Chapter 4
Civil Procedure in Juvenile Court[1]

1. Portions of this chapter are based on: JANET MASON, TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA (UNC School of Government, 2012).

4.1 Introduction

This chapter highlights civil procedure issues in abuse, neglect, dependency, and termination of parental rights cases, with some emphasis on statutes and cases that implicate the Rules of Civil Procedure. The chapter is not meant to address all aspects of procedure in juvenile cases, as most procedures are addressed by the Juvenile Code and explained in relevant chapters of this manual. Some procedural issues have an impact on jurisdiction, and details relating to jurisdiction along with cases discussing the relationship between procedure and jurisdiction are discussed in Chapter 3 *supra* (Jurisdiction and Venue). Local rules may also affect procedure and should be consulted.

A. Applicability of Rules of Civil Procedure in Juvenile Court

The first stated purpose of the Juvenile Code in G.S. 7B-100 is to "provide procedures for the hearing of juvenile cases. . . ." When the Juvenile Code provides a procedure, that procedure prevails over the Rules of Civil Procedure. Otherwise, the Rules may apply, but only when they do not conflict with the Juvenile Code and only to the extent they advance the purposes of the Code. *In re L.O.K.*, 174 N.C. App. 426, 431 (2005).

1. Rules apply when explicitly required by the Juvenile Code. The Juvenile Code specifically states that certain Rules of Civil Procedure apply in particular circumstances, in which case those rules must be followed. Rules of Civil Procedure that are referenced in the Code include Rules 4 (process), 5 (service and filing of pleadings and other papers), 17 (as it pertains to guardians ad litem), 42 (consolidation), and 58 (entry of judgment).

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

3. Rules or parts of rules apply when required to fill procedural gaps. Where the Code neither references a Rule of Civil Procedure nor sets out a different procedure, the Rules of Civil Procedure may be used to fill procedural gaps. *See In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008); *In re S.D.W.*, 187 N.C. App. 416 (2007). Some appellate court decisions have held that specific rules apply in juvenile proceedings. In others, the court has referenced or applied a Rule of Civil Procedure without discussion and with no suggestion that the rule's applicability was in doubt. The following are some rules that have been applied in juvenile cases:

- **Rule 5(a).** *In re H.D.F.*, 197 N.C. App. 480 (2009) (applying the rule to require that all papers and notices be served on the father even though he waived his right to counsel and did not attend all hearings).
- **Rule 7(b).** *In re McKinney*, 158 N.C. App. 441 (2003) (applying Rule 7(b)(1) to determine whether a motion to terminate parental rights was sufficient to confer jurisdiction).
- **Rule 11**. *In re Dj.L.*, 184 N.C. App. 76 (2007) (applying the rule to determine whether verification was sufficient).
- **Rule 35.** *In re Williams*, 149 N.C. App. 951 (2002) (applying the rule to determine that respondent was not entitled to a mental examination of the child).
- **Rule 43.** *In re A.M.*, 192 N.C. App. 538 (2008) (applying the rule to require at least some live testimony at a termination hearing).
- **Rule 52.** *In re T.P.*, 197 N.C. App. 723 (2009) (applying the rule in a termination action to require that the court find the facts specially and state its conclusions separately).
- **Rule 60.** *In re E.H.*, __ N.C. App. __, 742 S.E.2d 844 (2013) (holding that a Rule 60 motion was an appropriate means of addressing whether a voluntary dismissal was permissible and that the order denying the Rule 60 motion was appealable under G.S. 7B-1001); *In re C.N.C.B.*, 197 N.C. App. 553 (2009) (applying the rule to prohibit the trial court from making substantive modifications to a judgment after notice of appeal was given); *In re Saunders*, 77 N.C. App. 462 (1985) (applying the rule to reject a motion for relief from a judgment or order where the respondent did not comply with the time requirements of the rule).
- **Rule 61.** *In re T.M.*, 187 N.C. App. 694 (2007) (applying the rule to find harmless error and reject the argument made by respondent because no prejudice was shown).
- **Rule 63.** *In re Whisnant*, 71 N.C. App. 439 (1984) (applying the rule to say that only the judge presiding could sign the order).

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

- **Rule 12(c), to enter judgment on the pleadings**. *In re Shaw*, 152 N.C. App. 126 (2002) (holding that default judgment or judgment on the pleadings is inappropriate in an adjudication of neglect); *In re Thrift*, 137 N.C. App. 559 (2000) (holding that judgment on the pleadings is not available in abuse, neglect, and dependency matters because the Juvenile Code requires a hearing); *see also In re I.D.*, __ N.C. App. __, 769 S.E.2d 846 (2015).
- **Rule 13**. *In re S.D.W.*, 187 N.C. App. 416 (2007) (holding that Rule 13 does not apply to allow a claim for termination to be asserted as a counterclaim in a civil custody or visitation action); *In re Peirce*, 53 N.C. App. 373 (1981) (holding that a parent does not have a right to file a counterclaim in a termination action).
- **Rule 15, to conform TPR pleadings to the evidence**. *In re G.B.R.*, 220 N.C. App. 309 (2012) and *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008) (holding in termination of parental rights cases that the trial court erred in applying Rule 15 to allow amendment of the petition to conform to the evidence, but holding in *G.B.R.* that the error was harmless). *See infra* § 4.2.D (discussing amendments to pleadings).

- **Rule 56**. *In re J.N.S.*, 165 N.C. App. 536 (2004) (holding that summary judgment as to a ground for termination is contrary to the procedural mandate of the Juvenile Code requiring the court to hear evidence and make findings); *Curtis v. Curtis*, 104 N.C. App. 625 (1991) (holding that summary judgment procedures are not available in termination proceedings).

B. Rule Application Analysis

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

Yes, the rule applies if:

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

No, the rule does not apply if:

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

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

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

In the case *In re E.H.*, __ N.C. App. __, 742 S.E.2d 844 (2013), the court of appeals reasoned that application of Rule 41(a)(1)(i) to allow DSS to voluntarily dismiss a juvenile petition advanced the purposes of the Juvenile Code because the legislature entrusted DSS with the duty to determine whether allegations of abuse, neglect, or dependency are credible and what action to take. The court said that requiring the GAL or parent to consent to a dismissal would impermissibly shift this responsibility away from DSS. In addition, allowing DSS to dismiss its own petition after finding that evidence underlying the allegations is too weak to merit proceeding advances the Juvenile Code purpose of avoiding unnecessary periods of family separation and unnecessary burdens on the juveniles and their families, while allowing DSS to conserve its limited resources for other juveniles. Yet in the case *In re*

L.O.K., 174 N.C. App. 426 (2005), the court of appeals found the same Rule 41(a)(1) not applicable to bar DSS from filing another petition to terminate parental rights, where DSS had voluntarily dismissed an earlier petition after presenting evidence and resting its case. The court reasoned that to do so would be contrary to a child's best interest because it would result in no permanent plan. Thus, this Rule has been found both applicable and inapplicable in juvenile cases depending on whether the context of the application advanced Code purposes.

4.2 Petition

Juvenile cases are initiated by the filing of a petition, except that termination of parental rights cases may be initiated either by petition or by motion in a pending abuse, neglect, or dependency case.

A. Contents of Petition

General requirements for the contents of a petition alleging abuse, neglect, or dependency are addressed *infra* § 5.3.A. General requirements for the contents of a petition or motion for termination of parental rights are addressed *infra* § 9.5. Case law related to the relationship between petition requirements and jurisdiction is addressed *supra* § 3.2.

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

B. Verification of Petition or Motion

1. Verification essential. In abuse, neglect, dependency, and TPR cases the petition (or motion in a TPR case) must be verified or the petition/motion is fatally defective. G.S. 7B-403(a); G.S. 7B-1104; *In re T.R.P.*, 360 N.C. 588 (2006) (holding that the failure to verify the petition deprived the trial court of subject matter jurisdiction). Effective October 1, 2014, G.S. 7B-800.1(a)(5a) requires that in any pre-adjudication hearing, the court must consider whether the petition has been properly verified and invokes jurisdiction. *See* S.L. 2014-16 (effective Oct. 1, 2014).

2. Definition of verification. G.S. 7B-403(a) states that a petition alleging abuse, neglect, or dependency must be "verified before an official authorized to administer oaths." While verification generally refers to a formal declaration whereby one swears to the truth of statements in a document, the Juvenile Code does not define "verification." Courts, therefore, have looked to Rule 11 of the Rules of Civil Procedure for the definition of verification and have applied the rule to determine whether a verification is sufficient. *See In re Dj.L.*, 184

N.C. App. 76 (2007); *In re Triscari Children*, 109 N.C. App. 285 (1993); *see* also BLACK'S LAW DICTIONARY (8th ed. 2004).

Rule 11 states that a pleading may be verified by affidavit of the party. A verification must state "in substance" that the contents of the pleading are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he or she believes them to be true. N.C. R. CIV. P. 11(b).

Therefore, combining the language of the Juvenile Code with the language of Rule 11, proper verification in a juvenile case requires a confirmation of truthfulness:

- as to the contents of the petition or motion,
- by an appropriate person with the appropriate signature, and
- sworn to or affirmed before an official who is authorized to administer oaths.

(a) Appropriate person and signature. When DSS initiates an abuse, neglect, or dependency proceeding, the Juvenile Code states that "the director shall sign [the] petition." G.S. 7B-302(c). Appellate cases have made some subtle distinctions about what constitutes a proper verification by the DSS director. Social services law permits a county DSS director to "delegate to one or more members of his staff the authority to act as his representative." G.S. 108A-14(b). The Juvenile Code defines *director* as "[t]he director of the county department of social services . . . or the director's representative as authorized in G.S. 108A-14." G.S. 7B-101(10). Verification was found to be insufficient when a DSS employee signed the director's name, followed by "by" and the employee's own initials or name, with no indication that the employee was the director's "authorized representative." *See In re A.J.H-R.*, 184 N.C. App. 177 (2007); *In re S.E.P.*, 184 N.C. App. 481 (2007). However, verification has been found to be sufficient when signed, in his or her own name, by someone who can be identified as a DSS employee, even where there is no specific statement that the signer is the DSS director's authorized representative. *See In re Dj.L*, 184 N.C. App. 76 (2007) (finding no error where the respondent asserted that the petition failed to state that the signer was the DSS director or an authorized representative, but did not assert that the signer was not authorized); *In re D.D.F.*, 187 N.C. App. 388 (2007).

The court of appeals has rejected the contention that the trial court lacks jurisdiction when the verification predates the signing of the petition by the DSS attorney. See *In re M.M.*, 217 N.C. App. 396 (2011), in which the social worker verified the petition before it was signed by the DSS attorney, but nothing in the record established that the petition was not in existence when the social worker signed the verification and the respondent did not show any failure to comply with Rule 11 or the Juvenile Code in regard to signing and verifying the petition.

(b) Confirmation of truthfulness before person authorized to administer oaths. A proper verification must indicate that the petitioner or movant signing the pleading has confirmed the truthfulness of its contents. The person signing the petition or motion and confirming its truthfulness must do so before a person authorized to administer oaths. A notary is

clearly an acceptable person "authorized to administer oaths." G.S. 10B-40(d) addresses verification by notary, and appellate cases have looked to this statute to determine proper verification by notaries. *See In re Dj.L.*, 184 N.C. App. 76 (2007). Notarization, however, is not synonymous with verification as there must still be the appropriate confirmation of truthfulness. *See In re Triscari Children*, 109 N.C. App. 285 (1993). Other persons authorized to administer oaths include the clerk of superior court, deputy clerks, assistant clerks, and magistrates. The petition needs to include both the signature of the person authorized to administer oaths and an indication of the person's authority to administer oaths. *See In re N.T.*, __ N.C. App. __, 769 S.E.2d 658 (2015) (where the signature of the person before whom the petition was verified was illegible with no title provided to explain his or her authority, and there was no evidence in the record to show that the petition was properly verified, the court of appeals held that the trial court never obtained jurisdiction over the case and vacated its order). This case is currently stayed by the N.C. Supreme Court and as of June 2015 has not been scheduled for oral argument. However, as a result of this decision, the AOC revised its form Juvenile Petition, AOC-J-130, to add a check box for "Magistrate" and "District Court Judge" in the Verification section.

C. Signature of Attorney or Party

Rule 11(a) of the Rules of Civil Procedure requires that the petition (as well as all pleadings, motions, and other papers) be signed by at least one attorney of record and state the attorney's address or by the party if not represented by counsel. A party who signs a proper verification is not required to sign separately on the signature line of the pleading, although doing so is the better practice. *In re D.D.F.*, 187 N.C. App. 388 (2007). The attorney's signature constitutes certification by the attorney that he or she has read the petition, that to the best of his or her knowledge, information, and belief it is well grounded in fact and is warranted by law or a good faith argument, and that it is not being used for an improper purpose. A petition that is not signed must be "stricken unless it is signed promptly after the omission is brought to the attention" of the attorney or party. *See* N.C. R. CIV. P. 11(a); *In re L.B.*, 181 N.C. App. 174 (2007) (holding that where DSS's petition was signed two days after a nonsecure custody order was filed, the court gained jurisdiction when a DSS representative signed the petition). *Cf. Estate of Livesay ex rel. Morley v. Livesay*, 219 N.C. App. 183 (2012) (holding that a signed amended pleading filed 42 days after the initial unsigned pleading was filed related back to the original filing).

Practice Note: AOC forms may not include space for the attorney's signature, so when AOC forms are used, attorneys must ensure that a signature page is included. In emergencies, the DSS director or authorized representative may prepare and file a petition *pro se*, without involving the DSS attorney. It seems likely that in that circumstance the attorney's signature would be required only on subsequent pleadings.

D. Amendments and Supplemental Pleadings

1. Amendments in abuse, neglect, and dependency proceedings. The court in its discretion may permit the amendment of a petition. When allowing an amendment the court must direct

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

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

What these cases do have in common is a concern about notice and fairness. The court in *B.L.H.* emphasized (i) that the ground the petition was amended to allege did not exist and could not have been alleged when the petition was filed; and (ii) that the original petition, in addition to not alleging that ground by statutory reference, did not allege facts sufficient to put respondents on notice that the ground would be in issue. In *Smith*, the court of appeals noted the trial court's finding that the allegations in the pleading had put respondent on notice that the grounds added by the amendment could provide bases for the termination. The amendment in *L.T.R.* added factual allegations to conform to the evidence, not a different ground, and probably was not even necessary. The court quoted an earlier case in which it said, "[A] party attempting to limit the trial of issues by implied consent must object specifically to evidence outside the scope of the original pleadings; otherwise, allowing an amendment to conform the pleadings to the evidence will not be error, and, in fact, is not even technically necessary." *L.T.R. at* 390 (citations omitted).

More recently, in the case *In re G.B.R.*, 220 N.C. App. 309 (2012), the court of appeals relied on *B.L.H.* in holding that the trial court erred by allowing amendment of the TPR petition to conform to the evidence. The court went on, however, to determine that the respondent had sufficient notice, the erroneous granting of the motion to amend had no effect on the court's ultimate determination, and the error was harmless. Thus, appellate court decisions addressing amendments to conform to the evidence in TPR proceedings have focused on whether there was sufficient (even if not formal) notice of the allegations in the amended pleading and whether allowing the amendment resulted in prejudice. The court in *B.L.H.* might have undertaken this same analysis by examining whether the trial court abused its discretion in allowing an amendment to conform to the evidence, without holding that Rule 15(b) does not apply in termination proceedings.

3. Supplemental pleadings. The Juvenile Code does not address supplemental pleadings in abuse, neglect, dependency, or TPR proceedings, and appellate cases have not directly addressed the applicability in juvenile cases of Rule 15(d) of the Rules of Civil Procedure.

Rule 15(d) refers to a supplemental pleading as "setting forth transactions or occurrences or events which may have happened since the date of the pleading" and gives the court discretion to allow a supplemental pleading where there is reasonable notice and on terms that are "just."

Amendments and supplemental pleadings differ primarily with regard to the nature of the additional allegations the party seeks to assert. The facts in a supplemental pleading did not exist when the original pleading was filed. An amended pleading relates to information that existed but was not alleged in the original pleading. Both require a motion and permission of the court. In the case of *Foy v. Foy*, 57 N.C. App. 128 (1982), the court of appeals stated that a plaintiff's motion to amend her complaint was in substance a motion to file a supplemental pleading, which was governed by Rule 15(d). The court acknowledged that whether to allow a party to file a supplemental pleading was within the trial judge's discretion and that such pleadings should be allowed unless they would impose a substantial injustice on the opposing party. *Id*. at 132.

E. Responsive Pleadings

The Juvenile Code does not address responsive pleadings in abuse, neglect, and dependency proceedings, and the filing of answers in those cases is not required and is rare. The only provisions in the Juvenile Code for responsive pleadings are in the context of TPR proceedings, where the summons directs the respondent to file an answer to a TPR petition and the notice that accompanies a TPR motion directs the respondent to file a response. G.S. 7B-1106, 7B-1106.1. *See also infra* § 9.8 (discussing details relating to TPR answers and responses). The failure to file an answer or response, however, does not constitute an admission of the allegations and cannot result in a default judgment or judgment on the pleadings. *In re Tyner*, 106 N.C. App. 480 (1992). Filing a response that denies any material allegation of the petition or motion does, however, require the court to appoint a guardian ad litem for the juvenile. G.S. 7B-1108.

Appellate cases have rejected attempts to utilize other responsive pleadings, such as counterclaims, in TPR cases, stating that because the Juvenile Code provides procedures that include an answer or response but do not address other types of pleadings, these are the exclusive procedures. *See In re S.D.W.*, 187 N.C. App. 416 (2007); *In re Peirce*, 53 N.C. App. 373 (1981). The court of appeals has also rejected the argument that a counter-claim or cross-claim could be filed by the parent or GAL in an abuse case, reasoning that all authority of the trial court arises out of the juvenile petition, which can be filed only by DSS, and that although the parents and the GAL may present evidence and argument, they have no right to seek affirmative relief. *In re E.H.*, __ N.C. App. __, 742 S.E.2d 844 (2013).

4.3 Summons

Note: The relationship between the summons and subject matter jurisdiction is addressed in detail in §3.2.C.1 *supra*. Problems with issuance or service of a summons implicate personal jurisdiction, not subject matter jurisdiction. *See In re K.J.L.*, 363 N.C. 343 (2009).

A. Content and Issuance of Summons

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

Tools: AOC Form AOC-J-142, "Juvenile Summons and Notice of Hearing (Abuse/Neglect/Dependency)" (Oct. 2013).

AOC Form AOC-J-208, "Summons in Proceeding for Termination of Parental Rights" (Mar. 2012).

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1. Signature of clerk. Although the Juvenile Code is very specific with respect to the content of summonses in juvenile proceedings, Rule 4(a) and (b) of the Rules of Civil Procedure, relating to the issuance and content of a summons, has been applied to juvenile proceedings as well. In a termination of parental rights case, *In re K.J.L.*, 363 N.C. 343 (2009), the North Carolina Supreme Court stated that to be properly "issued," the summons must contain the signature of the clerk, assistant clerk, or deputy clerk as required by Rule 4(b).

2. Timing. The Juvenile Code states that the summons must be issued by the clerk immediately after an abuse, neglect, or dependency petition is filed. G.S. 7B-406(a). This is different from the requirement in Rule 4(a) of the Rules of Civil Procedure that a summons be issued within five days of the filing of the complaint. In most situations, the petition is filed with the clerk, who issues the summons at that time. However, a juvenile petition can be issued by a magistrate in emergency situations when the clerk's office is closed, and this constitutes "filing" of the petition. G.S. 7B-404, 7B-405. The magistrate is not authorized to issue the summons. A petition that is filed with a magistrate must be delivered to the clerk's office for processing as soon as the clerk's office opens, and the immediacy requirement will be keyed to when the clerk's office opens and processes the petition.

3. Who receives summons. When a petition alleges abuse, neglect, or dependency, the summons is issued to each party named in the petition except the juvenile. For a TPR petition, a summons is issued to the parents, except a parent who has relinquished the child for adoption or consented to adoption by the petitioner. A summons also must be issued to any court-appointed guardian or custodian and any agency with placement responsibility for the child or to which the child has been relinquished for adoption. In either type of proceeding, no summons is required for a parent whose actions resulted in a conviction of first or second degree rape and the conception of the child. *See* G.S. 7B-406(a), G.S. 7B-1106(a), G.S. 14-27.2(c), G.S. 14-27.3(c). The same is probably true of a parent whose actions resulted in a conviction of rape of a child by an adult offender and conception of the child, since that parent has no rights to custody of the child and no rights related to the child under Subchapter 1 of the Juvenile Code. *See* G.S. 14-27.2A(d). *See also infra* § 9.7 (regarding TPR summonses).

4. Service requirements when summons is not required. Although a summons need not be served on the juvenile or the juvenile's GAL, immediately after an abuse, neglect, or dependency petition is filed the clerk is required to provide a copy of the petition and any notices of hearings to the local GAL office. G.S. 7B-408. If a child has a guardian ad litem when a TPR petition or motion is filed, or if a guardian ad litem is appointed for the child during the proceeding, a copy of all pleadings and other papers required to be served (but not a summons) must be served on the GAL or attorney advocate pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a1). In a TPR proceeding, if an attorney was appointed for a parent in the underlying abuse, neglect, and dependency proceeding and the attorney has not been relieved of responsibility, a copy of all pleadings and other papers (but not a summons) must be served on the attorney pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a2).

B. Expiration of Summons

The provisions of Rule 4 of the Rules of Civil Procedure determine the life of a juvenile summons. Rule 4(c) requires that a summons be served within 60 days after the date of issuance, but provides that failure to serve the summons within 60 days does not invalidate the summons. When the 60-day time limit is not met, Rule 4(d) allows an extension of the time for service by obtaining either:

- an endorsement on the original summons for an extension of time, but the endorsement must be obtained within 90 days of issuance of the summons; or
- an alias or pluries summons (a summons subsequent to the first), obtained within 90 days of the issuance of the summons.

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

Under Rule 4(e), failure to secure an endorsement or an alias or pluries summons within 90 days results in discontinuance of the action with respect to a party who was not served within the 60-day period. Even after a discontinuance of the action, the petitioner may obtain an extension, an endorsement, or even a new summons, reviving the action. However, the action will be deemed to have commenced when the endorsement, alias or pluries summons, or new summons was obtained. At least in juvenile cases, discontinuance of an action under Rule 4(e) does not operate to deprive the court of subject matter jurisdiction, and the court may proceed to exercise personal jurisdiction in the action over a party who makes a voluntary appearance and does not object to insufficiency of service or process. See *In re N.E.L.*, 202 N.C. App. 576, 578 (2010) and *In re J.D.L.*, 199 N.C. App. 182, 187 (2009), in which the court of appeals stated that the supreme court, in *In re J.T.*, 363 N.C. 1 (2009) and *In re K.J.L.*, 363 N.C. 343 (2009), "appear[s] to have rejected the application of Rule 4(e) of the North Carolina Rules of Civil Procedure in all cases under the Juvenile Code."

4.4 Service

A. The Impact of Service

Service of process, unless waived, is necessary for the court to obtain personal jurisdiction over a respondent. Service effects the notice that is required as an element of due process under the federal and North Carolina constitutions. *See Harris v. Harris*, 104 N.C. App. 574 (1991), and the cases cited therein. The Juvenile Code specifically directs the court to "protect the rights of the juvenile and the juvenile's parent to assure due process of law." G.S. 7B-802.

Nevertheless, service on and personal jurisdiction over only one parent is sufficient for the court to proceed in an abuse, neglect, or dependency case. *In re Poole*, 357 N.C. 151 (2003), *rev'g per curiam for the reasons stated in the dissent*, 151 N.C. App. 472, 476–77 (2002). To determine whether a lack of notice unreasonably deprived the parent who was not served of due process, the court balanced the parent's right to custody with the state's interest in the welfare of children and the child's right to be protected by the state from abuse or neglect. *Id.*

Appellate cases have discussed the importance of fundamentally fair service procedures when the liberty interests of parents are at stake. *In re K.N.*, 181 N.C. App. 736 (2007), was a case in which service was questionable because although there were signed receipts showing acceptance of service by someone residing at the address on the summons, there was no evidence that the address was where the respondent mother actually lived. The mother arrived in the courtroom after the TPR hearing had concluded, but the court of appeals was not swayed by an argument that her arrival proved she had notice. The court of appeals cited *Santosky v. Kramer*, 455 U.S. 745 (1982), in support of its conclusion that the order should be vacated for lack of fair procedure due to issues of valid service and a twenty-minute hearing with no counsel present for the respondent. Similarly, in the case *In re H.D.F.*, 197 N.C. App. 480 (2009), failure to serve a father (whose counsel had withdrawn) with notices of hearings and numerous other documents filed in the neglect case was error and required reversal of an adjudication that occurred at a hearing of which the father had not been notified.

B. Summons

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

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

(a) Personal delivery. Service can be made by an authorized person's delivery of a copy of the summons and petition to the person or leaving copies at his or her house or usual place

of living with a person "of suitable age and discretion" who lives there.

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

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

(a) Applicability. With respect to abuse, neglect, and dependency proceedings, the Juvenile Code states that if service by publication pursuant to Rule 4(j1) of the Rules of Civil Procedure is required, the cost may be charged as court costs. G.S. 7B-407. (Before October 1, 2013, service by publication required prior court authorization. *See* S.L. 2013-129, sec. 12.) With respect to TPR proceedings, the Juvenile Code deals with unknown parents in G.S. 7B-1105, requiring a special hearing to attempt to ascertain the parent's identity and permitting service by publication when the parent's identity cannot be ascertained. *See infra* § 9.6 (discussing details related to a hearing on the unknown parent and special requirements for service by publication). Where the parent's identity can be ascertained but service on the parent cannot be accomplished by other means, service by publication is appropriate, but must comply with both the Juvenile Code (G.S. 7B-1106, 7B-1106.1), and Rule 4(j1). *See In re C.A.C.*, 222 N.C. App. 687 (2012); *In re Joseph Children*, 122 N.C. App. 468 (1996) (decided under prior law).

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

What constitutes "diligent efforts" is not specifically defined by statute or case law. North Carolina cases have rejected having a "checklist" for what constitutes due diligence and have said that this issue is fact-specific and must be examined on a case by case basis. *See, Jones v. Wallis*, 211 N.C. App. 353, 358 (2011); *Emanuel v. Fellows*, 47 N.C. App. 340, 347 (1980). Some cases have stated that to exercise due diligence a party must use all "resources reasonably available" to accomplish service. *See Jones v. Wallis*, 211 N.C. App. 353, 357; *Fountain v. Patrick*, 44 N.C. App. 584, 587 (1980). Nevertheless, the court of appeals has rejected the notion that due diligence requires that a party "explore every possible means of ascertaining the location of a defendant." *Jones v. Wallis*, 211 N.C.

App. 353, 359 (holding that due diligence was exercised where: service was attempted at defendant's last known address and another address, public records were searched, the internet was searched, counsel for plaintiff went personally to last known address to speak with current residents, determination was made that last known address had been foreclosed, and a copy of the complaint was sent to defendant's attorney to ask that he accept service). Where a new address for the defendant was specifically provided to the plaintiff in an email from the defendant's attorney but service was only attempted at the defendant's old address, this did not constitute diligent efforts. *Dowd v. Johnson*, __ N.C. App. __,760 S.E.2d 79 (2014).

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

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

Practice Note: Sometimes in practice, after a diligent search is made, a diligent search affidavit is presented to the court with a request for authority to serve by publication. In abuse, neglect, and dependency cases, where the court can proceed without personal jurisdiction over both parents, service by publication sometimes is done only where both parents are missing. However, the court may continue to inquire into and enter orders about efforts to locate and serve a missing parent, and sometimes a parent will be served by publication so that the court's orders will be binding on that parent or so that a subsequent TPR can be initiated by motion in the cause.

(c) Contents of notice. Rule 4(j1) is very specific with respect to the contents of the published notice. In addition, the contents of the notice must comply with Juvenile Code requirements related to summons content. In the case *In re C.A.C.*, __ N.C. App. __, 731 S.E.2d 544 (2012), the court of appeals held that service by publication in a TPR case was deficient because it did not include notice of the respondent's right to counsel, required by G.S. 7B-1106(b)(4). Respondent did not appear at the hearing and although provisional counsel did appear, the court of appeals held that provisional counsel's appearance could not be considered a "general appearance" that would waive the deficiency in service. *See also In re Joseph Children*, 122 N.C. App. 468 (1996) (finding error where service by publication did not comply with the Juvenile Code requirement that summons contain information about requesting counsel).

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

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

See G.S. 7B-1102(b)(1)b and G.S. 7B-406(b)(4)e.

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

Practice Notes: Where the name of the parent being served is known, the published notice should contain any known aliases as well as the parent's name. Whether the full name of the other parent (the one not being served by publication) should be included in the notice is not specifically addressed in the Rules or the Code, but presumably it should be included. G.S. 7B-1105 states that when serving a parent whose identity is unknown, the words "In re Doe" may be substituted for the title of the case. No similar provision exists for other cases in which service by publication is required. While Rule 3.1 of the Rules of Appellate Procedure protects the child's identity in appellate documents, nothing in the statutes or in case law addresses protection of the child's identity in a publication notice.

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

(d) Where to publish. Publication of notice is where the person to be served is believed to be located, but if there is no reliable information as to the person's location, publication is appropriate where the action is pending. If the parent in a TPR proceeding is unknown, at the hearing required by G.S. 7B-1105 the court orders publication in one or more locations the court determines are most likely to be effective in notifying the parent. *See* G.S. 7B-1105(d).

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

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

- that the publication and mailing (if the party's post office address is known) were done in accordance with the requirements of G.S. 1-75.10(a)(2), which requires an affidavit of the publisher or printer specifying the date of the first and last publication, and an affidavit of the person who mailed a copy of the complaint or notice if mailing was required;
- circumstances warranting the use of service by publication and efforts that were made to serve by other means (*see In re Shaw*, 152 N.C. App. 126 (2002) (reaffirming the necessity of including this information on the affidavit and finding this requirement satisfied when the affidavit stated that the respondent's address, whereabouts, dwelling house, or usual place of abode was unknown and could not with due diligence be ascertained because the respondent was a transient person with no permanent residence)); and
- information, if any, regarding the location of the party served.

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

3. Service in a foreign country. Service in a foreign country is governed by Rule 4(j3) of the Rules of Civil Procedure, which allows service by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents when the convention applies. N.C. R. CIV. P. 4(j3)(1). However, this is a complex issue that this manual does not attempt to address fully. Proper service methods vary from country to country and the appropriate method depends on whether a particular country is a party to the Hague Convention or another convention dealing with service. Even when a country is a signatory to a convention, it is critical to know whether the country has filed objections or exceptions. Mexico, for example, is a signatory to the Hague Convention, but has filed an objection to alternative service methods, so that service by publication in Mexico is not an option.

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

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

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

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

For information from the UNC School of Government on this topic, see W. Mark C. Weidemaier, *International Service of Process Under the Hague Convention*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/07 (UNC School of Government, Dec. 2004) and W. Mark C. Weidemaier, *Service of Process and the Military*, ADMINISTRATION OF JUSTICE BULLETIN No. 2004/08 (UNC School of Government, Dec. 2004).

C. Notice and Motions

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

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

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

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

Although service of the summons on the child is not required, where the child is required to receive notice, acceptance of service by an attorney advocate constitutes proper service on a GAL, which constitutes proper service on a child represented by the GAL. *See In re J.A.P.*, 189 N.C. App. 683 (2008) (decided under former law).

4.5 Continuances

A. Continuances Disfavored

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

B. Abuse, Neglect, Dependency Proceedings

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

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

Otherwise, the court may grant a continuance "only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile." G.S. 7B-803. *See In re R.L.*, 186 N.C. App. 529 (2007) (finding that neither a systemic problem of over-scheduling nor the absence of a respondent or a respondent's attorney at an earlier hearing constituted extraordinary circumstances warranting multiple continuances), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008). Resolution of a pending criminal charge against a respondent arising out of the same circumstances as the juvenile petition cannot be the sole extraordinary circumstance for granting a continuance. G.S. 7B-803.

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

C. TPR Proceedings

G.S. 7B-1109(d) authorizes the court to continue an adjudication hearing in a TPR proceeding for up to 90 days from the date of the initial petition to:

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

A continuance beyond 90 days may be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court must enter a written order stating the grounds for granting the continuance. G.S. 7B-1109(d). *See In re Mitchell*, 148 N.C. App. 483, *rev'd on other grounds*, 356 N.C. 288 (2002) (applying G.S. 7B-803 to determine that denial of a continuance in a TPR case was proper where nothing in the record indicated that the court requested or needed additional information in the best interests of the children, that more time was needed for expeditious discovery, or that extraordinary circumstances necessitated a continuance, and where it was apparent that mother's absence was voluntary or a result of her own negligence).

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

In a private TPR case, it was not error for the trial court to deny a motion to continue when the respondent did not appear at the hearing despite being aware of the hearing and had his attorney make an oral motion for continuance at the hearing. The court found the respondent did not demonstrate extraordinary circumstances when denying the request. *In re C.J.H.*, __ N.C. App. __, __ S.E.2d __ (April 21, 2015).

D. Considerations

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

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

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

4. Time to prepare. Although continuances are disfavored, the court's failure to grant a continuance may be reversible error if good cause for the continuance exists and the party is prejudiced by the denial. G.S. 7B-908(b)(2), when it authorizes the court to appoint a guardian ad litem for the juvenile at an initial post-termination of parental rights hearing, says specifically that "[t]he court may continue the case for such time as is necessary for the guardian ad litem to become familiar with the facts of the case." The burden is on the party seeking a continuance to show good cause. *See In re D.Q.W.*, 167 N.C. App. 38 (2004) (holding that respondent was not prejudiced where he did not explain why his attorney had insufficient time to prepare, what his attorney hoped to accomplish during a continuance, or how preparation would have been more complete if a continuance had been granted). If a continuance is necessary in order to safeguard a party's constitutional rights, it must be granted. *State v. Jones*, 342 N.C. 523 (1996).

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

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

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

4.6 Discovery

A. Discovery Generally

G.S. 7B-700 addresses discovery in abuse, neglect, dependency, and TPR proceedings and supersedes the discovery provisions in the Rules of Civil Procedure. Because G.S. 7B-700 applies to all actions under Subchapter I of the Code, it also applies when petitions are filed relating to alleged interference with or obstruction of a DSS assessment or for judicial review of a responsible individual determination. The Code encourages a process in which parties access information by means of permissible voluntary information sharing before resorting to discovery motions to obtain information. Parties are permitted to utilize discovery motions only if they have made a reasonable effort to obtain the information they seek using non-judicial procedures. G.S. 7B-700(c). Any party may file motions to compel or limit discovery.

Note that the Juvenile Code addresses information sharing in juvenile cases in more than one place (not just in the discovery statute). *See infra* § 2.7.B (discussing information sharing and access to information in juvenile cases).

B. The Juvenile Code and Discovery

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

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

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

2. GAL sharing of information. The child's guardian ad litem is not free to voluntarily share information with other parties, but can share information pursuant to either a court order or local rules. G.S. 7B-700(f). The GAL also must share information requested by other designated agencies (including DSS) under G.S. 7B-3100 to the extent that information falls within the parameters of that statute. See *infra* § 2.7.B.6 for more information on this agency sharing statute. In addition, the GAL must share reports and records with all parties before submitting them to the court. G.S. 7B-601(c).

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

Local rules or administrative orders issued pursuant to this authority apply only to the parties to a juvenile proceeding and may not be directed to agencies or entities that are not parties. Information sharing among agencies is covered by G.S. 7B-3100, and rules issued by the Department of Public Safety authorize a chief judge to issue administrative orders designating local agencies that are required to share information pursuant to that statute. *See* 14B N.C.A.C. 11A.0301 and .0302.

4. Discovery motion contents. A motion for discovery must contain:

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

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

5. Discovery procedure. A motion for discovery must be served on all parties pursuant to Rule 5 of the Rules of Civil Procedure. The court must conduct a hearing and rule on the motion within 10 business days of the date the motion is filed. G.S. 7B-700(c). G.S. 7B-700 makes no reference to the discovery procedures in the Rules of Civil Procedure. A chief judge might reference or incorporate certain discovery rules in the district's local rules or an administrative order issued pursuant to G.S. 7B-700.

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

7. Limitations on discovery. A court hearing a motion for discovery may grant, restrict, defer, or deny the relief requested. G.S. 7B-700(c). A party requesting that discovery be denied, restricted, or deferred must submit the information the party seeks to protect for in camera review by the court. If the court denies discovery, copies of materials submitted for in camera review must be preserved for potential appellate review. G.S. 7B-700(d). *See In re J.B.*, 172 N.C. App. 1 (2005) (holding, in a case decided under prior law, that the trial court did not err in using its authority to "deny or restrict" discovery where it denied a request to interview the child due to the disruption it would cause to the child's therapeutic progress).

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

4.7 Intervention

A. Abuse, Neglect, Dependency Proceedings

The Juvenile Code defines precisely who the parties are in an abuse, neglect, or dependency proceeding. See G.S. 7B-401.1. Someone who is not a party but is providing care for the child, such as a foster parent, is entitled to notice of and an opportunity to be heard at review hearings. In addition, the court may require that notice be given to others persons or agencies. G.S. 7B-906.1(b), (c). The court may consider information from any person or agency that will aid in the court's review. G.S. 7B-901, 7B-906.1(c). The right to notice and to be heard does not confer party status.

Only the following may intervene in an abuse, neglect, or dependency proceeding:
- the juvenile's parent, guardian, custodian, or caretaker;
- another DSS that has an interest in the proceeding; or
- a person with standing to initiate a TPR proceeding who seeks to intervene for the sole purpose of filing a motion for termination of parental rights.

G.S. 7B-401.1(h), 7B-1103(b).

Until legislative changes in 2013, the Juvenile Code addressed intervention in abuse, neglect, or dependency proceedings only in G.S. 7B-1103(b) and only in relation to those who have standing to initiate TPR proceedings. *See* S.L. 2013-129, sec. 9. It was not unusual, however, for relatives or foster parents to make motions to intervene in juvenile cases in order to seek custody of or visitation with a child. The few appellate court decisions that addressed intervention applied Rule 24 of the Rules of Civil Procedure to assess the propriety of the trial court's ruling. *See, e.g.*, *In re T.H.*, ___ N.C. App. ___, 753 S.E.2d 207 (2014) (holding that biological mother of adopted children was not entitled under Rule 24 to intervene in a juvenile proceeding as a matter of right and that trial court did not abuse its discretion in denying her motion for permissive intervention). Because the Juvenile Code now addresses intervention explicitly, Rule 24 does not apply in abuse, neglect, and dependency cases. (The applicability of Rule 24 in TPR cases is different and is addressed in B. below.)

While opportunities for intervention are limited, the Code does address the overlap of civil actions for custody or visitation and juvenile proceedings involving the same child. When parties or nonparties to an abuse, neglect, or dependency action seek custody of the child in a civil action or are already engaged in a custody action involving the child when the juvenile case is filed, the civil action is automatically stayed for as long as the court exercises jurisdiction in the juvenile matter. However, the Juvenile Code authorizes the court in the juvenile proceeding to consolidate the custody case and the abuse, neglect, or dependency case, or to stay the juvenile case and allow the custody action to proceed. *See* G.S. 7B-200(c), (d); G.S. 7B-401.1(h). *See supra* § 1.4 (discussing overlapping actions).

A relative or other person seeking custody of or visitation with a child who is the subject of an abuse, neglect, or dependency proceeding can initiate a civil custody action, or file a motion in an existing civil action, and move for the court to consolidate the civil and juvenile

actions or to stay the juvenile action. The procedure for doing that is unclear, however, since only the judge in the juvenile case, to which the person may not be a party, can rule on the motion to consolidate or stay.

B. Termination of Parental Rights Proceedings

The statutory limitations on intervention (in G.S. 7B-401.1(h) and 7B-1103(b)) apply only to abuse, neglect, and dependency proceedings. The Juvenile Code is silent with respect to intervention in termination of parental rights proceedings. Where the Juvenile Code is silent, appellate decisions have applied Rule 24 to analyze whether intervention is permissible. *See In re T.H.*, ___ N.C. App. ___, 753 S.E.2d 207, 212 (2014) (holding that intervention pursuant to Rule 24 was permissible in a dependency case to which the statutory limitations on intervention did not apply [note that this holding was superseded by G.S. 7B-401.1(h)]); *In re Baby Boy Scearce,* 81 N.C. App. 531, 541 (1986) (upholding the application of Rule 24 to allow permissive intervention by foster parents, emphasizing the child's best interest).

Assuming that Rule 24 applies in termination actions, it is important to distinguish the rule's provisions for intervention of right and those for permissive intervention.

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

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

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

2. Permissive intervention. Under Rule 24(b) the court may grant a motion for permissive intervention by someone whose claim or defense has a question of law or fact in common with the main action. N.C. R. CIV. P. 24(b). However, because the courts have held that a respondent parent cannot file a counterclaim for custody in a termination of parental rights action [*see, e.g.*, *In re Peirce*, 53 N.C. App. 373 (1981)], it seems unlikely that a third party could intervene in a TPR to pursue a custody claim. Either a party or a nonparty can file a civil action for custody or a motion in a pending civil custody action and seek to have that action consolidated with the termination of parental rights action. *See Smith v. Alleghany County Dept. of Social Services*, 114 N.C. App. 727 (1994). *See also Griffin v. Griffin*, 118 N.C. App. 400, 403 (1995) (holding under former statutory scheme that "because custody and adoption proceedings relating to the same child have 'common questions of law or fact,'

the judge" could consolidate the proceedings pursuant to Rule 42(a) of the Rules of Civil Procedure).

Should a court find that Rule 24 does apply to allow permissive intervention, in addition to showing a common issue of law or fact, the person seeking to intervene must establish that he or she has standing to assert the claim or defense put forward. *See, e.g.*, *Perdue v. Fuqua*, 195 N.C. App. 583 (2009) (affirming denial of grandmother's motion to intervene on basis that allegations in her motions to intervene and for custody were insufficient to establish that she had standing to seek custody). In deciding whether to grant a motion for permissive intervention, the court must consider whether allowing intervention will unduly delay or prejudice the adjudication of the rights of the original parties. N.C. R. CIV. P. 24(b). The standard for reviewing an order granting or denying a motion for permissive intervention is abuse of discretion. *In re T.H.*, ___ N.C. App. ___, 753 S.E.2d 207 (2014).

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

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

4.8 Motions in Juvenile Proceedings

A. Motions Procedure

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

Under Rule 7(b) of the Rules of Civil Procedure, a motion may be oral only if it is made during a hearing or at a session for which the case is calendared. Otherwise, motions must be in writing. A motion must state the specific rule under which the movant is proceeding. The format of motions is governed by Rule 10 of the Rules of Civil Procedure. Unless the Juvenile Code states otherwise, the filing and service of motions is pursuant to Rule 5 of the Rules of Civil Procedure (*see supra* § 4.4.C, relating to service of motions), and the timeframe for a motion is according to Rule 6 of the Rules of Civil Procedure, which generally requires service no later than 5 days prior to the hearing. When a motion is based on facts that are not in the record, the court may determine the motion based on affidavits presented by the parties, or the court may require that the matter be heard wholly or partly on oral testimony or depositions. N.C. R. CIV. P. 43(e).

Under Rule 6 of the General Rules of Practice for the Superior and District Courts, motions must be signed by at least one attorney of record if the party is represented by counsel, stating the attorney's office address and telephone number. The court has the discretion to order arguments on a motion to be accomplished by means of a telephone conference without requiring counsel to appear in court in person. On motion of any party, the court may order that the telephone conference be recorded. The court may direct a party to pay the costs of the telephone calls.

B. Common Motions in Juvenile Proceedings

Motions common in juvenile proceedings, addressed in other parts of this manual, include:

- appointment of guardian ad litem for parent (*see infra* §§ 2.5.F; 5.4.B.4; 9.4.B)
- use of audio-visual equipment for remote testimony (*see infra* § 11.2.B.1)
- continuances (*see supra* § 4.5)
- writ for incarcerated parent to be brought to hearing (*see supra* § 2.5.B.2)
- funds for expert or other expenses (*see supra* § 2.5.E)
- amendments to petition (*see supra* § 4.2.D)
- various evidentiary motions (*see infra* ch. 11, Evidence)

Some motions can be made using forms provided by the Administrative Office of the Courts (AOC). Note the importance of ensuring that a form is up to date and used correctly (i.e., do not assume that use of the form will automatically comply with relevant statutes). Motions for which AOC forms are available include:

- Form AOC-G-107, "Motion And Appointment Authorizing Foreign Language Interpreter/Translator" (Mar. 2007).
- Form AOC-G-115, "Request And Order For Authorizing Transcript Of Confidential Proceeding" (Feb. 2012).
- Form AOC-G-116 "Motion, Appointment And Order Authorizing Payment Of Deaf Interpreter Or Other Accommodation" (Mar. 2007).
- Form AOC-J-140, "Motion for Review (Abuse/Neglect/Dependency)" (Oct. 2013).
- Form AOC-J-155, "Motion And Order To Show Cause (Parent, Guardian, Custodian Or Caretaker In Abuse/Neglect/Dependency Case)" (Nov. 2000).

4.9 Judgments and Orders

A. Drafting Orders

1. Who drafts the order. Judges of course may draft their own orders, but nothing prevents the trial judge from directing the prevailing party to draft an order on the court's behalf. *In re J.B.*, 172 N.C. App. 1 (2005); *see also In re S.N.H.*, 177 N.C. App. 82 (2006) (holding that the trial court did not err in directing the petitioner's attorney to draft an order after enumerating in court specific findings of fact to be included in the order); *In re H.T.*, 180 N.C. App. 611 (2006). Rule 52 of the Rules of Civil Procedure, addressing findings by the court, has not been

interpreted to require the judge to manually draft or orally dictate a judgment. *See Johnson v. Johnson*, 67 N.C. App. 250 (1984) (finding no error where the court directed an attorney to prepare proposed findings and conclusions and draft the judgment, and adopted the judgment as its own when tendered and signed); *Walker v. Tucker*, 69 N.C. App. 607 (1984). Regardless of who drafts an order, the trial court is ultimately responsible for the order. *In re A.B. and J.B.*, __ N.C. App., __, 768 S.E.2d 573 (2015). In the case *In re J.W. and K.M.*, __ N.C. App. __, __ S.E.2d __ (May 5, 2015), the courts of appeals acknowledged the common practice of having counsel draft orders and took that practice into consideration in its holding, explained *infra* in § 4.9.B.2.

2. Circulating draft orders. While it is common practice for attorneys to draft court orders, it is important that draft orders be circulated to all parties before being submitted to the judge. Another party may identify discrepancies between the draft order and that party's understanding of the judge's oral order, and a party may elect to submit his or her own proposed findings of fact or amendments to those in the draft order. *See also* North Carolina State Bar, 97 Formal Ethics Opinion 5 (1998) (relating to the need to submit a proposed order to opposing counsel simultaneously with submitting it to the court). In some districts local rules may address the circulation of draft orders.

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

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

B. Findings of Fact and Conclusions of Law[2]

The Juvenile Code includes a number of specific requirements for the court's findings and conclusions in orders, and these requirements vary depending on the type and stage of the proceeding. In addition, Rule 52 of the Rules of Civil Procedure requires specific and separate findings of fact and conclusions of law.

2. Some content in this subsection was sourced or adapted from Janet Mason, *Drafting Good Court Orders in Juvenile Cases*, JUVENILE LAW BULLETIN No. 2013/02 (UNC School of Government, September 2013).

1. Separation of findings of fact and conclusions of law. Rule 52(a) of the North Carolina Rules of Civil Procedure governs court orders in bench trials and has been applied to juvenile proceedings. *See In re T.P.*, 197 N.C. App. 723 (2009); *In re J.L.*, 183 N.C. App. 126 (2007); *In re C.W.*, 182 N.C. App. 214 (2007). Rule 52(a) specifically requires that findings of fact and conclusions of law be stated separately. Appellate courts have noted that the failure to separate findings from conclusions can hinder appellate review and in some cases may prevent the appellate court from determining whether the order is supported by clear, cogent, and convincing evidence, prompting a remand. *See In re T.M.M.*, 167 N.C. App. 801 (2005); *see also infra* § 12.8 (explaining the standards of review for findings and conclusions). However, a mislabeled finding of fact or conclusion of law may be reviewed on appeal according to its correct label. *See In re M.M.*, __ N.C. App. __, 750 S.E.2d 50 (2013).

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

- **Recitation of allegations**. A number of appellate decisions have held that fact findings must consist of more than mere recitations of the allegations in the petition. *See, e.g.*, *In re O.W.*, 164 N.C. App. 699 (2004) (remanding the case where findings were a mere recitation of the allegations and were not sufficiently specific); *In re Harton*, 156 N.C. App. 655 (2003) (citing Rule 52 and discussing the disfavor of mere recitation in context of a permanency planning order); *In re Anderson*, 151 N.C. App. 94 (2002) (citing Rule 52 and discussing the disfavor of mere recitation in context of a TPR order). However, in the case *In re J.W. and K.M.*, the court of appeals sought to clarify such decisions and held that it is not *per se* reversible error for findings of fact to mirror the wording of a party's pleading. Instead, the determination of whether findings of fact are sufficient depends on an examination of the record of the proceedings and whether they "demonstrate that the trial court, through process of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re J.W. and K.M.*, __ N.C. App. __ at __, __ S.E.2d __ (May 5, 2015) (citations omitted). In its reasoning, the court of appeals acknowledged that trial judges often rely on counsel to assist in drafting orders, and stated the need to avoid imposing on counsel the obligation "to eliminate unoriginal prose."
- **Recitation of testimony and sufficient specificity**. Findings must consist of more than mere recitation of the testimony of witnesses, and they must be sufficiently specific to allow an appellate court to review the decision and test the correctness of the judgment. A finding of fact by the court reflects a determination that evidence is credible and sufficiently clear and convincing to permit the court to say that something is a fact. For example, the statement "Dr. Lee testified that the child's injuries could not have been caused accidentally" is a recitation of testimony, whereas the statement "the child's injuries could not have been caused accidentally" is a finding of fact based on the court's determination that the doctor's testimony was credible, clear, and convincing. *See, e.g.*, *In re M.M.*, __ N.C. App. __, 750 S.E.2d 50 (2013) (holding that many of the trial court's findings were actually recitations of assertions made by parties and witnesses or even arguments by attorneys); *In re H.J.A.*, __ N.C. App. __, 735 S.E.2d 359 (2012) (holding

that the trial court's findings of fact were insufficient, although it had recited testimony that might support the required findings);

- **Reports and documents in an order.** Juvenile proceedings typically involve multiple reports and documents. A report or other document simply attached to an order does not by itself constitute findings of fact. When reports and documents are evidence that the court considered at the hearing, they do not need to be attached to an order. When they (or portions of them) are being incorporated by reference as findings of fact, or the court is finding as a fact that the document exists, they should be attached to the order and the order should specify what the attachment is and why it is being attached. However, the court should incorporate by reference sparingly, and then only if accompanied by the court's own specific findings related to what is incorporated. *See In re H.J.A.*, __ N.C. App. __, 735 S.E.2d 359 (2012) (the trial court's order referencing the GAL and DSS reports without making specific findings about those reports was insufficient); *In re A.S.*, 190 N.C. App. 679 (2008); *In re C.M.*, 183 N.C. App. 207 (2007) (finding no error in incorporating reports where the trial court did not simply adopt reports but made separate findings based them).
- **Findings based on evidence.** Findings of fact must be based on evidence that is actually presented and admitted by the court. *See In re C.W.*, 182 N.C. App. 214 (2007) (finding that the trial court's order and its findings of fact contained information that was neither introduced nor admitted at trial); *In re A.W.*, 164 N.C. App. 593 (2004) (finding error where the trial court based findings of fact for adjudication on a report that was not introduced at adjudication). The issue of what constitutes competent evidence is discussed *infra*, Chapter 11, but note that statements by counsel are not evidence and do not support findings of fact. *In re D.L.*, 166 N.C. App. 574 (2004). When a case is appealed, the issue of whether there is sufficient evidence to support the findings may be raised regardless of whether that issue was raised in the trial court.
- **Specific findings required by the Juvenile Code.** Many provisions in the Juvenile Code require the court to make very specific findings to support specific types of orders and/or to reflect appropriate consideration of statutory criteria in various stages of the proceedings. In many appellate cases, failure of the trial court to make findings required by the Code has led to reversal. This has been especially true when courts fail to make required findings under G.S. 7B-507 (ceasing reunification efforts, *see supra* § 2.6.E.6 for related cases); G.S. 7B-906.1(n) (waiving further review hearings, *see infra* § 8.2.A.4 for related cases); and G.S. 7B-906.1(d), (e) (required findings for review and permanency planning hearings, *see infra* § 8.3 for related cases). (Note that older cases will refer to G.S. 7B-906 and 7B-907, which were replaced by G.S. 7B-906.1, effective October 1, 2013, by S.L. 2013, sec. 26.) However, the North Carolina Supreme Court in the case *In re L.M.T.*, __ N.C. __, 752 S.E.2d 453 (2013), rejected the argument that findings must include exact statutory wording, emphasizing practical application of the law so that the best interests of the child are the paramount concern. Examining a permanency planning order for compliance with G.S. 7B-507, the supreme court held that findings of fact do not need to quote the precise language of the statute, but must "address the substance of the statutory requirements," noting also that use of the precise statutory language will not remedy a lack of supporting evidence for the trial court's order.

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

Conclusions of law must be supported by findings of fact. Where specific findings required by a particular statute are not made or are not specific or strong enough to support the conclusions, appellate courts will not affirm the trial court's order. *See In re I.K.*, __ N.C. App. __, 742 S.E.2d 588 (2013) (reversing a permanency planning order where there were inconsistent findings and evidence, including findings that there was a risk of sexual abuse by the father and that the father should have unsupervised visitation); *In re H.J.A.*, __ N.C. App. __, 735 S.E.2d 359 (2012) (holding that the trial court erred where findings did not specify which parent particular findings referred to and specific findings required by 7B-907(b) were not made); *In re I.R.C.*, 214 N.C. App. 358 (2011) (holding that trial court erred in failing to link its findings to its conclusion to cease reunification efforts and neglecting to address G.S. 7B-507(b) requirements). *See also In re O.J.R.*, __ N.C. App. __, 769 S.E.2d 631 (2015) (where the trial court's TPR order was reversed and remanded in part due to its failure to make the required findings and conclusions and its lack of findings to support some conclusions).

For findings of fact to support conclusions of law, they must not be inconsistent with those conclusions. In the case *In re A.B. and J.B.*, __ N.C. App. __, 768 S.E.2d 573 (2015), the court of appeals reversed the trial court's order terminating a mother's parental rights where the court's conclusions contradicted its findings and some of its findings contradicted other findings.

Note that while parties may stipulate to facts, they may not stipulate to conclusions of law. *See In re A.K.D*, __ N.C. App. __, 745 S.E.2d 7 (2013) and *infra* § 6.2.G. related to stipulations.

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

C. Entry and Service of the Order

1. What constitutes entry. The Juvenile Code provides for orders to be entered and served in accordance with Rule 58 of the Rules of Civil Procedure. G.S. 7B-1001. An order is not

entered until it is reduced to writing, signed by the judge, and filed with the clerk. *See In re Pittman*, 151 N.C. App. 112 (2002); *In re Hayes*, 106 N.C. App. 652 (1992). This means that when the judge makes an oral order in open court, it does not become enforceable until it is reduced to writing, signed by the judge, and filed with the clerk of court. *See Carland v. Branch*, 164 N.C. App. 403 (2004).

A trial court's misapprehension of when an order terminating parental rights was entered led to a reversal in the case *In re B.S.O.*, __ N.C. App. __, 740 S.E.2d 483 (2013). The trial court has broad discretion to re-open a case and admit additional testimony after the conclusion of the evidence, after argument of counsel, even weeks after the original hearing, or when the "ends of justice require." In *B.S.O.*, which cites cases on this principal, the trial court refused to exercise its discretion as to whether to take additional evidence, because it thought a valid order terminating parental rights had been entered, when in fact the order was not final because it had not been reduced to writing.

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

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

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

In addition, the time period for filing these motions is tolled for any period of noncompliance with the service provisions, but not longer than 90 days. N.C. R. CIV. P. 58.

G.S. 7B-1001(b) requires that notice of appeal be given "within 30 days after entry and service of the order in accordance with . . . Rule 58." Thus, the time within which notice of appeal must be given does not begin to run until both entry and service have occurred. For details related to notice of appeal, see *infra* § 12.5.

D. Time Requirements for Orders

1. Entry of order within 30 days. Orders for all of the following types of hearings must be in writing, include appropriate findings of fact, and be entered (signed by judge and filed with clerk) within 30 days of the hearing:

- nonsecure custody, G.S. 7B-506(d);
- adjudication of abuse, neglect, or dependency, G.S. 7B-807(b);
- disposition in abuse, neglect, or dependency case, G.S. 7B-905(a);
- review, G.S. 7B-906.1(h);
- permanency planning, G.S. 7B-906.1(h);

- hearing on unknown parent, G.S. 7B-1105(e); and
- TPR adjudication and disposition, G.S. 7B-1109(e), 7B-1110(a).

2. Clerk's duty to reschedule when entry is late. For certain orders, the Juvenile Code gives the clerk responsibility for scheduling a special hearing when the order is not entered within the 30-day time requirement:

- adjudication of abuse, neglect, or dependency, G.S. 7B-807(b);
- review, G.S. 7B-906.1(h);
- permanency planning, G.S. 7B-906.1(h); and
- TPR adjudication and disposition, G.S. 7B-1109(e), 7B-1110(a).

If the order is not entered within 30 days after the hearing, the juvenile clerk is required to schedule a hearing at the first session of juvenile court after the 30-day period for an explanation and determination of the reason for the delay and to obtain any needed clarification about the contents of the order. The court must enter the order within 10 days after this hearing.

3. Remedy for untimely orders is mandamus. The appropriate remedy for a trial court's failure to enter a timely order is mandamus, not a new hearing. *In re T.H.T.*, 362 N.C. 446 (2008). Application for a writ of mandamus is made pursuant to Rule 22 of the North Carolina Appellate Rules. In describing the remedy of mandamus, the court specified these required elements:

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

In re T.H.T., 362 N.C. 446, 453–54.

E. Modifying, Vacating, and Obtaining Relief from Orders

1. Modification under the Juvenile Code. Where there is an adjudication of abuse, neglect, or dependency, the court has the authority to modify or vacate any order or disposition made in the case as long as the court has jurisdiction. G.S. 7B-1000(b). The court, on motion and after notice, may conduct a review hearing to determine whether modification of an order is in the best interests of the child, and may modify or vacate the order in light of changes in circumstances or the needs of the juvenile. G.S. 7B-1000(a). For an explanation of modification of orders pursuant to dispositional statutes or this statute, see practice note *infra* § 8.2.A.

If a guardian of the person has been appointed for the child and guardianship has been made the permanent plan, any hearing to determine modification of the order is pursuant to G.S. 7B-600(b).

2. Modification under Rule 60. In addition to G.S. 7B-1000, modification of or relief from orders may occur pursuant to Rule 60 of the Rules of Civil Procedure.

(a) Clerical mistakes. The trial court can correct clerical mistakes at any time on the court's own initiative or on motion of a party after notice, if ordered by the court. If an appeal is pending, the trial court may correct clerical mistakes before the appeal is docketed in the appellate division. N.C. R. CIV. P. 60(a); *see also In re J.K.P.*, __ N.C. App. __, 767 S.E.2d 119 (2014) (affirming trial court and allowing correction of a clerical error pursuant to Rule 60(a) prior to the appeal being docketed where the trial court's written findings and its contemporaneous statements at the hearing showed that the wrong box was checked on a form allowing for waiver of counsel). After the appeal is docketed, the trial court may correct an order only with the appellate court's permission. N.C. R. CIV. P. 60(a). *See In re C.N.C.B.,* 197 N.C. App. 553 (2009) (holding that Rule 60 did not permit trial court to make substantive modifications to a judgment after notice of appeal was given).

(b) Mistake, inadvertence, etc. A party may make a motion for relief from a judgment or order for

- mistake, inadvertence, surprise, or excusable neglect;
- newly discovered evidence that could not have been discovered in time to move for a new trial;
- fraud, misrepresentation, or other misconduct of an adverse party; or
- the judgment is void,

N.C. R. CIV. P. 60(b).

(c) Extraordinary circumstances. Rule 60 also permits relief from a judgment for "any other reason justifying relief." Application of this catch-all provision has been interpreted to be appropriate only where extraordinary circumstances exist and there is a showing that justice demands the relief requested. *See, e.g.*, *Howell v. Howell*, 321 N.C. 87 (1987); *Baylor v. Brown*, 46 N.C. App. 664 (1980).

(d) Final judgment required. Rule 60(b) motions for relief may be made only with respect to final judgments or orders. G.S. 7B-1001 sets out the types of orders that are final for purposes of giving notice of appeal in juvenile proceedings. *See infra* § 12.4.B (orders that may be appealed). In the case *In re E.H.*, __ N.C. App. __, __, 742 S.E.2d 844, 848 (2013), the court of appeals discussed finality in the context of Rule 60 and juvenile proceedings, noting that "[n]o judgment or order is ever truly 'final' in the juvenile context if the trial court retains jurisdiction, at least until the juvenile attains the age of majority." The court went on to hold, however, that a voluntary dismissal by DSS was final and that a motion under Rule 60(b) was the proper avenue to challenge the

voluntary dismissal by DSS. *See also In re A.B. and J.B.*, __ N.C. App. __, 768 S.E.2d 573 (2015) (where a trial court had granted a Rule 60 motion, the court of appeals noted that it could not analyze the motion in the context of Rule 60 because there had been no final judgment; the court of appeals opted to treat the motion not as a Rule 60 motion but as a motion to reopen the evidence, which is permissible in the discretion of the trial court).

(e) Timing. A motion pursuant to Rule 60 must be made "within a reasonable time" and in some circumstances within a year of the judgment from which relief is being sought. *See In re Saunders*, 77 N.C. App. 462 (1985) (affirming the decision to dismiss a motion for relief from a judgment or order where the respondent did not comply with time requirements of the rule).

(f) Motion made while appeal is pending; combined hearings. When a Rule 60(b) motion is made while an appeal is pending, a request may be made of the trial court to indicate how it *would* rule on the motion if an appeal were not pending, along with a request to the appellate court to delay consideration of the appeal until the trial court has considered the 60(b) motion. *See In re L.H.* 210 N.C. App. 355 (2011) (discussing this procedure pursuant to *Bell v. Martin*, 43 N.C. App 134 (1979), *rev'd on other grounds*, 299 N.C. 715 (1980)).