining the parent on the record and making findings of fact sufficient to show that the waiver is knowing and voluntary. Before these provisions became effective on October 1, 2013, the North Carolina Supreme Court had held that a parent's waiver of counsel in a juvenile case was not governed by G.S. 15A-1242, which applies only in criminal cases. *In re P.D.R.*, 365 N.C. 533 (2012). Subsequently, the court of appeals held that the trial court must make an inquiry sufficient to determine whether a parent's waiver was knowing and voluntary, the standard now stated in the Juvenile Code. *See In re J.K.P.*, __ N.C. App. __, 767 S.E.2d 119 (2014) and *In re A.Y.*, __ N.C. App. __, 737 S.E.2d 160 (2013) (both holding that trial court's inquiry relating to the respondent's waiver was adequate to determine that the waiver was knowing and voluntary).

4. Withdrawal of counsel. Appellate courts have held that an attorney's withdrawal from a case requires: (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. *In re D.E.G.*, __ N.C. App. __, 747 S.E.2d 280 (2013) (citing *Smith v. Bryant*, 264 N.C. 208 (1965)). Whether to permit an attorney to cease representation of a client is within the discretion of the trial court. However, where the client has no notice of the attorney's intent to withdraw, the trial court has no discretion and must either grant a reasonable continuance or deny the motion to withdraw. *Id.* In order to determine whether circumstances would permit withdrawal when the parent is absent from the hearing, the court must inquire into the efforts made by counsel to contact the parent. *Id.* (citing *In re S.N.W.*, 204 N.C. App. 556 (2010)). *See also In re M.G. and H.G.*, __ N.C. App. __, 767 S.E.2d 436 (2015) (vacating a TPR order and remanding the case because the trial court erred in allowing respondent's counsel to withdraw without first confirming that respondent had been notified of counsel's intention to do so).

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

5. Ineffective assistance of counsel. A parent asserting a claim of ineffective assistance of counsel must show that the attorney's performance (1) was deficient (or fell below an objective standard of reasonableness); (2) was so deficient that the parent was denied a fair hearing; and (3) resulted in prejudice to the parent. *In re S.N.W.*, 204 N.C. App. 556 (2010); *In re S.C.R.*, 198 N.C. App. 525 (2009).

In a TPR case in which a respondent father claimed he was denied effective assistance of counsel when his attorney was permitted to not participate in the hearing, the court of appeals remanded the case, stating that it was not able to determine whether the respondent received effective assistance of counsel, and that the trial court should have made further inquiries about the attorney's efforts "(1) to contact Respondent; (2) to protect Respondent's rights; and (3) to ably represent Respondent." The record did not show what steps the attorney took to contact the client after the attorney's attempt to return a phone call from the respondent was unsuccessful. The court noted that evidence in the record indicated that DSS had been able to communicate and meet with respondent after the TPR petition was filed, and that counsel's fee application included less than an hour for time spent out of court on the case, which "does not reflect an adequate amount of time given the lengthy history of this case." *In re S.N.W.*, 204 N.C. App. 556. *See also In re K.J.L.*, 206 N.C. App. 530 (2010) (rejecting mother's argument of ineffective assistance of counsel and GAL).

In a private TPR case in which the respondent father asserted ineffective assistance of counsel, the court of appeals concluded that trial counsel did not make sufficient efforts to communicate with the respondent in order to provide him with effective representation and vacated the TPR order, remanding the case for a new hearing. *In re B.L.H.*, __ N.C. App. __, 767 S.E.2d 905 (2015). Here, the only action undertaken by counsel related to communicating with the respondent was to contact the federal prison to learn about its email

system. Counsel did not write any letters or send any emails to the respondent and did not engage in any phone conversations with the respondent; he did not present evidence on the respondent's behalf at the hearing and failed to make a cogent argument at the adjudication phase. The court of appeals pointed out that it was not a case where the respondent had failed to cooperate; to the contrary, the respondent acted promptly upon receiving the TPR summons with a response directed to his appointed counsel, and timely returned an affidavit of indigency. *Id.*

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

7. Payment of counsel and reimbursement of fees. Counsel appointed for an indigent parent is to be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services. G.S. 7B-603(b) and 7B-1101.1(a). The court may require reimbursement of fees from a parent, but only if (1) the parent is 18 or older, and (2) the juvenile is adjudicated abused, neglected, or dependent, or the parent's rights are terminated. The court determines whether the parent should reimburse fees at a dispositional or other appropriate hearing, and the court must take into consideration the parent's ability to pay. G.S. 7B-603(b1).

Resources: For performance guidelines for representing parents created by the North Carolina Office of Indigent Defense Services, see N.C. COMM'N ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR ATTORNEYS REPRESENTING INDIGENT PARENT RESPONDENTS IN ABUSE, NEGLECT, DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS AT THE TRIAL LEVEL (2007).

For standards of practice in representing parents adopted by the American Bar Association, see AMERICAN BAR ASS'N, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (2006).

See "Parent Representation" on the website for the ABA Center on Children and the Law for materials, training, and opportunities to connect with other attorneys.

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

E. Funds for Experts and Other Expenses[5]

1. Expenses of representation. Indigent persons entitled to appointed counsel are also entitled to have the state provide them with "necessary expenses of representation." G.S. 7A-450(a) and (b). An indigent respondent parent has the right to the services of counsel pursuant to G.S.

5. Source for some content in this section: Parent Representation Coordinator, N.C. Office of Indigent Defense Services, *Memo on Ex Parte Motions for Experts in AND Cases*.

7A-451, G.S. 7B-602, and G.S. 7B-1101.1. Upon a proper showing, the parent also is entitled to funds for the services of expert witnesses or other expenses of representation. Payment for these services is in accordance with Rules of the Office of Indigent Defense Services. G.S. 7A-454. Under current IDS rules, an indigent parent must apply to the court in which the case is pending for funding (see discussion in 3. below related to parent's ex parte motion). The parent's attorney must locate an expert and then file a motion using the form AOC-G-309 requesting court approval for expert fees. Fees for types of experts are set out in the form itself. The Office of Indigent Defense Services maintains a database of experts in all areas, accessible through the "Forensic Resources" page on the IDS website.

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

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

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

3. Parent's ex parte motion. No appellate court decisions address the question of whether, in a juvenile case, a respondent parent's motion for funds for an expert may be made and heard ex parte. It is well established that in criminal cases ex parte hearings on motions for experts

are permissible, and even required if requested, on the basis that an open hearing could jeopardize a defendant's Fifth Amendment privilege against self-incrimination, Sixth Amendment right to effective assistance of counsel, or right to privileged communications with his or her attorney. *See State v. Ballard*, 333 N.C. 515 (1993). Although a respondent parent in a juvenile case does not have a Sixth Amendment right to counsel like a defendant in a criminal case, the parent does have due process rights and a statutory right to counsel and to effective assistance of counsel.

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

F. Guardian ad Litem for Parent[6]

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

Legislation in 2013 substantially changed GAL representation for parents. Before October 1, 2013, the court had the discretion to appoint a GAL for a parent based on incompetence *or* diminished capacity, and case law established that the GAL's role was one of either substitution or assistance, depending on the basis for the appointment. Those distinctions no longer exist. Now, a GAL for a parent who is not a minor may be appointed only for a parent who is incompetent. *See* G.S. 7B-602(c); *In re T.L.H.*, __ N.C. __ (June 11, 2015) (applying G.S. 7B-1101.1).

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

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

6. Portions of this subsection are based on: Janet Mason, *Guardians ad Litem for Respondent Parents in Juvenile Cases*, JUVENILE LAW BULLETIN No. 2014/01 (UNC School of Government January 2014).

parent is incompetent. A minor parent may be "the juvenile" in a separate case involving the minor parent's own status as an abused, neglected, or dependent juvenile. In that proceeding he or she would (or might, if only dependency were involved) have a GAL appointed pursuant to G.S. 7B-601 like any other juvenile who is the subject of a petition.

(b) GAL for parent who is incompetent. On motion of any party or on the court's own motion, the court *may* appoint a guardian ad litem for a parent who is incompetent pursuant to Rule 17 of the Rules of Civil Procedure. G.S. 7B-602(c) and G.S. 7B-1101.1(c).

While appointment of a GAL is in the court's discretion, where there are indications that the parent may be incompetent, the court should conduct a hearing to determine whether the parent needs a guardian ad litem. Failure to conduct a hearing in that circumstance may be an abuse of discretion. *See In re T.L.H.*, __ N.C. __ (June 11, 2015). *In re M.H.B.*, 192 N.C. App. 258 (2008) (decided under prior law); *In re N.A.L.*, 193 N.C. App. 114 (2008) (decided under prior law). Determination of incompetence is discussed below in subsection 5.

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

3. Timing and source of GAL appointment. Any party or the court itself may move for the appointment of a guardian ad litem for a respondent parent. If the petitioner (or movant in a TPR case) knows that the parent is incompetent, the petitioner should "make written application" for the appointment of a GAL before or at the time the action is filed. See Rule 17(c). There is no statutory limitation on when during a proceeding the motion can or should be made. However, courts have held that when there is a substantial question as to whether a party in a civil action is competent, the court should address that question "as soon as possible in order to avoid prejudicing the party's rights." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72 (2005). *See also In re I.T.P-L.*, 194 N.C. App. 453, 466–67 (2008) (holding that appointment of a guardian ad litem for a respondent was "timely" when made on motion of the petitioner seventeen days after a termination of parental rights petition was filed and three months before the first hearing). Pre-trial or pre-adjudication hearings provide an appropriate opportunity for considering whether a competency issue needs to be addressed.

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

- A parent's attorney may not also serve as the parent's guardian ad litem. G.S. 7B-602(d) and G.S. 7B-1101.1(d).
- GALs trained and supervised by the NC Guardian ad Litem Program do not serve as Rule 17 GALs. The GAL Program is limited to providing services to children who are the

subject of a petition for abuse, neglect, dependency, or termination of parental rights. *See* G.S. 7B-1200 and G.S. 7B-1108(b).

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

5. Determination of incompetence. No specific procedures are articulated in the Juvenile Code or Rule 17 for determining whether to appoint a GAL for the parent. However, it is clear that an actual adjudication of incompetence pursuant to G.S. Chapter 35A is not required. *See* G.S. 35A-1102 (stating that even though Chapter 35A is the exclusive procedure for adjudicating a person incompetent, that does not interfere with the judge's authority to appoint a GAL under Rule 17). If a court determines there is a substantial question as to a respondent's competence, the court in the juvenile action must conduct a hearing or inquiry on the issue of competence. *See In re P.D.R.*, __ N.C. App. __, 737 S.E.2d 152 (2012); *In re M.H.B.*, 192 N.C. App. 258 (2008); *In re N.A.L.*, 193 N.C. App. 114 (2008) (all decided under prior law).

Whether facts raise a substantial question as to competence is a discretionary determination. Substantial deference must be given to the trial court, which has interacted with the respondent parent whose competency is at question. Evaluating a respondent parent's competency extends beyond finding there is a mental health diagnosis and includes observations of the respondent's behavior in the courtroom, ability to express herself, her understanding of the situation, and her ability to assist her counsel. *In re T.L.H.*, __ N.C. __ (June 11, 2015). In a TPR case, *In re J.R.W.*, __ N.C. App. __, 765 S.E.2d 116 (2014), the court of appeals rejected the mother's argument that a hearing as to competency should have been conducted because the record established that the severity of the mother's mental health problems did not rise to the level of incompetency and even included facts demonstrating competency. For example, the mother had successfully transitioned from shelter to apartment living, had enrolled in a GED program, had appropriate visits with her child, completed a parenting program, and attended all but one hearing where the court had an opportunity to observe her. In its reasoning, the court pointed out that the statute did not require an inquiry related to competence merely because a parent had a mental health history.

The parent and his or her attorney must be given notice of the hearing or inquiry. *See Hagins v. Redev. Comm'n of Greensboro*, 275 N.C. 90 (1969). No formal procedure for a hearing to determine incompetence is prescribed, but the court of appeals has offered this guidance:

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

Rutledge v. Rutledge, 10 N.C. App. 427, 431 (1971).

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

In discussing the term "incompetent" in connection with the appointment of guardians ad litem for respondent parents, the courts have adopted the definition of "incompetent adult" found in G.S. 35A-1101(7). *See, e.g.*, *In re A.R.*, __ N.C. App. __, 767 S.E.2d 427 (2014); *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012); *In re A.R.D.*, 204 N.C. App. 500 (2010); and *In re M.H.B.*, 192 N.C. App. 258 (2008) (all decided under prior law). That definition reads as follows:

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

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

6. Role of the parent's GAL. Appointment of a guardian ad litem based on incompetence "will divest the parent of their [sic] fundamental right to conduct his or her litigation according to their [sic] own judgment and inclination." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 71 (2005) (citation omitted) (decided under prior law). But appointment of a guardian ad litem does not affect the parent's control over any other aspect of his or her life or property. Neither the Juvenile Code nor Rule 17 provides specific guidance as to the role of the parent's GAL. Broadly speaking, the duty of a GAL is "to protect the interest" of the party in the litigation in which he or she is appointed. *Narron v. Musgrave*, 236 N.C. 388, 394 (1952), *quoting* Spence v. Goodwin, 128 N.C. 273, 274 (1901).

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

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

- "Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent."
- "To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him."
- "Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights."

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

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

7. Payment. G.S. 7B-603(b) specifies that GALs for parents shall be paid a reasonable fee in accordance with the rules adopted by IDS.

2.6 Important Definitions and Concepts[7]

This section addresses definitions and concepts that are especially significant in juvenile proceedings. Definitions of some terms discussed here and other terms are set out in G.S. 7B-101. Explanations of juvenile court logistics, systems, and special courts are addressed *supra* at § 1.3.B. Explanations of people involved in juvenile proceedings and their roles in the system are addressed earlier in this chapter.

Resource: JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA (UNC School of Government, 3d ed. 2013).

A. Abused Juvenile

An abused juvenile is defined as any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker engages in certain conduct (explained below) resulting in harm to the child or risk of harm to the child. *See* G.S. 7B-101(1).

1. Conduct by parent, guardian, custodian, or caretaker. The conduct that results in a child's being abused for purposes of the Juvenile Code includes the conduct of a parent, guardian, custodian, or caretaker. The same conduct by someone else may well be deemed

7. Source for some content in this section: JANET MASON, REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA (UNC School of Government, 3d ed. 2013).

abusive in other legal contexts (such as criminal court), but the fact that the harm or risk of harm is caused by the conduct of a parent, guardian, custodian, or caretaker is what makes the child's condition subject to the provisions of the Juvenile Code. While abuse always involves a parent, guardian, custodian, or caretaker, it may involve other people as well. For example, abuse may arise when a parent allows someone else to inflict a nonaccidental injury on a child, or when a parent creates a substantial risk of serious injury by leaving the child with someone the parent knows to be violent.

2. Serious physical injury. Abuse includes inflicting or allowing to be inflicted on the juvenile a serious physical injury by other than accidental means; or creating or allowing to be created a substantial risk of serious physical injury to the juvenile by other than accidental means. G.S. 7B-101(1)a., b. The Juvenile Code does not define "serious physical injury"; however, in the criminal context, it is defined as "[p]hysical injury that causes great pain and suffering. The term includes serious mental injury." G.S. 14-318.4(d). Whether the injury is "serious" must be determined on the facts of each case. *See*, *e.g.*, *In re A.N.L.*, 213 N.C. App. 266 (2011) (holding that respondent-mother's decision to enter into a physical altercation with her boyfriend while holding infant created a substantial risk of serious physical injury to the child); *In re C.M.*, 198 N.C. App. 53 (2009) (affirming adjudication of abuse based on head trauma caused by a blow to the head).

3. Cruelty. Abuse includes using or allowing to be used on the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior. G.S. 7B-101(1)c. This part of the abuse definition is not relied on often, perhaps because it overlaps with the part of the neglect definition that refers to improper discipline or the part of the abuse definition that refers to serious physical injury or emotional abuse. In the case *In re H.H.*, __ N.C. App. __, 767 S.E.2d 347 (2014), the court of appeals examined this definition of abuse and affirmed the trial court's adjudication of abuse after determining that sufficient findings were made that the mother struck her eight year-old five times with a belt, leaving multiple bruises on the inside and outside of his legs that were still visible the next day, and the child described it as "a beating."

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

- first or second degree rape [G.S. 14-27.2, 14-27.3];
- rape of a child by an adult offender [G.S. 14-27.2A];
- first or second degree sexual offense [G.S. 14-27.4, 14-27.5];
- sexual offense with a child by an adult offender [G.S. 14-27.4A];
- sexual act by a custodian [G.S. 14-27.7];
- crime against nature [G.S. 14-177];
- incest [G.S. 14-178];
- preparation of obscene photographs, slides, or motion pictures of the juvenile [G.S. 14-190.5];
- employing or permitting the juvenile to assist in a violation of the obscenity laws [G.S. 14-190.6];

- dissemination of obscene material to the juvenile [G.S. 14-190.7, 14-190.8];
- displaying or disseminating material harmful to the juvenile [G.S. 14-190.14, 14-190.15];
- first or second degree sexual exploitation of the juvenile [G.S. 14-190.16, 14-190.17];
- promoting the prostitution of the juvenile [G.S. 14-205.3(b)];
- taking indecent liberties with the juvenile [G.S. 14-202.1];
- human trafficking [G.S. 14-43.11];
- involuntary servitude [G.S. 14-43.12];
- sexual servitude [G.S. 14-43.13]; or
- unlawful sale, surrender, or purchase of a minor [G.S. 14-43.14].

G.S. 7B-101(1)d., g.

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

Resource: For information on crimes listed above, see JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (UNC School of Government, 7th ed. 2012) and 2014 CUMULATIVE SUPPLEMENT TO NORTH CAROLINA CRIMES (UNC School of Government, 2014).

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5. Emotional abuse. Abuse includes creating or allowing to be created serious emotional damage to the juvenile. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others. G.S. 7B-101(1)e. Few cases go into court solely on the basis of emotional abuse. This may be because it is difficult to determine the precise cause of a child's behavior and emotional state. In one of the few appellate court decisions addressing emotional abuse, the court of appeals affirmed the trial court's adjudication based on the children's having suffered serious emotional damage as a result of the parents' long-standing and acrimonious marital disputes. *Powers v. Powers*, 130 N.C. App. 37 (1998).

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

7. Failure to prevent harm. The language "allows to be" in the definition of abuse means that inaction can constitute abuse. Failure to prevent harm or allowing situations to occur that create a serious risk of harm may be abuse. *See*, *e.g.*, *In re Gwaltney*, 68 N.C. App. 686

(1984) (affirming abuse adjudication where mother allowed situations in the home that tended to promote sexual abuse); *In re Adcock*, 69 N.C. App. 222 (1984) (affirming termination of parental rights where evidence showed that mother failed to intervene in another adult's abusive conduct toward the child).

For case law related to evidence to show abuse, see *infra* § 6.3.D.

B. Neglected Juvenile

A neglected juvenile is one who:

- does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker;
- has been abandoned;
- is not provided necessary medical or remedial care;
- lives in an environment injurious to his or her welfare; or
- has been placed for care or adoption in violation of the law;

G.S. 7B-101(15). In determining whether a child is neglected, it is relevant whether that child lives in a home where another child has died as a result of suspected abuse or neglect or where another child has been subject to abuse or neglect by an adult who regularly lives in the home. G.S. 7B-101(15).

For additional case law related to evidence to show neglect, see *infra* § 6.3.E.

1. Lack of care, supervision, or discipline. A juvenile is neglected if he or she does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker. *See* G.S. 7B-101(15). The effect the conduct has or could have on the child is key to a determination of neglect. *See In re K.J.D.*, 203 N.C. App. 653 (2010) (affirming neglect adjudication of child who was receiving proper care in a kinship placement because the child would be at substantial risk of harm if either parent removed the child from the placement); *In re Everette*, 133 N.C. App. 84 (1999) (vacating an adjudication of neglect because the court failed to make findings that the child was impaired or at substantial risk of impairment due to lack of care, supervision, or discipline). *See also In re J.W. and K.M.*, __ N.C. App. __, __ S.E.2d __ (May 5, 2015); *In re A.B.*, 179 N.C. App. 605 (2006); *In re McLean*, 135 N.C. App. 387 (1999) (all emphasizing the need to find some physical, mental, or emotional impairment of the child or a substantial risk of such impairment). An explicit finding about the detrimental effect of improper care is not required, however, if the evidence supports such a finding. *See In re H.N.D.*, 364 N.C. 597 (2010), *rev'g per curiam for the reasons stated in the dissent*, 205 N.C. App. 702 (2010).

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

2. Abandonment. A juvenile who has been abandoned is considered neglected. *See* G.S. 7B-101(15). Abandonment may be the culmination of a parent's long-term failure to perform his or her parental responsibilities. It has been described as "willful or intentional conduct" that "evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child," or a "refusal to perform the natural and legal obligations of parental care and support," including "withholding . . . presence, . . . love, . . . [and] the opportunity to display filial affection." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962); *see also In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986); *In re Apa*, 59 N.C. App. 322, 325 (1982).

Abandonment also may be a one-time act, such as leaving an infant in a basket on the steps of a hospital. G.S. 7B-302 requires DSS to take action immediately when it receives a report that a child has been abandoned.

As a ground for termination of parental rights, abandonment may be asserted as one form of neglect, but it also constitutes a separate ground based on a parent's conduct during the six-month period immediately before the termination action was initiated. Another ground for termination involves a parent's voluntary abandonment of an infant under the "safe surrender" law. G.S. 7B-1111(a)(7). *See infra* § 9.11.G (discussing abandonment as a ground for termination of parental rights); *see also* Janet Mason, *Legal Abandonment of Newborns: North Carolina's Safe Surrender Law*, 75 POPULAR GOV'T 29 (UNC School of Government, 2009).

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

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

5. Unlawfully placed. A juvenile is neglected if he or she has been placed for care or adoption in violation of law. G.S. 7B-101(15). No appellate court decisions address this basis for an adjudication of neglect, but possible unlawful placements include those that violate statutes relating to:

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

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

The weight to be given to evidence of neglect of another juvenile in the home is in the trial court's discretion. *See In re P.M.*, 169 N.C. App. 423 (2005). The fact of prior abuse or neglect of another child, standing alone, may not be sufficient to support an adjudication of neglect; there must be evidence showing a likelihood that the abuse or neglect will be repeated. *See In re J.C.B.*, __ N.C. App. __ , 757 S.E.2d 487 (2014); *In re S.H.*, 217N.C. App. 140 (2011). *See infra* § 6.3.E.2.a (addressing evidence involving other children).

7. Neglect for purposes of termination of parental rights. When neglect is alleged as a ground for terminating parental rights, the issue is no longer whether the child is a "neglected juvenile." Rather, it is whether the respondent parent neglected the child. Although the termination statute refers back to the definition of "neglected juvenile" in describing the neglect ground for termination, the courts have held that the neglect required for termination and the neglect required for an initial adjudication of neglect are not the same. *See infra* § 9.11.A (discussing neglect in the TPR context).

C. Dependent Juvenile

A dependent juvenile is one who is in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for his or her care or supervision or whose parent, guardian, or custodian is unable to provide for the child's care or supervision and lacks an appropriate alternative child care arrangement. G.S. 7B-101(9). This definition includes no reference to the cause of the parent's inability to care for the child or to the temporary or permanent nature of the inability. A ground for terminating parental rights based on the parent's inability to provide proper care and the child's resulting dependency, states that the inability "may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile." G.S. 7B-1111(a)(6). Another element of the ground for termination, but not for an adjudication that a juvenile is dependent, is a "reasonable probability" that the parent's incapability will continue for the foreseeable future. G.S. 7B-1111(a)(6).

Note that a child is not dependent if the child has one parent who can provide proper care, so the status of both parents must be taken into account in determining whether a child is dependent. *See In re H.H.*, __ N.C. App. __, 767 S.E.2d 347 (2014) (where children were removed from mother's care and placement with father was suitable, it was error for the court to adjudicate the children dependent). Also, the language "and lacks an appropriate

alternative child care arrangement" is a critical part of the definition. When an appropriate alternative child care arrangement exists (e.g., an appropriate relative is willing and able to assume responsibility for a child), the child is not dependent, despite the parent's inability to provide proper care. *See, e.g.*, *In re J.D.R.*, __ N.C. App. __, 768 S.E.2d 172 (2015); *In re B.M.*, 183 N.C. App. 84 (2007); *In re P.M.*, 169 N.C. App. 423 (2005). Evidence that paternity has been established after the petition was filed may be considered by the court at the adjudicatory hearing when determining a child is dependent. If paternity is established and there are no allegations in the petition or evidence at the adjudicatory hearing regarding the father's inability or unwillingness to care for or make alternative child care arrangements for his child, the child cannot be found to be dependent. *In re V.B.*, __ N.C. App. __, 768 S.E.2d 867 (2015).

For case law related to evidence to show dependency, see *infra* § 6.3.F.

D. Permanence and Timeliness

The concepts of permanence and timeliness for children received increased focus with the enactment of the federal Adoption and Safe Families Act (ASFA) of 1997, which led to the addition of references to permanence and to specific timelines in North Carolina's Juvenile Code. *See infra* § 13.2.D (providing more detail on ASFA). These changes came in response to a recognition that the juvenile system was overburdened and moved slowly, that some children were spending what many professionals thought to be an unreasonable portion of their childhoods in foster care, and that efforts to assist parents in correcting conditions that led to a child's removal often were insufficient. The changes also reflected an increased awareness that children's perception of time is different from that of adults. A period of three days, three months, or three years as experienced by judges, attorneys, social workers, and parents is not comparable to that same period in the life of a child.

Laws relating to child protection have sought to recognize and better protect against the detrimental effects of delay in child protection proceedings. One purpose of the Juvenile Code, added by the legislature after ASFA and reflective of specific ASFA language, is to "provide standards . . . for ensuring that . . . when it is not in the juvenile's best interest to be returned home [after being removed by the court], the juvenile will be placed in a safe, permanent home within a reasonable amount of time." G.S. 7B-100(5). Delays also may be detrimental to parents and contrary to the Juvenile Code purpose of "preventing the unnecessary or inappropriate separation of juveniles from their parents." G.S. 7B-101(4). The Juvenile Code includes a variety of specific timelines for different stages of abuse, neglect, dependency, and termination of parental rights proceedings. Some of these reflect requirements of ASFA and relate to the concept of permanence, discussed above, and reasonable efforts, discussed below. Others either predate ASFA or were enacted independently. In addition, Rule 3.1(c) of the North Carolina Rules of Appellate Procedure sets out an expedited process for appeals in juvenile cases.

Throughout the Code it is clear that the preferred form of permanence is the child's remaining in or returning to the child's own home, when the child can be safe there. At review and permanency planning hearings, however, the court must determine whether, if the

child's return home is unlikely, another permanent plan should be established or pursued concurrently as an alternative if the child does not return home.

The following excerpt from the online resource *Child Information Gateway* illustrates the increased focus on the concepts of permanence and timeliness in the child welfare system:

> Today, foster care is recognized as a temporary service. Children are only removed and placed out of home if reasonable efforts to keep them safe at home are unsuccessful. From the first day in foster care, efforts begin to return children home or help them find another permanent family. While there is still much work to be done, the achievement of permanency for children in foster care remains a driving goal for child welfare professionals.

"Concept and History of Permanency in U.S. Child Welfare" on the website for the Child Welfare Information Gateway, U.S. Department of Health and Human Services.

Resource: For additional resources related to permanency, see "Achieving & Maintaining Permanency" on the website for the Child Welfare Information Gateway, U.S. Department of Health and Human Services.

E. Reasonable Efforts and Related Requirements

1. Overview. In juvenile proceedings "reasonable efforts" is a term of art that originated with the federal Adoption Assistance and Child Welfare Act of 1980. Reasonable efforts requirements have been part of the North Carolina Juvenile Code since 1988. *See* S.L. 1987-1090. *See infra* § 13.2.B (providing more detail on the Adoption Assistance and Child Welfare Act). In any case in which the child is placed in the custody or placement responsibility of DSS, the Code requires the court to make findings at each critical stage of the proceeding about whether DSS has made reasonable efforts to keep the parents and child together, to reunify the family if the child has been removed from the home, or to secure another permanent placement for the child. At any hearing at which the child is not returned home, the court also must determine whether efforts to reunify the parents and child should continue or cease.

Beyond the possibility of being reversed on appeal, the Code does not specify consequences for a court's failure to make findings about reasonable efforts or for the failure of a DSS to actually make reasonable efforts. The findings and the efforts themselves are conditions of the state's receipt of federal child welfare funding. Consequences to the state for failing to adhere to reasonable efforts requirements, if they occur, come from the federal government, which can withhold or recoup funding the state receives under Title IV-E of the Social Security Act if these and other conditions are not met. *See infra* § 13.1.B (providing more information on Title IV-E and other federal programs, as well as state compliance with federal laws). So, while a finding by the court that DSS has not made reasonable efforts may influence the court's decision about what order to enter, it does not affect the court's options.

Although the statute and case law refer to reasonable efforts findings, a determination of whether DSS has made reasonable efforts is more accurately characterized as a conclusion of law, which should be supported by specific findings of fact about what DSS has done. *See In re Helms*, 127 N.C. App. 505 (1997).

Resources: For a comprehensive discussion on the reasonable efforts requirements, see the white paper from the YOUTH LAW CENTER, MAKING REASONABLE EFFORTS: A PERMANENT HOME FOR EVERY CHILD (2000). For guidance on what constitutes reasonable efforts, see the material starting on page 66 of this resource.

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2. Statutory definition of reasonable efforts, return home, and reunification. The Juvenile Code defines *reasonable efforts* as DSS's diligent use of:

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

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

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

3. Applicability of reasonable efforts requirements. The North Carolina Juvenile Code articulates reasonable efforts requirements for court hearings and court orders whenever the court orders a child to be placed, or to continue to be placed, in DSS custody or placement responsibility. G.S. 7B-507. From DSS's perspective, the duty to make reasonable efforts exists even before a juvenile case is initiated, as DSS must provide protective services aimed at making it possible for children to remain safely in their own homes.

The Code does not explain the meaning of "placement responsibility." Appellate cases suggest that it refers to circumstances in which DSS is given supervisory or other responsibilities even though custody or guardianship is awarded to someone else, or in which custody or guardianship is awarded to someone else but is not the permanent plan for the child. *See In re Padgett*, 156 N.C. App. 644 (2003) (holding that reasonable efforts requirements were not applicable where the trial court had granted custody to grandparents and released DSS from further responsibility). *See also In re E.C.*, 174 N.C. App. 517 (2005) (holding that where an order awarding guardianship did not make guardianship the permanent plan, the court and DSS were still bound by reasonable efforts requirements).

4. Requirements to make reasonable efforts. When the court orders a child to be placed or remain in DSS custody or placement responsibility, the hearing and the resulting order must address the following findings related to reasonable efforts:

(a) Reasonable efforts to prevent the need for placement. The court must make specific findings as to whether DSS has made reasonable efforts to either prevent or eliminate the need for placement. G.S. 7B-507(a)(2). If efforts to prevent the juvenile's placement were precluded by an immediate threat of harm to the child, the court may find that the child's placement without such efforts was reasonable. G.S. 7B-507(a).

(b) Reasonable efforts to reunify. When the child has been removed from the home, the court must make specific findings as to whether DSS has made reasonable efforts to reunify the family (unless the court has already determined that those efforts are not required). *See* G.S. 7B-507(a)(2). Reunification refers to the child's placement with either parent or with a guardian or custodian from whose home the child was removed. Reasonable efforts and reasonable efforts findings must be made with respect to both parents and, if custody was removed from a custodian or guardian, that person as well.

(c) Reasonable efforts to achieve permanent plan. Where the child has been removed from the home and the court is conducting permanency planning hearings (required by G.S. 7B-906.1), the court is required to make findings regarding whether DSS has, since the previous permanency planning hearing, made reasonable efforts to implement the permanent plan for the child. G.S. 7B-906.1(e)(5).

(d) Concurrent efforts. The court may order that reasonable efforts to reunify be made concurrently with another permanent plan for the child. G.S. 7B-507(d). *See In re J.J.L.*, 170 N.C. App. 368 (2005) (holding that a permanency planning order adopting concurrent plans of reunification and adoption did not make the respective responsibilities of parents and DSS unclear or place the children in "limbo"; the order set out specifically what each party was to do to establish permanent placement for the children and outlined the children's placement during continued reunification efforts).

(e) Whether to continue efforts. The court must make findings as to whether DSS should continue to make efforts to reunify (unless the court has already determined those efforts are not required). G.S. 7B-507(a)(3). For requirements for ceasing efforts, see 6., below. *See also In re H.D.F.*, 197 N.C. App. 480 (2009) (holding that the trial court's orders for DSS to supervise the mother's visitation and to aid in her substance abuse assessment were the "functional equivalent" of ordering DSS to "make reasonable efforts" for reunification, and the trial court was therefore in compliance with G.S. 7B-507(a)(3)).

5. Other requirements and considerations. When the court orders that a child be placed or continued in DSS custody or placement responsibility, the court must also find or consider the following:

(a) Contrary to best interest. The court must make a finding that the child's continuation in

or return to his or her own home would be contrary to the child's best interest. G.S. 7B-507(a)(1).

(b) DSS responsibility. The order must specify that the juvenile's placement and care are the responsibility of DSS and that DSS is to provide or arrange for foster care or another placement of the juvenile. Nevertheless, after considering DSS recommendations, the court may order a specific placement that it finds to be in the child's best interest. G.S. 7B-507(a)(4).

(c) Services or other efforts. The court's order may provide for services or other efforts aimed at returning the child to a safe home or at achieving another permanent plan for the child. G.S. 7B-507(a)(5).

(d) Health and safety. The child's health and safety must be the paramount concern in determining reasonable efforts to be made. G.S. 7B-507(d).

6. Ceasing reunification efforts. The court may order that reasonable efforts to eliminate the need for placement are not required or must cease, and may do so as early as a nonsecure custody hearing, but only if the court makes written findings that:

- the efforts would be either futile or inconsistent with the child's health, safety, and need for a safe permanent home within a reasonable period of time;
- a court has involuntarily terminated the parent's rights to another child;
- a court has determined that the parent has subjected the child to "aggravated circumstances," as defined by G.S. 7B-101(2); or
- a court has determined that the parent has committed murder or voluntary manslaughter of another child of the parent; aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; committed a felony assault resulting in serious bodily injury to the child or another child of the parent; committed sexual abuse against the child or another child of the parent; or has been required to register as a sex offender on any government-administered registry.

G.S. 7B-507(b).

(a) Specific findings and conclusions essential. Appellate cases involving challenges to orders ceasing reunification efforts have focused on determining whether the trial court made appropriate findings that address the specific requirements of G.S. 7B-507, whether the findings were based on credible evidence in the record, whether the findings supported the court's conclusion of law, and whether the trial court abused its discretion. *See In re N.G.*, 186 N.C. App. 1 (2007), *aff'd per curiam*, 362 N.C. 229 (2008). A 2013 legislative change modified the statutory requirement of making findings under G.S. 7B-507 to making "specific" findings, echoing previous case law emphasis on the need for court orders to be specific in addressing the requirements of G.S. 7B-507.

Where court orders have failed to address the specific requirements of G.S. 7B-507, appellate cases have found reversible error. *See, e.g.*, *In re A.E.C.*, __ N.C. App. __, 768

S.E.2d 166 (2015) (vacating and remanding the court's order to cease reunification efforts where the order and the order terminating parental rights failed to determine whether DSS had made reasonable efforts to reunify, whether reunification would be futile, or why placement with the father was not in the child's best interest); *In re A.P.W.*, __ N.C. App. __, 741 S.E.2d 388 (2013); *In re Weiler*, 158 N.C. App. 473 (2003) (reversing an order ceasing reunification efforts where the findings did not state that efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe permanent home within a reasonable period of time, and did not support the conclusion that reunification efforts should cease); *In re Everett*, 161 N.C. App. 475 (2003) (reversing an order ceasing reunification efforts where none of the court's findings addressed the statutory basis for ceasing reunification efforts).

However, the exact statutory language of G.S. 7B-507(b) is not necessarily required. In the case *In re L.M.T.*, the North Carolina Supreme Court held that the use of the actual statutory language in making findings is best practice, but the statute does not demand that the trial court's order contain a verbatim recitation of its language. *In re L.M.T.*, __ N.C. __, 752 S.E.2d 453 (2013) (reversing the court of appeals, which had reversed the trial court, because the order embraced the substance of the statutory provisions); *In re H.D. and K.R.*, __ N.C. App. __, 768 S.E.2d 860 (2015); *In re D.C.*, __ N.C. App. __, 763 S.E.2d 314 (2014). *See also In re M.J.G.*, 168 N.C. App. 638 (2005).

The requirements of G.S. 7B-507(b) have been found to be satisfied where the trial court relates its findings to a conclusion of law that specifically sets forth the basis for ceasing reunification efforts, but the court of appeals has refused to "simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home." *In re I.R.C.*, 214 N.C. App. 358, 363 (2011) and cases cited therein at 364. *See also In re J.P.*, __ N.C. App. __, 750 S.E.2d 543 (2013) (holding that the trial court did relate its findings to a conclusion of law setting forth the basis for ceasing reunification efforts).

If a TPR action is initiated within 180 days of the entry of an order ceasing reunification efforts, the Juvenile Code combines the appellate review of the order ceasing reunification efforts with review of the TPR order. Because the appeals are heard together, the appellate court may look to both orders when determining if the statutory requirements for ceasing reunification has been met: "Either order standing alone or the orders as read together can be enough to satisfy the language of [G.S. 7B-507(b)]." *In re D.C.*, __ N.C. App. __, 763 S.E.2d 314, 316 (2014) (citing *In re L.M.T.*, __ N.C. __ , 752 S.E.2d 453 (2013) and finding that although the permanency planning order was insufficient, the findings in the TPR order were sufficient to meet the statutory requirements for ceasing reunification efforts); *see also In re A.E.C.*, __ N.C. App. __ ,768 S.E.2d 166 (2015). The procedure and timing of this combined appeal is explained *infra*, §12.5.A.2.

(b) Permanency planning hearing timing and notice. When the court determines that reunification efforts are not required or shall cease, the court must order a plan for permanence as soon as possible, but not until each party is provided with reasonable

opportunity to prepare and present evidence. If an order ceasing reunification efforts is made in a hearing that was properly noticed as a permanency planning hearing, the court may immediately proceed to consider all of the criteria in G.S. 7B-906.1(e), make the required findings, and order a permanent plan. If an order ceasing reunification efforts results from a hearing that was not properly noticed as a permanency planning hearing, then a permanency planning hearing must be scheduled within 30 days to address the permanent plan pursuant to 7B-906.1. G.S. 7B-507(c). See *infra* § 8.2.A.3 & 8.2.B for additional explanation related to timing, notice, and a personal appearance as waiver of notice.

(c) Notice of appeal and offer of proof. At any hearing where the court finds that reunification efforts are not required or shall cease, the affected parent may give notice in open court, or in writing within ten days, to preserve the right to appeal the ruling in accordance with G.S. 7B-1001(a)(5). The court must permit the party giving notice the opportunity to make a detailed offer of proof as to any evidence the party sought to offer in opposition to cessation of reunification efforts and that the court refused to admit or consider. G.S. 7B-507(c).

The statute governing appeals of orders ceasing reunification efforts, G.S. 7B-1001(a)(5), has complex requirements related to the timing and manner of the appeal that depend on whether the appealing party is a parent or custodian/guardian, and on whether a TPR petition is filed within 180 days. These requirements are explained *infra* in § 12.5.A.2.

Although the Juvenile Code requires a party to preserve his or her right to appeal an order ceasing reunification efforts by giving notice orally or in writing, the court of appeals has nevertheless considered a challenge to an order ceasing reunification efforts without such notice when combined with the appeal of the TPR order. In the case *In re H.D. and K.R.*, __ N.C. App. __, 768 S.E.2d 860 (2015), the court of appeals relied on the N.C. Supreme Court case *In re L.M.T.*, __ N.C. __, 752 S.E.2d 453 (2013), in determining that although the respondent did not designate the order ceasing reunification in her notice of appeal, it would be considered on appeal because it was combined with the appeal of the TPR order. In the case *In re A.E.C.*, __ N.C. App. __ , 768 S.E.2d 166 (2015), the court of appeals relied on the reasoning in an unpublished case, *In re J.R.*, __N.C. App. __, 759 S.E. 2d 712 (2014), to determine that a proper and timely appeal of a TPR order that includes a cease reunification order as an issue for appeal properly raises for appeal the order ceasing reunification.

Where an order does not explicitly state that it is ceasing reunification but effectively does so, it may be considered a de facto cease reunification order. Where respondent mother appealed an order ceasing reunification efforts along with an order terminating her parental rights, DSS argued that because the permanency planning order did not contain a finding ceasing reunification efforts, there was no right to appeal the order. The court of appeals found that even though the order did not explicitly cease reunification efforts, it implicitly did so by changing the permanent plan to adoption and ordering the filing of a TPR, and the lack of a finding regarding cessation of reunification efforts did not warrant dismissal of the appeal. The order was reversed and remanded for failure to

make the findings of fact required by G.S. 7B-507(b). *In re A.P.W.*, __ N.C. App. __, 741 S.E.2d 388 (2013). Similarly, where the court eliminated a previous goal of reunification as part of the permanent plan, established a permanent plan of guardianship, and transferred custody of the children from YFS to their legal guardians, the court of appeals deemed this order to effectively cease reunification efforts even though it did not explicitly say so. *In re N.B. and L.B.*, __ N.C. App. __, 771 S.E.2d 562 (2015); *see also In re A.E.C.*, __ N.C. App. __, 768 S.E.2d 166 (2015) (also finding that an order implicitly ceased reunification efforts by making the permanent plan adoption and ordering DSS to file a TPR).

(d) Sufficiency of evidence and findings to cease reunification. The following cases address the sufficiency of the evidence and findings to support an order ceasing reunification efforts.

- The findings supporting the order ceasing reunification efforts were held sufficient where they referred to the mother's substance abuse, her failure to appreciate the risk of domestic violence on herself and her children related to contact with her live-in boyfriend, her refusal to accept responsibility for her actions or acknowledge her substance abuse problem despite her history of court involvement dating back decades and including at least six child custody cases. Also supporting the order were findings that the mother was either unwilling or unable to apply what she had learned through various services, was not a fit and proper person to have care, custody, and control of the children, and that it was contrary to the children's best interest and need for a safe, permanent home to be reunified with her. *In re N.B. and L.B.*, __ N.C. App. __, 771 S.E.2d 562 (2015).
- Reviewing the permanency planning order together with the TPR order, the court of appeals found that the detailed findings in the TPR order relating to the respondent mother's drug abuse, failures of treatment, and relapses up until the time of the TPR hearing were sufficient to support cessation of reunification efforts. *In re D.C.*, __ N.C. App. __, 763 S.E.2d 314 (2014).
- Findings in the reunification order that the mother had failed to attend visits or complete her case plan, had pending criminal charges, had not participated in drug screens, and that the children could not go home for at least six months were sufficient to suggest that reunification efforts would be futile. *In re H.D. and K.R.*, __ N.C. App. __, 768 S.E.2d 860 (2015).
- The court of appeals reversed and remanded a permanency planning order that ceased reunification efforts with respondent father, holding that the evidence did not support the trial court's findings related to reunification efforts and the findings did not support the conclusion that reunification efforts should cease. The findings failed in several respects to meet the requirements of G.S. 7B-907(b) and 7B-507: there was insufficient evidence of risk of abuse by the father; some findings were mere recitations of evidence; some findings were contrary to evidence that the father was not likely to abuse the child; and findings did not explain why the child could not be returned home or why not returning home was in her best interest. *In re I.K.*, __ N.C. App. __, 742 S.E.2d 588 (2013). (Note that this case predates the statutory change that converted most of the language in G.S. 7B-906 and 7B-907 to 7B-906.1.)

- The Supreme Court found the findings were sufficient to support the trial court's order ceasing reunification efforts where respondent mother's drug abuse and domestic violence problems were worsening, and she was covering these problems up and refusing to acknowledge them. *In re L.M.T.*, 367N.C. 165 (2013).
- In the case *In re A.Y.*, __ N.C. App. __, 737 S.E.2d 160 (2013), the court of appeals agreed with respondent mother that some findings of fact in an order ceasing reunification efforts were unsupported, but the court determined that they were not material to the trial court's decision, and other findings were sufficient to support ceasing reunification efforts. Supported findings established continuing verbal aggression and significant conflict between the parents; that the parents had not successfully engaged in couples therapy; that the mother had made only limited progress on treatment goals and had a pattern of poor parenting; and that the child had been detrimentally affected.
- An order to cease reunification efforts was affirmed where the court of appeals interpreted the trial court's findings to show that the respondent father failed to do anything to improve his ability to parent, care for, or show love and affection for his child. Findings were that the respondent father had been incarcerated for much of the time that the child had been in custody and was awaiting trial on a new set of charges that could result in three to five years of incarceration; that during the first three months that the child was in DSS custody and the father was not incarcerated, the father only visited the child on three of the twelve opportunities made available to him; that during these three visits the father had to be assisted by a visitation monitor; and that the father did not correspond with the child during his incarceration. In addition, during incarceration respondent father was approved for participation in the GED program, work release, counseling, and substance abuse treatment but did not participate in work release or complete any programs or classes. He also committed infractions on four different occasions resulting in more restrictive confinement while incarcerated. *In re D.E.G.*, __ N.C. App.__, 747 S.E.2d 280 (2013).
- An order to cease reunification efforts was upheld where findings were that mother failed to comply with the terms of a case plan regarding the child's sibling, that the father failed to seek necessary medical care despite being prompted, and that both parents had mental retardation. Also, the mother did not understand the reason for DSS involvement, and she shared characteristics with parents who have been known to abuse their children. Despite intensive case management offered to respondents, there were missed appointments and an inability to contact or locate the child and mother. Both the mother and father would need ongoing support to effectively parent, and there did not appear to be a person available to supervise parents if child was placed in their home or the home of a relative. *In re C.M.*, 183 N.C. App. 207 (2007).
- Evidence was insufficient to support an order ceasing reunification efforts with respondent mother where DSS recommended reunification; injuries to the child occurred while in the care of someone the mother was no longer seeing; the mother had a low I.Q. but no severe mental health issues that would interfere with her ability to parent; mother understood her poor choices leading to abuse and had grown and matured to a level as to not be a danger to the child; and the mother continued to pay child support, visit the child regularly, stay employed, and comply with her case plan. Also, the trial court had failed to consider changed conditions, which in this case were

highly relevant. *In re Eckard*, 148 N.C. App. 541 (2002).

- An order ceasing reunification efforts was upheld where mother did not have stable housing, had tested positive for drugs, failed to attend several substance abuse assessments, and was not making progress on her psychological problems. In addition, an order to cease reunification efforts with the mother had been entered regarding another child. *In re M.J.G.*, 168 N.C. App. 638 (2005).
- In determining whether to continue reunification efforts or change the permanent plan, it was permissible for the court to consider the cost of providing services deemed necessary for reunification. Here, the court concluded that because the mother would need help twenty-four hours a day to cope with and care for her children, "reunification is possible but not financially practical." *In re J.J.*, 180 N.C. App. 344, 350–51 (2006).
- Findings in an order to cease reunification efforts were sufficient where evidence showed that there were risks associated with the child's returning home, that earlier attempts at home placement had failed, and that mother had failed even to contact the social worker since the last review. *In re R.A.H.*, 182 N.C. App. 52 (2007).

2.7 Confidentiality and Access to Information

A. Confidentiality of Records and Hearings

1. Generally. Most information related to abuse, neglect, and dependency cases is confidential and has special statutory protections. G.S. 7B-302, 7B-2900 through 7B-2902, and 7B-3100 emphasize the strict confidentiality of juvenile records—both the clerk's records and DSS records—and G.S. 7B-601 requires the GAL to keep information confidential.

Access to and sharing of information among parties is addressed in certain Juvenile Code provisions and is discussed *infra* § 2.7.B.

Resources: For thorough discussions of confidentiality in the context of social services programs, including the meaning of confidentiality, how to analyze confidentiality issues, and federal and state confidentiality laws, see the following bulletins from the UNC School of Government (formerly the UNC Institute of Government):

- John L. Saxon, *Confidentiality and Social Services (Part I): What Is Confidentiality?*, SOCIAL SERVICES LAW BULLETIN No. 30 (UNC Institute of Government, Feb. 2001).
- John L. Saxon, *Confidentiality and Social Services (Part II): Where Do Confidentiality Rules Come From?*, SOCIAL SERVICES LAW BULLETIN No. 31 (UNC Institute of Government, May 2001).
- John L. Saxon, *Confidentiality and Social Services (Part III): A Process for Analyzing Issues Involving Confidentiality*, SOCIAL SERVICES LAW BULLETIN No. 35 (UNC Institute of Government, Apr. 2002).
- John L. Saxon, *Confidentiality and Social Services (Part IV): An Annotated Index of Federal and State Confidentiality Laws*, SOCIAL SERVICES LAW BULLETIN No. 37 (UNC Institute of Government, Oct. 2002).

For information about DSS policies and procedures related to confidentiality in the child protective services setting, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. VIII § 1428 (July 2008).

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2. The clerk's record. The clerk of court is responsible for maintaining all records pertaining to juvenile cases. The clerk's record includes the summons, the petition, custody orders, other court orders, written motions, other papers filed in the proceeding, and recordings of hearings. (See *DSS records and information* below pertaining to other case information.) This constitutes the "juvenile record," which is confidential and may be examined only by court order, except that the following persons may examine the juvenile's record and obtain copies of written parts of the record without a court order:

- the person named in the petition as the juvenile;
- the guardian ad litem;
- the county department of social services; and
- the juvenile's parent, guardian, or custodian, or the attorney for the juvenile or the juvenile's parent, guardian, or custodian.

G.S. 7B-2901(a).

For more information about the clerk's records and court administration, see *infra* appendices 3, 4, and 5.

3. DSS records and information. DSS must maintain a record for a juvenile who is under its protective custody or under placement by the court. The DSS record includes family background information, reports of social, medical, psychiatric, or psychological information concerning the juvenile or the juvenile's family, or other information that the court finds should be protected from public inspection in the best interest of the juvenile. Only the GAL and the juvenile may examine these records without a court order. G.S. 7B- 302 and G.S. 7B-2901(b). *See also* 10A N.C.A.C. 70A.0112 (relating to DSS records).

DSS is required to keep all information it receives in connection with a child protective services assessment "in strictest confidence." G.S. 7B-302(a1). However, there are a number of exceptions to the requirement of confidentiality for DSS records and information. Those include:

- When a juvenile case is pending, DSS is authorized to share with any other party information that is relevant to the subject matter of the action. G.S. 7B-700(a).
- DSS must disclose confidential information to any federal, state, or local government entity or its agent that needs the information to protect a child from abuse and neglect. G.S. 7B-302(a1)(1).
- DSS must disclose information regarding the identity of a person making a report of abuse, neglect, or dependency to any federal, State, or local government entity or its agent with a court order, or without a court order when the entity demonstrates a need for the reporter's name to carry out the entity's mandated responsibilities. G.S. 7B-302(a1)(1a).
- Disclosure of information is permitted pursuant to court order. G.S. 7B-2901; 10A

N.C.A.C. 70A.0113(a)(1). See also G.S. 7B-302(a1)(3) and (4), regarding steps courts must take before ordering DSS to release confidential information in criminal cases or in civil actions to which DSS is not a party.

- The child or the child's guardian ad litem may examine the child's own record. G.S. 7B-302(a1)(2); G.S. 7B-2901(b)(1); 10A N.C.A.C. 70A.0113(a)(2).
- DSS may share information and a "summary of documentation" from the case record without a court order with agencies or individuals that provide or facilitate the provision of protective services to a child. 10A N.C.A.C. 70A.0113(b).
- DSS must allow the District Attorney or his or her designee to access the case record when the DA conducts a review of DSS's decision not to file a petition. 10A N.C.A.C. 70A.0113(c).
- The court may require DSS to reveal the identity of the reporter at a hearing on a petition relating to alleged interference with or obstruction of an assessment. G.S. 7B-303(e).
- Sharing of information by designated agencies is required under limited circumstances and for limited purposes. G.S. 7B-3100. *See infra* § 2.7.B.6 (relating to sharing of information among agencies).

DSS must also protect the confidentiality of records for those persons applying for or receiving social services, which includes child protective services, pursuant to G.S. 108A-80.

4. Recording of hearing. Juvenile court proceedings are recorded but the recording may be reduced to a written transcript only when notice of appeal has been filed. G.S. 7B-806. Recordings may be erased only pursuant to court order after the time for appeal has expired with no appeal having been filed. G.S. 7B-2901(a).

The fact that the recording is incomplete or of poor quality will require a new hearing only if specific error during the missing or unintelligible portion of the recording is alleged or prejudice to the appellant as a result of the recording problems is shown. *See, e.g., In re Howell*, 161 N.C. App. 650 (2003); *In re Bradshaw*, 160 N.C. App. 677 (2003).

5. Determining whether juvenile proceedings are open or closed. The presumption is that hearings in juvenile cases are open. The court has the discretion to close a hearing or any part of a hearing after considering the circumstances of the case, including but not limited to the following:

- the nature of the allegations;
- the age and maturity of the juvenile;
- the benefit to the juvenile of confidentiality;
- the benefit to the juvenile of an open hearing; and
- the extent to which the confidentiality afforded the juvenile's record pursuant to G.S. 132-1.4(l) and G.S. 7B-2901 will be compromised by an open hearing.

G.S. 7B-801. However, the court may not close a hearing or part of a hearing if the juvenile requests that it remain open. Note also that even if a hearing is open, Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure prohibits electronic media coverage and still photography of juvenile proceedings.

B. Disclosure of and Access to Information

The Juvenile Code gives both DSS and the GAL access to information, including some information that is considered confidential, and also requires the sharing of information among agencies in some circumstances. However, access to and the disclosure of information is complicated by several factors, which are discussed in this section. For a discussion of the admissibility of evidence that is privileged or confidential, see *infra* § 11.11.

1. Discovery and parties sharing information. The Juvenile Code addresses discovery in juvenile cases in G.S. 7B-700, which is applicable to abuse, neglect, dependency, and TPR proceedings. Although G.S. 7B-700(c) permits parties to file motions for discovery, they may do so only if they have been unable to obtain information under G.S. 7B-700(a) (allowing DSS to share relevant information) or G.S. 7B-700(b) (allowing the sharing of information pursuant to local rules or administrative orders). Discovery in juvenile cases is discussed more fully *infra* at § 4.6. See also *infra* § 2.7.B.6 related to sharing of information among agencies.

Although G.S. 7B-700(a) permits DSS to share with any other party information relevant to the juvenile proceeding, the same is not true for the GAL. The GAL is not generally authorized to share information it obtains unless ordered by the court, local rules provide otherwise, or if the sharing is pursuant to agency sharing provisions under G.S. 7B-3100. *See* G.S. 7B-700(f); *infra* § 2.7.B.6 (related to agency sharing). However, the GAL must share with all parties reports and records before submitting them to the court. G.S. 7B-700(f).

The sharing of reports (prepared for submission to the court) among parties may be governed by local rules or administrative orders, subject to certain parameters. G.S. 7B-808(c). Reports are discussed in detail *infra* § 8.1.D.

2. Some records subject to special requirements. Despite the broad authority given to DSS and the GAL to access information and for agencies to share information, described below, access to some types of information is restricted by federal law. Notwithstanding the discussion in this section related to disclosure of and access to information, certain types of information may be disclosed or accessed only pursuant to applicable federal provisions.

- **Education records** are subject to the Family Education Rights and Privacy Act (FERPA), explained *infra* at § 13.5.
- **Mental health and substance abuse records** may be subject to 42 C.F.R. pt. 2, explained *infra* at § 13.4.
- **Medical records** are subject to the Health Insurance Portability and Accountability Act (HIPAA), explained *infra* at § 13.4.

State laws restrict access to, or provide for the confidentiality of, some types of records and information. However, the broad access to confidential information given to DSS and the GAL (as explained below) typically overrides these laws, and some laws explicitly make an exception for situations involving the reporting or investigation of abuse or neglect. *See, e.g.*, G.S. 122C-54(h) (although Mental Health, Developmental Disability and Substance Abuse

Services providers are restricted from disclosing information, this provision states that providers are required to disclose confidential information for purposes of complying with Article 3 of G.S. Chapter 7B, which includes the mandatory reporting law).

3. DSS access to information. DSS may demand in writing any information or reports, whether or not confidential, that may be relevant to an assessment of reported abuse, neglect, or dependency, or to the provision of protective services. This authority does not extend to information protected by the attorney-client privilege. In addition, a custodian of criminal investigative information or records may seek a protective order if the custodian believes that disclosure would jeopardize an investigation or the rights of the state or a defendant. G.S. 7B-302(e). An agency or individual's refusal to disclose information sought by DSS might be considered obstruction of an assessment and addressed by filing a petition under G.S. 7B-303. *See infra* § 5.1.G (relating to obstructing a DSS assessment).

4. GAL access to information. The Juvenile Code gives the child's GAL the authority to obtain any information or reports, whether or not confidential, that may in the GAL's opinion be relevant to the case. The only privilege that may be invoked to prevent the GAL and the court from obtaining the information is the attorney-client privilege. G.S. 7B-601(c). The GAL appointment order form (AOC-J-207, March 2012) contains the following language related to this provision:

> The Guardian ad Litem has the authority to obtain any information or reports, whether or not confidential, that may in the Guardian ad Litem's opinion be relevant to the case. This order includes the release of confidential information subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). 45 C.F.R. 164.512(a) & (e). No privilege other than the attorney-client privilege may be invoked to prevent the Guardian ad Litem and the Court from obtaining such information. The confidentiality of the information or reports shall be respected by the Guardian ad Litem and no disclosure of any information or reports shall be made to anyone except by order of the Court or unless otherwise provided by law.

Practice Note: Some custodians of records ask for a certified copy of the GAL appointment order before allowing access to or copies of records. Others accept a copy of a certified copy or simply look at the appointment order to verify the appointment before allowing access to records. Occasionally a records custodian will refuse to release information or records without a subpoena.

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

6. Agency information sharing. Upon request, certain agencies—called "designated agencies"—must share with other designated agencies information (even confidential information) that is relevant to:

- any DSS assessment of a report of child abuse, neglect, or dependency;
- DSS's provision or arrangement of protective services in a child abuse, neglect, or dependency case; or
- any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent.

See G.S. 7B-3100(a). Agencies must share information, however, only to the extent permitted by federal law and regulations (such as the Family Education Rights and Privacy Act, discussed *infra* § 13.5). 14B NCAC 11A.0302. Agencies that receive information pursuant to these provisions may use the information only for the protection of the child and others or to improve the child's educational opportunities. G.S. 7B-3100(a).

(a) Designated agencies. Agencies authorized to share information include:

- the Division of Juvenile Justice in the Department of Public Safety (still listed as Department of Juvenile Justice and Delinquency Prevention in the statute), which includes juvenile court counselors;
- GAL offices;
- county departments of social services;
- local management entities or area mental health, developmental disability, and substance abuse authorities;
- local law enforcement agencies;
- the district attorney's office in the district (however, while a DA may obtain information, the statute does not impose on a DA a requirement to disclose or release any information in the DA's possession);
- county mental health facilities and developmental disabilities and substance abuse programs;
- local school administrative units;
- local health departments; and
- any local agency that is designated by an administrative order issued by the chief district court judge in the district.

See G.S. 7B-3100(a); 14B N.C.A.C. 11A.0301.

The court is not an "agency," and records maintained by the clerk of court are not subject to these provisions. They are governed by G.S. 7B-2901, discussed *supra* in § 2.7.A.

(b) Continued sharing and confidentiality. Designated agencies must continue to share information until DSS closes the protective services case or, if a petition is filed, until the juvenile is no longer subject to the jurisdiction of the juvenile court. Agencies must keep shared information confidential and may not permit public inspection of the information. G.S. 7B-3100(a).

(c) Documentation of sharing. Designated agencies sharing information must document the name of the agency to which the information was provided and the date it was provided. 14B N.C.A.C. 11A.0302.

7. Subpoenas and court orders to protect or access information. Agencies and attorneys sometimes may feel caught between the duty to protect information (due to privilege, confidentiality, or a belief that sharing the information would be damaging) and the statutory authority or mandate to share the information. Subpoenas and resulting compliance or motions to quash are more formal mechanisms for obtaining, disclosing, or protecting information. Subpoenas also allow the court to resolve disputes about whether information should be disclosed. Motions for protective orders are another means by which one can seek to protect information that he or she believes should not be disclosed. When the issue of information sharing is pursuant to a discovery motion, requests for protective orders are governed by G.S. 7B-700(d). Note that these methods are available only after a petition has been filed.

Resource: For a discussion of subpoenas, see John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (UNC School of Government, Sept. 2005).

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8. Disclosure in child fatality or near-fatality cases. The rules of disclosure are different when a child dies from suspected abuse, neglect, or maltreatment, or a child is in serious or critical condition as the result of sickness or injury caused by suspected abuse, neglect, or maltreatment. A public agency that receives a request to disclose information related to a child fatality or near fatality must disclose certain information *if*

- a person is criminally charged with causing the death or near death of a child, or
- a district attorney certifies that a person would be charged but for that person's death.

However, not all confidential information is required to be disclosed, and there are circumstances under which the agency is permitted to deny a request for information after consulting with the district attorney. If a request is denied, the person seeking the information may go to the superior court to seek an order compelling disclosure, and the court must conduct an in camera review to determine whether denial of the request for information was warranted. *See* G.S. 7B-2902.