Chapter 9
Termination of Parental Rights[1]

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

9.1 Purpose and Overview of Termination of Parental Rights

A. Overview of Termination of Parental Rights

Termination of parental rights (TPR) is the state's ultimate interference with the constitutionally protected parent-child relationship, severing all legal ties between the parent and the child. TPR may occur only if the court finds by clear, cogent, and convincing evidence that at least one statutory ground for termination exists and also finds that terminating the parent's rights is in the child's best interest.

All TPR proceedings are in juvenile court, before a district court judge without a jury. Informally they are characterized as "private" actions (when initiated by one parent against the other, for example) or as "agency" actions (when the child is in the custody of DSS or a licensed child-placing agency that initiates the action). If an abuse, neglect, or dependency case is pending and the permanent plan for the child becomes adoption (see *supra* § 8.4, discussing various permanency options), DSS may be required to initiate TPR proceedings when TPR is necessary for the child to be adopted.

A TPR proceeding is divided into two stages, adjudication and disposition. At adjudication, the party initiating the proceeding (petitioner or movant) has the burden of proving by clear, cogent, and convincing evidence that one or more statutory grounds for termination of parental rights exist. If the court adjudicates one or more grounds, the court moves on to disposition where it determines whether TPR is in the child's best interest. At the disposition stage, there is no burden of proof. After considering additional relevant evidence, the court makes findings of fact and, based on those findings, makes a discretionary determination as to best interest.

If the court does not find that grounds for termination exist or, after adjudicating a ground, finds that TPR is not in the child's best interest, the court must dismiss the case.

If the court terminates parental rights and the child is in the custody of DSS or a licensed child-placing agency, post-termination review hearings must be held at least every 6 months to examine progress toward achieving the permanent plan for the child. Post-TPR review hearings as well as issues related to adoption are addressed in Chapter 10 *infra*.

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

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

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

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

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

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

9.2 Jurisdiction and Procedure

A. Subject Matter Jurisdiction

See *supra* §§ 3.1, 3.2, and 3.3 for a detailed discussion and case law related to subject matter jurisdiction.

The district court has exclusive original jurisdiction over termination of parental rights cases. G.S. 7B-200(a)(4); G.S. 7B-1101. Any order entered by a court that lacks subject matter jurisdiction is void. *See* N.C. R. CIV. P. 12(h)(3).

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

- proper petitioner (standing), *see supra* § 3.2.B.1;
- proper initiation of proceedings, *see supra* § 3.2.B.2;
- verification of petition or motion, *see supra* §§ 3.2.B.3 and 4.2.B;
- compliance with the U.C.C.J.E.A., *see supra* § 3.3;
- location of child, *see supra* § 3.2.B.7; and
- compliance with the Indian Child Welfare Act (ICWA), *see supra* § 3.2.B.4 and *infra* § 13.6 (details related to the ICWA).

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

- defects in or lack of summons, *see supra* § 3.2.C.1;
- failure to include certain information in petition, *see supra* § 3.2.C.2;
- failure to comply with statutory timelines, *see supra* § 3.2.C.3; and
- failure to appoint a GAL in an underlying abuse, neglect, or dependency proceeding when required, *see supra* § 3.2.C.4.

B. Personal Jurisdiction

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

See supra § 3.4 for a detailed discussion and case law relating to personal jurisdiction.

C. Applicability of the Rules of Civil Procedure

When the Juvenile Code provides a procedure, that procedure prevails over the Rules of Civil Procedure. Otherwise, the Rules may apply to fill a procedural gap, but only when they do not conflict with the Juvenile Code and only to the extent that they advance the purposes of the Code. *See, e.g.*, *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008).

Appellate cases that have analyzed the application of specific rules or discussed the Rules of Civil Procedure generally in the TPR context are discussed in detail in Chapter 4, and some are referenced in relevant sections of this chapter.

9.3 Initiation of Proceedings and Standing

A. Initiation of TPR

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

(a) Termination of one's own parental rights not permitted. Parents cannot unilaterally and extra-judicially terminate their own parental rights. *In re Jurga*, 123 N.C. App. 91 (1996) (holding that a written declaration of voluntary termination of parental rights contravened statutory procedures and was ineffective). Note: A parent's consent or relinquishment for adoption results in termination of the parent's rights when an adoption is final.

(b) TPR cannot be initiated by counterclaim. A claim for termination of parental rights could not be asserted by one parent as a counterclaim in the other parent's civil action for visitation. *In re S.D.W.*, 187 N.C. App. 416 (2007).

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

2. DSS required to initiate TPR in certain circumstances. If termination of parental rights is necessary to accomplish the permanent plan for a child, G.S. 7B-907(e) requires that DSS file a termination petition or motion within 60 days after the permanency planning hearing unless the court makes findings about why that cannot be done. This requirement is "directory," not "mandatory," and DSS's failure to file within the 60-day period is not reversible error absent a showing of prejudice. *In re B.M.*, 168 N.C. App. 350 (2005); *see also In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007).

In other specified circumstances DSS is required to initiate TPR proceedings *unless* the court makes certain findings. These are discussed in § 8.3.G *supra*.

B. Standing to File Petition or Motion

1. Introduction. Only the following persons or agencies, under the circumstances detailed below, may file a petition or motion to terminate parental rights:

- a parent,
- a guardian,
- a DSS or child-placing agency with custody of the child,
- a person with whom the child has lived for two or more years,
- a guardian ad litem,
- a person who has filed a petition to adopt the child.

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

2. Either parent. Either parent may initiate an action seeking termination of the other parent's rights, with one exception. G.S. 7B-1103(a)(1). If the child was conceived as the result of a rape that occurred on or after December 1, 2004, and the father has been convicted of the rape under G.S. 14-27.2 or 14-27.3, the father cannot initiate a TPR proceeding. G.S. 7B-1103(c).

3. Guardian. Any judicially appointed guardian of the person of the child may initiate a TPR proceeding. G.S. 7B-1103(a)(2). *See also In re D.C.*, __ N.C. App. __, 737 S.E.2d 182 (2013) (affirming the guardians' authority to file a TPR and noting that the statute places no preliminary requirements on guardians before filing); *In re B.O.*, 199 N.C. App. 600 (2009) (explaining that the Juvenile Code does not equate custody and guardianship, and it gives guardians, but not legal custodians, standing to petition for termination).

4. DSS or child-placing agency. TPR may be initiated by any county DSS or licensed child-placing agency to which (i) a court has given custody of the child, or (ii) a parent or guardian of the person of the child has relinquished the child for adoption pursuant to G.S. Chapter 48. G.S. 7B-1103(a)(3), (4).

(a) Must establish custody order. Unless the child has been relinquished to DSS for adoption, if DSS does not have court-ordered custody of the child or fails to establish that there is a court order giving DSS custody, DSS will not have standing to initiate TPR and the court will not have subject matter jurisdiction.

- When DSS did not attach to the petition or include in the record a copy of the order giving DSS custody, DSS failed to establish that it had standing and the trial court lacked subject matter jurisdiction. *In re T.B.*, 177 N.C. App. 790 (2006).
- Custody pursuant to a valid nonsecure custody order is sufficient to confer on DSS standing to file a TPR petition. *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007).
- Where the court had placed the child in the legal custody of relatives before DSS filed

its petition, DSS did not have standing to file a TPR petition because it no longer had custody. *In re D.D.J.*, 177 N.C. App. 441 (2006).

(b) Custody order must be valid. If the order giving DSS custody is invalid, DSS will not have standing to initiate TPR. For example, orders giving DSS custody were void and DSS did not have standing, when the petitions in the underlying cases had not been properly signed and verified, depriving the court of subject matter jurisdiction. *In re S.E.P.*, 184 N.C. App. 481 (2007).

See supra § 4.2.B, C (discussing verification and proper signatures).

5. Person child has lived with for two years. Any person with whom the child has resided for a continuous period of two years or more immediately preceding the filing of the petition or motion for termination has standing to initiate TPR. G.S. 7B-1103(a)(5). *See also In re B.O.*, 199 N.C. App. 600 (2009) (holding that the petitioners did not have standing because, when petition was filed, the child had not resided with them for two years and they did not satisfy any other criteria in G.S. 7B-1103 for having standing). Appellate cases have interpreted "residing with" to mean the same as "living with," looking at the number of nights a child spends with a person per year without regard to whether the person has primary, shared, or joint legal custody of the child. *See In re A.D.N.*, __ N.C. App. __, 752 S.E.2d 201 (2013) (holding that child had resided with TPR petitioner for a continuous period of two years where the child spent an average of 85% of his nights with petitioner). The language "continuous period of two years" does not require that the child spend every single night with the person for that period, and a period of temporary absence will not necessarily prevent a determination that the child's stay was "continuous." *Id*. at 208 (using the child support guidelines and UCCJEA for guidance and holding that "continuous" allows for a limited number of nights away from the person's home).

6. A guardian ad litem. A guardian ad litem appointed under G.S. 7B-601 to represent the child in an abuse, neglect, or dependency proceeding, who has not been relieved of that responsibility, has standing to initiate TPR. G.S. 7B-1103(a)(6).

7. Person who has filed for adoption. Any person who has filed a petition to adopt the child has standing to initiate TPR. G.S. 7B-1103(a)(7). *See also* G.S. 48-2-302(c) (providing that a petition for adoption may be filed concurrently with a petition to terminate parental rights). (G.S. Chapter 48 addresses adoptions.)

9.4 Counsel and Guardians ad Litem for Parent and Child

A. Counsel for Parent

1. Parent's right to counsel. The respondent parent has a right to be represented by counsel, and to appointed counsel if indigent, but may waive the right. G.S. 7B-1101.1(a). *See also supra* § 2.5 (discussing parents' rights and representation by counsel).

2. Appointment of counsel. The procedure for appointment of counsel is different for proceedings initiated by petition and proceedings initiated by motion. All appointments are pursuant to the policies of the Office of Indigent Defense Services (IDS). *See supra* § 2.5.D (providing additional detail on appointment of counsel and the Office of Indigent Defense Services).

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

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

(a) TPR initiated by petition. If the proceeding is initiated by petition, an attorney who was appointed to represent the parent and is still representing the parent in an underlying abuse, neglect, or dependency proceeding will continue to represent the parent in the termination proceeding unless the court orders otherwise. G.S. 7B-1106(b)(3).

If a respondent parent named in the petition is not already represented by counsel, the clerk must appoint provisional counsel for the parent and indicate the appointment on the summons. At the first hearing after the parent is served, the court must affirm the appointment of counsel unless the parent

- does not appear at the hearing,
- does not qualify for court-appointed counsel,
- has retained counsel, or
- waives the right to counsel.

In any of those circumstances, the court must dismiss provisional counsel. G.S. 7B-1101.1(a). Provisional counsel must be appointed in accordance with the rules adopted by the Office of Indigent Defense Services. G.S. 7B-1101.1(a). The retention or release of provisional counsel may be addressed at a pretrial hearing held pursuant to G.S. 7B-1108.1, if the respondent has been served.

Practice Notes: Appointment of provisional counsel probably is not required for an unknown parent who is not "named in the petition."

Note that the court acts on the status of provisional counsel at the first hearing after respondent is served, not at the very first hearing as in an abuse, neglect, or dependency case.

(b) TPR initiated by motion. If the proceeding is initiated by motion in a pending abuse, neglect, or dependency proceeding, an attorney appointed to represent the parent in that proceeding will continue to represent the parent in the termination matter unless the court orders otherwise. G.S. 7B-1106.1(b)(3). The attorney appointed to represent the parent in

the underlying abuse, neglect, or dependency action is not considered provisional counsel in the termination of parental rights action. *See In re D.E.G.*, __N.C. App. __, 747 S.E.2d 285 (2013). The Code does not provide for automatic appointment of provisional counsel for a parent who is unrepresented when the termination proceeding is initiated by motion. *See also In re M.G. and H.G.*, __ N.C. App. __, 767 S.E.2d 436 (2015) (citing *In re D.E.G.*, __N.C. App. __, 747 S.E.2d 285 (2013), in holding that an attorney appointed in the underlying case who continues to represent a parent in a TPR action is not provisionally appointed in the TPR). However, the notice served on the parent with the motion must inform the parent that if he or she is indigent and not already represented by counsel, the parent may contact the clerk to request appointed counsel. G.S. 7B-1106.1(b)(4).

(c) Reconsideration of appointment at any time. The court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding. G.S. 7B-1101.1(a).

(d) Inquiry at adjudication hearing. If a parent appears at the adjudication hearing and is not represented by counsel, the court must conduct an inquiry into whether the parent desires counsel but is indigent and cannot retain counsel. If the court determines that the parent is indigent and desires counsel, the court must appoint counsel and grant the parent an extension of time to permit counsel to prepare. G.S. 7B-1109(b).

3. Waiver of counsel. A parent who qualifies for appointed counsel may be permitted to proceed without counsel only after the court examines the parent and makes findings of fact showing that the parent's waiver of counsel is knowing and voluntary. G.S. 7B-1101.1(a1). The court's examination must be part of the recorded proceedings pursuant to G.S. 7B-806. *Id*. (*See* AOC Form AOC-J-143, "Waiver of Parent's Right to Counsel" (October 2013).) The parent's failure to file an answer or response or to ask for counsel before the hearing does not constitute waiver of the right to counsel. *Little v. Little*, 127 N.C. App. 191 (1997). *See supra* § 2.5.D.3 for more information on waiver of counsel.

4. Attorney's withdrawal. An attorney's withdrawal from a case requires:

- justifiable cause,
- reasonable notice to the client, and
- the permission of the court.

In re D.E.G., __ N.C. App. __, 747 S.E.2d 280, 284 (2013) (citing *Smith v. Bryant*, 264 N.C. 208 (1965)). Whether to permit an attorney to cease representation of a client is within the discretion of the trial court. However, where the client has no notice of the attorney's intent to withdraw, the trial court has no discretion and must either grant a reasonable continuance or deny the motion to withdraw. *Id*. In order to determine whether circumstances would permit withdrawal when the parent is absent from the hearing, the court must inquire into the efforts made by counsel to contact the parent. *Id*. (citing *In re S.N.W.*, 204 N.C. App. 556 (2010)). *See also In re M.G. and H.G.*, __ N.C. App. __, 767 S.E.2d 436 (2015).

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

6. Effective assistance of counsel. The parent has a right to effective assistance of counsel. To establish a claim for ineffective assistance of counsel respondent must show that the attorney's performance:

- was deficient (or fell below an objective standard of reasonableness),
- was so deficient that the parent was denied a fair hearing, and
- resulted in prejudice to the parent.

In re S.N.W., 204 N.C. App. 556 (2010); *In re S.C.R.*, 198 N.C. App. 525 (2009). *See also In re K.J.L.*, 206 N.C. App. 530 (2010); *In re J.A.A.*, 175 N.C. App. 66 (2005); *In re Dj.L.*, 184 N.C. App. 76 (2007); *In re Oghenekevebe*, 123 N.C. App. 434 (1996). *See also supra* § 2.5.D.5 (ineffective assistance of counsel).

B. Guardian ad Litem for Minor Parent or Parent who is Incompetent

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

Note: Legislation in 2013 substantially changed GAL representation for parents and eliminated the distinction between GALs of assistance and GALs of substitution. *See supra* § 2.5.F.1 for an explanation of the legislative history of GALs for parents.

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

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1. GAL for minor parent. The court *must* appoint a guardian ad litem pursuant to Rule 17 of the Rules of Civil Procedure to represent any parent who is an unemancipated minor. G.S. 7B-1101.1(b).

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

required one, could not be considered in the TPR proceeding. *In re E.T.S.*, 175 N.C. App. 32 (2005).

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

The court has the discretion to determine whether a hearing on the parent's competency and need for a Rule 17 GAL is required. *In re J.R.W.*, __ N.C. App. __, 765 S.E.2d 116 (2014); *see also In re C.G.A.M.*, 193 N.C. App. 386 (2008) (decided under prior law). The court has discretion to determine if there is a substantial question as to whether a respondent is incompetent requiring a hearing to determine the need for a GAL. *In re T.L.H.*, ___ N.C. ___ (June 11, 2015); *In re N.A.L.*, 193 N.C. App. 114 (2008) (decided under prior law); *In re J.A.A.*, 175 N.C. App. 66 (2005) (decided under prior law); *see also In re J.R.W,* __ N.C. App. __, 765 S.E.2d 116 (2014) (finding no abuse of discretion for failing to conduct hearing on competency where mother's mental health issues were not severe enough to indicate incompetence and other factors in the record demonstrated competence); *In re A.R.D.*, 204 N.C. App. 500 (2010) (decided under prior law) (finding no abuse of discretion for failing to conduct a hearing on competency where evidence did not amount to a diagnosis of a mental health issue or indicate that the mother was unable to handle her own affairs); *In re S.R.*, 207 N.C. App. 102 (2010) (decided under prior law)(finding no abuse of discretion for failing to appoint a GAL for mother where there were no allegations or evidence that her substance abuse, mental health, and anger issues affected her competence, and her actions indicated she was aware of her problems and what she needed to do).

When there is a substantial question as to incompetence, the court should address that question as soon as possible. *See supra* § 2.5.F.3 discussing timing of GAL appointment.

For a discussion of the court's determination of incompetence, *see supra* § 2.5.F.5.

3. GAL appointment and role. The Code prohibits appointing the parent's counsel as GAL but does not say anything else regarding who should be appointed. See G.S. 7B-1101.1(d). In practice, attorneys are often appointed to act as parents' GALs, although there is no requirement that the GAL be an attorney. Rule 17 of the Rules of Civil Procedure refers to the appointment of "some discreet person." The role of the parent's GAL is not well defined by either the Juvenile Code or Rule 17. The court of appeals has said that a GAL's role under Rule 17 is to act "as a guardian of procedural due process for the parent, to assist in explaining and executing her rights . . . to represent the party . . . to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party." *In re A.S.Y.*, 208 N.C. App. 530, 540 (2010) (citations omitted) (internal quotation marks omitted) (decided under prior law but addressing incompetence and Rule 17). The GAL is required to actively participate in the proceedings for which the GAL is appointed, and when a GAL is appointed in the underlying abuse, neglect, or dependency case, that GAL's responsibilities continue throughout TPR proceedings as long as the reasons for the appointment still exist. *In re A.S.Y.*, *id*. (holding in a TPR case initiated by motion that it was reversible error for the trial court to

excuse the parent's GAL and not appoint another GAL when the parent did not appear for the TPR hearing).

The role of the GAL for a parent is discussed more fully in § 2.5.F.6 *supra*, and in the resource cited in B above.

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

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

C. Guardian ad Litem for Child

1. Introduction. A guardian ad litem representing the child in an abuse, neglect, or dependency proceeding will continue to represent the child in a TPR, regardless of how it is initiated, unless the court orders otherwise. If the child does not already have a GAL, the court may be required to appoint a GAL for the child in a TPR proceeding. Even when not required to do so, the court always has discretion to appoint a GAL for the child at any stage of the TPR proceeding. The GAL appointment, duties, and payment are the same as for a GAL appointed in an abuse, neglect, or dependency case. This section provides only an overview of GAL representation. A full explanation of best interest representation by a GAL volunteer and a GAL attorney advocate, with training and supervision by the GAL Program, is explained in § 2.3 *supra*.

2. Required appointment. The court must appoint a guardian ad litem for a child who does not already have one in any TPR case in which (i) an answer or response is filed denying any material allegation of the petition or motion and (ii) the petition or motion was filed by someone other than the child's guardian ad litem. G.S. 7B-1108(b). In the case *In re A.D.N.*, the court of appeals held that the issue of failure to appoint a GAL for the child must be preserved for appeal, and it refused to rule on the failure of the trial court to appoint a GAL because the failure was not objected to at trial. *In re A.D.N.*, __ N.C. App. __, 752 S.E.2d 201 (2013). In two earlier cases with the same holding the court of appeals invoked Rule 2 of the Rules of Appellate Procedure to reach the issue and found prejudicial error in the trial court's failure to appoint a guardian ad litem for the child. *See In re Fuller*, 144 N.C. App. 620 (2001); *In re Barnes*, 97 N.C. App. 325 (1990).

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

G.S. 7B-1108 states that "a licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina." The supreme court in *J.H.K.*, 365 N.C. 171 (2011), expressly interpreted this language to mean that "if the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate." *Id.* at 175. However, appellate courts have stressed that the two roles are different and have held that appointment of an attorney advocate who is not also designated as the child's GAL is not sufficient. In the case *In re R.A.H.*, 171 N.C. App. 427 (2005), the court of appeals reversed and remanded when, although an attorney advocate was appointed and was present at the TPR hearing, no GAL was appointed or involved until four days into the hearing. *See also In re J.L.H.*, 217 N.C. App. 192 (Nov. 15, 2011) (finding reversible error where the trial court in a private TPR appointed an attorney advocate but not a guardian ad litem for the child). Thus, a court order that appoints only one person to serve in both roles (which is only appropriate if that person is an attorney) should appoint that person as a GAL. If the court appoints a person only as an attorney advocate, it will not be clear, unless specifically stated in the order, that the attorney advocate is to serve in both the attorney and GAL roles.

3. Discretionary appointment. In every case, the court has discretion to appoint a GAL for the child to assist the court in determining the child's best interest. The appointment may be made before or after the court adjudicates a ground for termination. G.S. 7B-1108(c).

4. Who is appointed. If a guardian ad litem has been appointed and is still representing the child in an abuse, neglect, or dependency proceeding, that GAL will also represent the child in any termination proceeding, unless the court orders otherwise. G.S. 7B-1108(d). If the child does not already have a GAL, the court makes a new appointment pursuant to G.S. 7B-601. However, GALs trained and supervised by the GAL program may be appointed only in cases in which the juvenile is or has been the subject of an abuse, neglect, or dependency petition (i.e., not private TPR cases), unless for good cause the GAL program consents to the appointment. G.S. 7B-1108(b). See *supra* § 2.3.C for an explanation of GAL team representation. Where the GAL is not an attorney, an attorney is also appointed.

5. Role of the GAL. The GAL's duties in a TPR case are the same as for a GAL appointed in an abuse, neglect, or dependency case—to represent the best interests of the child and to carry out the duties outlined in G.S. 7B-601. G.S. 7B-1108(b). Best interest representation and GAL responsibilities are explained in § 2.3.D *supra*.

D. Payment of Counsel and Guardians ad Litem

1. Fees for counsel and GAL for parent. Fees of counsel or a guardian ad litem appointed for an indigent parent are to be paid by the Office of Indigent Defense Services. G.S. 7B-1101.1(a), (f). The Juvenile Code does not address fees for a GAL for a parent who is not indigent; however, Rule 17(b) of the Rules of Civil Procedure (under which an appointment of a parent's GAL would be made) states that the court may "fix and tax" the GAL's fee as part of the costs. See also G.S. 7B-1110(e), which authorizes the court to tax the cost of a TPR proceeding to any party.

2. Fees for child's GAL attorney. Guardians ad litem for children are typically volunteers working under the supervision of the GAL Program without compensation. However, volunteer GALs are paired with GAL attorney advocates who are compensated. In some cases, a GAL attorney is appointed to act as both GAL and attorney advocate. Payment of GAL attorney advocates is explained in detail at § 2.3.E *supra*.

3. Reimbursement for fees.

(a) Reimbursement of parent representation fees. If a parent's rights are terminated, the court may order the parent to reimburse the state for some or all of the fees for the parent's appointed counsel, taking into account the parent's ability to pay. If the parent does not comply with the court's order to pay, the court must file a judgment against the parent for the amount ordered. G.S. 7B-603(b1). If the parent is not indigent and does not secure private counsel, the fee of a guardian ad litem appointed for the parent is a proper charge against the parent. G.S. 7B-1101.1(f).

(b) Reimbursement of representation fees for minors. Whenever an attorney or guardian ad litem is appointed for a person under age eighteen, or eighteen or over but dependent on and domiciled with a parent or guardian, the court may require the parent, guardian, or a trustee to pay the fee, but only if the court terminated parental rights. If a parent is ordered to pay fees and does not comply, the court must file a judgment against the parent for the amount ordered. G.S. 7B-603(a1); G.S. 7A-450.1.

4. Retained counsel. Attorney fees for retained counsel are not awardable in termination of parental rights actions. *Burr v. Burr*, 153 N.C. App. 504 (2002).

9.5 Contents of Petition or Motion

For a discussion of amendments to TPR petitions, see *supra* § 4.2.D.2.

A. Identifying Information

1. Title. The petition or motion must be entitled "In Re (*last name of child*), a minor juvenile." G.S. 7B-1104. (Note that in the juvenile record maintained by the clerk, all materials relating to a termination of parental rights proceeding are located in a "T" (or "JT") subfolder of the juvenile file, regardless of whether the TPR is initiated by petition or motion and whether it is a private or agency action. Rule 12.1, AOC Rules of Recordkeeping. For information on recordkeeping in juvenile proceedings, see *infra* appendix 4.)

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

3. Petitioner or movant. The petition or motion must include the petitioner's or movant's

name and address and facts sufficient to show that the petitioner or movant has standing to initiate the action. G.S. 7B-1104(2). *See supra* § 9.3.B (discussing standing).

4. Parents. The petition or motion must include the names and addresses of the child's parents. If a parent's name or address is unknown, the petition or motion or an attached affidavit must describe efforts that have been made to determine the name and address. (See *infra* § 9.6 related to a hearing on an unknown parent.) A father need not be named as a respondent if the father has been convicted of first- or second-degree rape under G.S. 14-27.2 or 14-27.3 and the child who is the subject of the action was born as a result of the rape. G.S. 7B-1104(3).

5. Guardian of the person or custodian. The petition or motion must include the name and address of any court-appointed guardian of the child's person and of any person or agency to which a court of any state has given custody of the child. A copy of any related court order must be attached. G.S. 7B-1104(4), (5).

- Where DSS is the petitioner or movant, DSS must show that it has custody of the child in order to establish that DSS has standing. *See In re T.B.*, 177 N.C. App. 790 (2006) (holding that the trial court lacked subject matter jurisdiction when DSS did not attach to the petition or include in the record a copy of the order giving DSS custody of the child).
- When custody is clear from the record, failure to attach a copy of the custody order to the petition or motion does not deprive the trial court of subject matter jurisdiction. *See, e.g.*, *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008); *In re B.D.*, 174 N.C. App. 234 (2005) (holding that DSS's failure to attach the custody order did not deprive the trial court of jurisdiction where the respondent showed no prejudice).
- In a private termination action, the petitioner's failure to include a prior custody order with the petition and failure to include the name and address of any appointed guardian, or a statement declaring the petitioner had no such knowledge, rendered the petition fatally defective. *In re Z.T.B.*, 170 N.C. App. 564 (2005).

B. Addressing the UCCJEA

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

2. Child status information required by UCCJEA. Information about the child's status, as required by the UCCJEA in G.S. 50A-209, must be set out in the petition or motion or an attached affidavit. Failure to attach the affidavit does not divest the court of jurisdiction and can be cured by filing the affidavit within a time specified by the court. *In re J.D.S.*, 170 N.C. App. 244 (2005). A form affidavit, AOC-CV-609, "Affidavit as to Status of Minor Child" (July 2011), is available on the website of the AOC.

C. Facts to Support Grounds for Termination

The petition or motion must include facts sufficient to support a determination that one or more grounds for terminating parental rights exist. G.S. 7B-1104(6). The court cannot adjudicate a ground that is not alleged in the petition. *In re S.R.G.*, 195 N.C. App. 79 (2009).

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

Appellate cases discussing this requirement have focused on whether the facts alleged are sufficient to put a party on notice rather than whether a particular statute number is alleged. Allegations need not be exhaustive or extensive, but they must put a party on notice as to acts, omissions, or conditions that are at issue and must do more than recite the statutory wording of the ground. *In re B.S.O.*, __ N.C. App. __, 760 S.E.2d 59 (2014); *In re T.J.F.*, __ N.C. App. __, 750 S.E.2d 568 (2013); *In re Hardesty*, 150 N.C. App. 380 (2002). Although appellate cases have focused on the facts alleged rather than the stated grounds, they have also noted that the better practice is to specifically plead a particular ground for termination pursuant to a specific statutory section. *In re B.S.O.*, __ N.C. App. __, 760 S.E.2d 59 (2014); *In re T.J.F.*, __ N.C. App. __, 750 S.E.2d 568 (2013).

- The petitions did not allege willful abandonment under G.S. 7B-1111(a)(7), but did refer to respondent father's "abandonment" of his children in the context of alleging that he neglected them. This, coupled with allegations that his whereabouts were unknown since his incarceration and deportation approximately eight months prior to the filing of the petitions, was sufficient to put the father on notice of a potential adjudication on the ground of abandonment. *In re B.S.O.*, __ N.C. App. __, 760 S.E.2d 59 (2014).
- Where the petition alleged only the neglect ground but the court adjudicated the abandonment ground, the court of appeals held that the petition put the father on notice as to abandonment. The petition's language alleged the father's "lack of involvement with or regard for the minor child [constituted] neglect," and contained several allegations suggesting that the father had foregone his parental responsibilities and withheld his presence, care, and parental affection by failing to maintain contact with the child. *In re T.J.F.*, __ N.C. App. __, 750 S.E.2d 568 (2013).
- Although the petition did not specifically reference G.S. 7B-1111(a)(6), the allegations gave the respondent sufficient notice that termination would be sought on the basis of the parent's inability to provide proper care for the child. *In re A.H.*, 183 N.C. App. 609 (2007). *See also In re Humphrey*, 156 N.C. App. 533 (2003).
- Although the pleading asserted only the barebones legal grounds for terminating parental rights, it was sufficiently detailed because it incorporated by reference the entire juvenile file in the matter. *In re H.T.*, 180 N.C. App. 611 (2006).
- Bare allegations that the parent neglected the child and willfully abandoned the child for six months did not comply with this requirement, but an attached custody decree incorporated into the petition did contain sufficient facts. *In re Quevedo*, 106 N.C. App. 574 (1992).

D. Verification

The petition or motion must be verified, and failure to verify deprives the court of subject matter jurisdiction. *In re T.R.P.*, 360 N.C. 588 (2006) (petition in neglect proceeding); *In re C.M.H.*, 187 N.C. App. 807 (2007); *In re Triscari Children*, 109 N.C. App. 285 (1993) (explaining that the fact that the petition is signed and notarized is not sufficient to constitute verification). *See supra* § 4.2.B (discussing proper verification).

E. Request for Relief

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

9.6 Hearing for Unknown Parent

A. Preliminary Hearing to Determine Identity of Unknown Parent

1. When required. If the name or identity of a parent/respondent is unknown when a petition is filed, the court must conduct a preliminary hearing to determine the parent's name or identity. G.S. 7B-1105(a). *See also In re M.M.*, 200 N.C. App. 248 (2009). The hearing is not required in the case of a *known* parent whose *whereabouts* are unknown. *In re Clark*, 76 N.C. App. 83 (1985). Naming "John Doe" in the alternative does not trigger the need to hold a preliminary hearing so long as one parent is identified and named as a respondent party. *See In re A.N.S.*, __ N.C. App. __, 767 S.E.2d 699 (2015) (in a private TPR case, a putative father was named by the petitioner and "John doe" was named in the alternative; naming "John Doe" in the alternative did not negate the fact that the identity of the father was known and a preliminary hearing was, therefore, not required).

2. Timing. The hearing must be held within 10 days after the petition is filed or at the next term of court in the county if there is no court within 10 days. G.S. 7B-1105(a). The court must make findings and enter its order within 30 days of the preliminary hearing, unless the court finds that additional time is required for investigation. G.S. 7B-1105(e).

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

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

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

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

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

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

6. Amendment of petition to allege identity. When the parent was identified as a result of the hearing required by G.S. 7B-1105, amendment of the petition to allege his identity did not constitute the filing of a new action. The court rejected respondent's argument that the judicial determination of his paternity between the filing of the original and amended petitions precluded termination of his parental rights under G.S. 7B-1111(a)(5) for failure to establish paternity. *In re M.M.*, 200 N.C. App. 248 (2009).

B. Service on Unknown Parent

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

- be directed to the unknown parent of (male) (female) child born at a specified time and place;
- designate the court, docket number, and name of the case (at the direction of the court, "In re Doe" may be substituted);
- specify the type of proceeding;
- direct the respondent to answer the petition within 30 days after the specified date of first publication; (*Note:* For combined service on both a known and an unknown parent, the time to respond must be 40 days, as required by N.C. R. CIV. P. 4(j1), which applies to service on a known parent.)
- follow the form set out in N.C. R. CIV. P. 4; and
- state that parental rights will be terminated if no answer is filed.

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

In addition, the court of appeals has said that a notice of publication not only must comply with Rule 4(j1) but also must comply with the requirements for a summons. *In re Joseph Children*, 122 N.C. App. 468 (1996) (decided under prior law) (stating that notice of publication must include information related to the respondent's right to counsel since this is required in the summons). For more detail on service by publication, see *supra* § 4.4.B.2.

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

9.7 Summons and Notice

A. Introduction

Because a TPR may be initiated by a petition or by a motion in an existing juvenile proceeding, the Juvenile Code has two different provisions addressing the manner in which a respondent parent is informed of the TPR action. In proceedings initiated by petition, a summons to the parent is required. In proceedings initiated by motion, a specific form of notice is required. The requirements for the summons and the notice are similar but not identical. *See* AOC Form AOC-J-208 (TPR summons) and AOC Form AOC-J-210 (TPR notice of motion).

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

AOC Form AOC-J-210, "Notice of Motion Seeking Termination of Parental Rights" (Sept. 2009).

B. Summons for Proceeding Initiated by Petition

1. Those entitled to summons. Except as provided in the case of an unknown parent, on filing of the petition, the following persons or agency (except for the petitioner) must be named as respondents and a summons must be directed to them:

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

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

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

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

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

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

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

(b) Notice. The summons must give notice:

- that a written answer must be filed within 30 days or the parent's rights may be terminated;
- that any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parent unless the court orders otherwise;
- that if the parent is indigent and not already represented by appointed counsel the parent is entitled to appointed counsel, provisional counsel has been appointed (and is identified on the summons or an attachment), and the court will review the appointment at the first hearing after the parent is served;
- that after an answer is filed, or 30 days from the date of service if no answer is filed, the petitioner will mail notice of the date, time, and place of any pretrial hearing and the hearing on the petition;
- that the purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated; and
- that the parent may attend the termination hearing. *But see supra* § 2.5.B.2 (discussing cases holding that parent does not have an absolute right to be present at a termination hearing).

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

3. Service of summons. The summons must be served pursuant to Rule 4(j) of the Rules of Civil Procedure. A parent is not deemed to be under a disability even if he or she is a minor. G.S. 7B-1106(a). However, G.S. 7B-1101.1(b) requires appointment of a guardian ad litem for any parent under age eighteen.

See *supra* § 4.4.B for detailed discussion of service of a summons.

4. Problems with summons. Failure to issue a summons, or defects or irregularities in the summons or in service of process, relate to personal, not subject matter, jurisdiction and can

be waived. *In re K.J.L.*, 363 N.C. 343 (2009). If not waived, however, these may be grounds for dismissal.

See supra § 3.4 (discussing personal jurisdiction, including the manner in which it may be waived).

See supra § 4.3.B (relating to expiration of the summons and subsequent summonses).

C. Notice for Proceeding Initiated by Motion in the Cause

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

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

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

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

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

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

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

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

- that a written response must be filed within 30 days after service of the motion and notice, or the parent's rights may be terminated;
- that any attorney appointed previously and still representing the parent in the abuse, neglect, or dependency proceeding will continue to represent the parent unless the court

orders otherwise;
- that the parent, if indigent, is entitled to appointed counsel and, if not already represented by appointed counsel, may contact the clerk immediately to request counsel;
- that when a response is filed, or 30 days after service if no response is filed, the moving party will mail notice of the date, time, and place of any pretrial hearing and the hearing on the motion;
- that the purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated; and
- that the parent may attend the termination hearing.

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

4. Service of motion and notice. The requirements for service of the motion and notice depend on the circumstances. See *supra* § 4.4.C for additional information related to service of motions and notice.

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

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

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

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

(b) When Rule 5(b) service is appropriate. The motion and notice may be served pursuant to Rule 5(b) of the Rules of Civil Procedure, except in the circumstances explained above where service pursuant to Rule 4 is required. G.S. 7B-1106.1(a), 7B-1102(b). Rule 5 requires that service be made on a party's attorney of record if there is one. Service directly on the party is required only if ordered by the court or if the party has no attorney of record. When a party has an attorney or record, service only on the party is not sufficient; the party's attorney must be served. G.S. 1A-1, Rule 5.

- Respondents' contention that more than two years had passed since initiation of the proceeding, thus triggering a requirement for service pursuant to Rule 4, was not supported by the record, so service of the motion and notice pursuant to Rule 5 was proper. *In re H.T.*, 180 N.C. App. 611 (2006).
- Because Rule 5 service was permissible, service on respondent's attorney was proper. *In re H.T.*, 180 N.C. App. 611 (decided under an earlier version of Rule 5 that allowed service on either the party or the attorney).

- Service pursuant to Rule 5 was proper when the motion was filed within two years after filing of the most recent neglect petition. *In re P.L.P.*, 173 N.C. App. 1 (2005), *aff'd per curiam*, 360 N.C. 360 (2006).

(c) Minor parent not under disability. A minor parent is not deemed to be under a disability (G.S. 7B-1106(a)); however, G.S. 7B-1101.1(b) requires appointment of a guardian ad litem for any parent under age eighteen who is not married or otherwise emancipated.

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

9.8 Answer or Response

Any respondent may file an answer or response to a TPR petition or motion. G.S. 7B-1108. The answer or response must be filed within 30 days after service of the petition or motion (or within the time determined by Rule 4 if service is by publication). *See* G.S. 7B-1106(b)(2), 7B-1106.1(b)(2), 7B-1107. Only a district court judge may grant an extension of time in which to file an answer or response. G.S. 7B-1108(a).

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

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

Regardless of whether the respondent files an answer or response, and regardless of whether the respondent admits or denies allegations in the petition or the motion, the court must hold a hearing. When the respondent does not file an answer or response, the court at the hearing may examine the petitioner or movant or others on facts alleged in the petition or motion and may issue an order terminating the respondent's parental rights. *See* G.S. 7B-1107.

Absence of an answer denying material allegations of the petition does not authorize a "default type" order terminating parental rights, since the statute requires a hearing on the petition. *In re Tyner*, 106 N.C. App. 480 (1992).

The parent's failure to file an answer or response or to ask for counsel before the hearing does not constitute waiver of the right to counsel (*Little v. Little*, 127 N.C. App. 191 (1997)), nor does it remove the court's responsibility at the hearing to inquire about and potentially appoint counsel for the parent. *See supra* § 9.4.A.

9.9 Pretrial and Adjudication Hearing Requirements

A. Pretrial Hearing

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

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

3. Notice. Written notice of the pretrial hearing is required, and should be included in the summons or notice required by G.S. 7B-1106 or 7B-1106.1.

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

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

G.S. 7B-1108.1.

B. Adjudication Hearing

1. Timing. A hearing on a termination petition or motion must be held within 90 days after the petition or motion is filed unless the court orders that it be held at a later time. G.S. 7B-1109.

(a) Continuance. For good cause, the court may continue the hearing up to 90 days from the date of the initial petition to receive additional evidence or allow parties to conduct expeditious discovery. *See supra* § 4.6 related to discovery. The court may grant a continuance that extends beyond that 90-day period only in extraordinary circumstances, when necessary for the proper administration of justice, and must issue a written order stating grounds for the continuance. Granting or denying a motion for a continuance is in the trial court's discretion. G.S. 7B-1109(d). *See also In re D.Q.W.*, 167 N.C. App. 38 (2004); *see generally supra* § 4.5 (discussing continuances in greater detail).

(b) Delay and prejudice. After the state supreme court's holding that mandamus is the appropriate means to address a trial court's failure to enter an order within the statutory 30-day time period (*see In re T.H.T.*, 362 N.C. 446 (2008)), the court of appeals reached the same conclusion with respect to delay in holding a hearing. *In re E.K.*, 202 N.C. App. 309 (2010) (refusing to find reversible error, but acknowledging that delays in the case were "deplorable"). Note that prior to *In re T.H.T.*, numerous appellate cases had held that failure to comply with the statutory time requirements could be reversible error, but only if an appellant showed prejudice resulting from the delay. See *supra* § 4.9.D.3 for *T.H.T.'s* required elements for seeking mandamus.

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

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

The fact that a judge acquires knowledge of evidentiary facts from an earlier proceeding does not require the judge to be disqualified from presiding over a TPR hearing. *In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994) (holding that the fact that judge conducted review, found that children should remain with DSS, and recommended that termination be pursued was not sufficient to show bias); *In re M.A.I.B.K.*, 184 N.C. App. 218 (2007) (holding that the judge who presided over action to terminate one parent's rights was not precluded from presiding over later hearing to terminate other parent's rights). *See also supra* § 1.3.B.12 (discussing recusal).

(b) Consolidation with underlying case. When a termination of parental rights proceeding is initiated by petition in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same child, the court on its own motion or motion of a party may consolidate the actions pursuant to Rule 42 of the Rules of Civil Procedure. G.S. 7B-1102(c). Court orders resulting from consolidated hearings should sufficiently separate the matters considered in the different proceedings. *See In re R.B.B.*, 187 N.C. App. 639 (2007).

(c) Combined adjudication and disposition. Although different evidentiary standards apply at the adjudicatory and dispositional stages, it is not necessary for the two stages to be conducted at two separate hearings. *In re F.G.J.*, 200 N.C. App. 681 (2009); *In re Carr*, 116 N.C. App. 403 (1994).

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

If equipment fails to function, the record must be reconstructed. To show prejudicial error, a party must show (i) prejudice from the loss of specific testimony and (ii) what the content of any gaps or lost testimony was. *In re Caldwell*, 75 N.C. App. 299 (1985). *See*

also In re Clark, 159 N.C. App. 75 (2003). The fact that a recording is incomplete or unintelligible, by itself, is not a ground for reversal. There is a presumption of regularity in a trial, and the appellant must make a specific showing of probable error during the faulty or missing part of the recording. *In re Howell*, 161 N.C. App. 650 (2003); *In re Bradshaw*, 160 N.C. App. 677 (2003) (noting that the respondent took no steps to reconstruct the record and alleged only general prejudice).

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

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

5. Presence of parent. A parent has a right to attend all hearings in a proceeding to terminate that parent's rights. The right is not absolute, however, and in very limited circumstances the court can proceed in the absence of a parent who wants to be there. The most common circumstance involves parents who are incarcerated. The court must take steps to ensure that the absent respondent's due process rights are protected. For more detailed information on this topic, see *supra* § 2.5.B, discussing the parent's right to notice and opportunity to be heard, including the right to participate and limitations on that right.

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

(b) Continuance and failure to appear. Appellate cases have acknowledged the trial court's discretion to determine whether to hold a TPR hearing when the parent is not present or continue the hearing in order to secure the parent's presence. The court has discretion to proceed with the hearing, however, only if the respondent has been properly notified. *See In re K.N.*, 181 N.C. App. 736 (2007) (reversing a TPR order where the respondent

entered courtroom shortly after the hearing and rebutted the presumption of proper service).

Whether to grant a continuance is in the trial court's discretion. *In re Mitchell M.*, 148 N.C. App. 483 (holding that the denial of the motion for a continuance was not error when the respondent's absence was voluntary or the result of her own negligence in failing to obtain adequate transportation), *reversed on other grounds*, 356 N.C. 288 (2002); *In re C.D.A.W.*, 175 N.C. App. 680 (2006) (denying the motion for a continuance was not error where the respondent chose to attend a drug treatment program rather than attend the hearing after repeatedly rejecting earlier opportunities to undergo drug rehabilitation), *aff'd per curiam*, 361 N.C. 232 (2007).

In a private TPR case in which the respondent father knew about the hearing but failed to appear, the trial court did not abuse its discretion in denying an oral motion to continue that was made by the father's attorney at the start of the hearing. Also, after learning in the middle of the hearing that the father could be present the next day, it was not an abuse of discretion for the trial court to allow direct examination of the petitioner's witness with the father's counsel present, but continue the hearing until the next afternoon so that the respondent father could be present for cross examination of that witness and the remainder of the hearing. *In re C.J.H.*, __ N.C. App __, __ S.E.2d __ (April 21, 2015).

Where the court of appeals found that "justice was impaired" by the trial court's denial of a continuance, an order terminating parental rights was reversed. *In re D.W.*, 202 N.C. App. 624 (2010) (citing 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).

Respondent's failure to appear for the TPR hearing was not excusable neglect when she had received proper notice and did not seek appointment of counsel or a continuance. *In re Hall*, 89 N.C. App. 685 (1988); *see also Mitchell County Dep't of Soc. Servs. v. Carpenter*, 127 N.C. App. 353 (1997), *aff'd per curiam*, 347 N.C. 569 (1998).

9.10 Evidence and Proof

Note: Evidentiary issues are discussed in greater detail in Chapter 11.

A. Evidentiary Requirements and Standards

At the adjudicatory hearing, the court must take evidence, find the facts, and adjudicate the existence or nonexistence of any alleged ground(s) for TPR. *See* G.S. 7B-1109(e). The rules of evidence in civil cases apply. G.S. 7B-1109(f). The standard of proof is clear, cogent, and convincing evidence, and the burden of proof is on the petitioner or movant. G.S. 7B-

1109(f). *See also In re Young*, 346 N.C. 244 (1997); *In re Montgomery*, 311 N.C. 101 (1984); *In re C.W.*, 182 N.C. App. 214 (2007).

At disposition, on the other hand, there is no burden of proof on any party and the court exercises its discretion, based on findings supported by the evidence, to determine whether termination of parental rights is in the child's best interest. *See In re C.W.*, 182 N.C. App. 214 (2007); *see also infra* § 9.12.B (discussing the evidentiary standard at disposition).

A court's order to terminate parental rights cannot be based solely on documentary evidence. In the case of *In re A.M.*, 192 N.C. App. 538 (2008), the court of appeals looked to G.S. 7B-1109(e), requiring the trial court to "take evidence" in conjunction with the purpose of the Juvenile Code [G.S. 7B-100(1), (2)], to determine that Rule 43(a) of the Rules of Civil Procedure was applicable to TPR proceedings. Rule 43(a) requires that "[i]n all trials the testimony of witnesses shall be taken orally in open court." Therefore, the petitioner was required to present some live testimony (even if minimal), and the court could not terminate parental rights based solely on documentary evidence. *See also In re N.B.*, 195 N.C. App. 113 (2009) (holding that testimony by only the respondent-mother was not sufficient since the petitioner carries the burden).

While a party may stipulate to facts from which the court can make conclusions, parties may not stipulate to a conclusion of law such as the conclusion that grounds for termination exist. *In re A.K.D.*, __ N.C. App. __, 745 S.E.2d 7 (2013) (holding in a private TPR case that the father's stipulation to the abandonment ground was invalid).

B. Evidence from Earlier Proceedings

Note: The state of the law related to evidence from earlier proceedings is somewhat unclear. *See infra* § 11.7 for a more in-depth analysis of this issue.

1. Orders in earlier proceedings and judicial notice. Appellate cases have held that orders from an underlying abuse, neglect, or dependency proceeding are admissible in a TPR, but that they are not determinative of the ultimate issue. Even when a prior order resulted from a dispositional or review hearing, at which the standard of proof and evidentiary rules differ from those at adjudication, appellate courts have upheld admission of the order and stated that the trial court is presumed to have disregarded any incompetent evidence. *See In re S.W.*, 175 N.C. App. 719 (2006); *In re M.N.C.*, 176 N.C. App. 114 (2006); *In re S.N.H.*, 177 N.C. App. 82 (2006); *In re J.B.*, 172 N.C. App. 1 (2005); *In re Huff*, 140 N.C. App. 288 (2000).

Still, it is up to a party who objected to the evidence to show on appeal that the trial court relied on incompetent evidence in making specific findings. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

The court may take judicial notice of prior orders and reports in the case, so long as the court's findings and conclusions reflect an independent determination of the facts and evidence warranting termination of respondent's parental rights. *See In re W.L.M.*, 181 N.C. App. 518 (2007) (explaining that the respondent did not demonstrate that the trial court relied in its

findings on any incompetent evidence or that prejudice had resulted from the court's taking judicial notice of the file); *In re S.D.J.*, 192 N.C. App. 478 (2008). *See also infra* § 9.13.A.3 (discussing findings in a TPR order). However, there are limitations to the application of judicial notice, described in detail *infra* § 11.7.

2. Collateral estoppel and res judicata. When invoked by a respondent, collateral estoppel and res judicata are affirmative defenses that must be raised in an answer or response. *See In re D.R.S.*, 181 N.C. App. 136 (2007); N.C. R. CIV. P. 8(c).

See infra § 11.7.D.2 for a more detailed discussion of collateral estoppel and res judicata.

Collateral estoppel precludes the retrying of a fully litigated issue that (i) was decided in a prior action involving the same parties and (ii) was necessary to the determination in that matter. *In re N.G.,* 186 N.C. App. 1 (holding in a neglect proceeding that respondents were estopped from arguing that they were not responsible for another child's injuries, where that had been determined in a prior action to terminate the respondents' rights in relation to the other child), *aff'd per curiam*, 362 N.C. 229 (2008). The doctrine will not apply, however, where the standard of proof at the previous proceeding is different. *See In re K.A.*, __ N.C. App. , 756 S.E.2d 837 (2014).

A prior adjudication that the child was dependent does not preclude a later assertion of neglect as a ground for terminating parental rights. *In re Williamson*, 91 N.C. App. 668 (1988) (holding that an earlier adjudication of dependency was not inconsistent with a finding that a parent neglected the child for purposes of TPR). A prior adjudication is binding only with respect to facts found to exist at the time of the adjudication. *See, e.g.*, *In re J.N.S.*, 165 N.C. App. 536 (2004); *In re Wheeler*, 87 N.C. App. 189 (1987); *In re Wilkerson*, 57 N.C. App. 63 (1982).

The doctrine of res judicata applies only when (1) an earlier action resulted in a final judgment on the merits, (2) the cause of action in the earlier action and a later action are identical, and (3) the parties (or their privies) in the two actions are identical. *See, e.g.*, *In re C.E.L.*, 171 N.C. App. 468 (2005). A case that is dismissed for lack of jurisdiction is not decided on the merits and does not have a res judicata effect. *In re T.R.P.*, 360 N.C. 588 (2006).

After an earlier petition had been dismissed for delay in holding the hearing, res judicata did not require dismissal of a subsequent petition when evidence related only to events that occurred after the filing of the first petition. *In re I.J.*, 186 N.C. App. 298 (2007). The court did not address whether the first case had been decided "on the merits."

C. Events between Filing of Petition or Motion and Hearing

An evidentiary issue that arises in TPR proceedings is the significance of events that occur between the time the petition or motion for TPR is filed and the time of the TPR hearing. Several grounds for termination refer specifically to a period of time immediately preceding the filing of the petition or motion, and for those grounds the court is limited to considering that specific time period. *See* G.S. 7B-1111(a)(3), (4), (5), (7). Note, however, that relevant

evidence of events after the filing of the petition or motion is admissible at the disposition stage. *In re J.A.O.*, 166 N.C. App. 222 (2004).

In cases involving the neglect ground, the appellate courts have regularly referred to the determination of "whether neglect authorizing the termination of parental rights existed at the time of the hearing." *See, e.g., In re N.B.,* 195 N.C. App. 113, 116 (2009); *In re J.W.,* 173 N.C. App. 450, 455 (2005), *aff'd per curiam*, 360 N.C. 361 (2006). *See also infra* § 9.11.A (discussing abuse and neglect grounds for termination). If there has been a prior adjudication of abuse or neglect, the court must determine whether there is a probability of a repetition of abuse or neglect in light of the fitness of the parent to care for the child at the time of the termination proceeding. *See In re Ballard*, 311 N.C. 708 (1984) (relating to neglect); *Alleghany County Dep't of Soc. Servs. v. Reber*, 75 N.C. App. 467 (1985) (relating to abuse), *aff'd per curiam*, 315 N.C. 382 (1986).

When termination is sought on the basis of willfully leaving the child in foster care without making sufficient progress to correct conditions that led to placement, the court may consider evidence relating to events up to the time of the hearing. *In re Pierce*, 356 N.C. 68 (2002) (reaching a contrary conclusion based on the earlier wording of the statute, but noting that under a recent amendment there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's reasonable progress).

D. Specific Types of Evidence

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

- medical, mental health, substance abuse, and other records, § 11.6.E., F. (*see also infra* § 13.4);
- opinions and expert testimony, §§ 11.9, 11.10;
- testimony by children, § 11.2;
- character and prior acts, § 11.8;
- privileges, § 11.11;
- hearsay and hearsay exceptions, including out-of-court statements by children, §§ 11.5, 11.6.

9.11 Grounds for Termination of Parental Rights

A. Abuse or Neglect

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

1. Definition of abuse or neglect. Abuse or neglect of the child must meet the same statutory definition that would apply in an underlying abuse or neglect proceeding. *See* G.S. 7B-101. However, there is a substantive difference between the quantum of proof of neglect required

for termination and that required for mere removal of the child from a parent's custody. *In re Evans*, 81 N.C. App. 449 (1986). Parental rights may not be terminated for threatened future harm. *Id.*; *In re Phifer*, 67 N.C. App. 16 (1984) (holding that the parent's abuse of alcohol, without proof of an adverse impact on the child, was insufficient for adjudication of the neglect ground for termination). See *supra* §§ 2.6.A and 2.6.B for details on the definitions of abuse and neglect.

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

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

4. Prior adjudication admissible but not required. A prior adjudication of abuse or neglect is not a precondition to a termination proceeding based on those grounds. *See, e.g., In re R.B.B.*, 187 N.C. App. 639 (2007); *In re Williamson*, 91 N.C. App. 668 (1988) (holding that an earlier adjudication of dependency was not inconsistent with a finding that the parent neglected the child for purposes of TPR). Evidence of a prior adjudication of abuse or neglect is admissible in a TPR proceeding, but the court must consider evidence of changed conditions and the probability of repetition of abuse or neglect if the child were returned to the parent. *See In re Ballard*, 311 N.C. 708 (1984); *Alleghany County Dep't of Soc. Servs. v. Reber*, 75 N.C. App. 467 (1985), *aff'd per curiam*, 315 N.C. 382 (1986); *see also supra* § 9.10.B (discussing earlier proceedings).

(a) Prior adjudication of abuse. *See In re Beck*, 109 N.C. App. 539 (1993) (holding that the court did not err in admitting the prior order finding the child to be abused, since the court did not rely solely on that order); *see also In re McMillon*, 143 N.C. App. 402 (2001); *In re Wheeler*, 87 N.C. App. 189 (1987) (holding that a prior adjudication of abuse was collateral estoppel on the question of whether the father had abused the children, the parties were estopped from relitigating that issue, and the court did not rely solely on the prior adjudication in terminating parental rights).

(b) Prior adjudication of neglect. A prior adjudication of neglect, standing alone, is unlikely to be sufficient to support termination when the parents have been deprived of custody for a significant period before the termination proceeding, unless the court finds a probability of repetition of neglect if the child were returned home. *See In re Young*, 346 N.C. 244 (1997); *In re Ballard*, 311 N.C. 708 (1984). The principles stated in *In re Ballard* and *In re Young* have been repeated numerous times in appellate cases.

Other cases involving prior neglect adjudications include:

- *In re D.L.W.*, __ N.C. App. __, __ S.E.2d __ (May 19, 2015) (reversing the TPR based on neglect as to the mother because (1) the trial court's findings regarding

domestic violence related to the mother's relationship with the father and with DSS but not to her relationship with the children or her ability to care for them, and (2) although the mother was employed and could not account for where her earnings were spent and the family was living in a car, there was no evidence that her failure to create a budget caused or perpetuated the children's neglect).

- *In re B.S.O.*, __ N.C. App. __, 760 S.E.2d 59 (2014) (affirming the trial court's order finding that there was a high probability of a repetition of neglect where the mother had failed to address the issues that had led to the children's removal and to the original neglect adjudication: improper supervision, domestic violence, and unhealthy relationships, mental health issues, and unstable living arrangements).
- *In re J.K.C.*, 218 N.C. App. 22 (2012) (holding that in spite of a prior adjudication of neglect and the father's incarceration, there was not a substantial probability of a repetition of neglect and he had not willfully left the children in foster care without making progress, given his substantial compliance with the DSS case plan, keeping in contact with DSS, completing courses available to him in prison, and sending gifts to the children through his mother).
- *In re G.B.R.*, 220 N.C. App. 309 (2012) (reversing termination of father's rights where petition alleged neglect as grounds: father had been incarcerated and evidence at the hearing focused primarily on his incarceration but failed to address circumstances since his release or show a likelihood of a repetition of neglect, showing instead that while incarcerated father wrote many letters to the children and took a number of courses, including a "father accountability" class; since release, he had employment, his own apartment and insurance, and did not drink alcohol or use any medication).
- *In re J.H.K.*, 215 N.C. App. 364 (2011) (upholding TPR on ground of neglect where trial court had found that incarcerated parent's efforts toward sobriety were only successful while incarcerated or in a residential treatment program; success during incarceration was not indicative of how he would manage his addiction when released from custody; and evidence supported the finding of a reasonable probability of a repetition of neglect).
- *In re J.G.B.*, 177 N.C. App. 375 (2006) (holding that the neglect ground was not established where DSS took custody soon after the child's birth and the child was adjudicated only dependent; there must be evidence of prior neglect and a likelihood of repetition of neglect).
- *In re Shermer,* 156 N.C. App. 281 (2003) (holding that the evidence was insufficient to establish that an incarcerated parent abandoned or neglected the children, where the father wrote to and called his sons while in prison and made progress on a case plan after his release; there was no evidence of a likelihood of repetition of prior neglect because the earlier neglect was due solely to the mother's failure to provide proper care and supervision).
- *In re Leftwich*, 135 N.C. App. 67 (1999) (affirming termination based on "evidence of past neglect in conjunction with the special needs of the children and the evidence that respondent-mother [had] made no advancements in confronting and eliminating her problem with alcohol"). *See also In re Pope*, 144 N.C. App. 32, *aff'd per curiam*, 354 N.C. 359 (2001); *In re Allred*, 122 N.C. App. 561 (1996); *In re Davis*, 116 N.C. App. 409 (1994).

5. Current neglect. If there has not been a prior adjudication of neglect, establishing the neglect ground requires proof that the parent is neglecting the child at the time of the filing of the petition or motion. This is similar to establishing a likelihood of repetition of neglect when there has been an earlier adjudication of neglect, explained in 4(b) above. In both situations, the emphasis is on the parent's conduct, since the child ordinarily is receiving proper care from the other parent, in a foster home, or elsewhere when the petition or motion is filed. Whether the parent's conduct constitutes neglect or is likely to result in a repetition of neglect must be assessed in relation to what the parent has the ability to do in relation to the child. A number of reported cases addressing current neglect involve incarcerated parents:

- *In re C.G.R.*, 216 N.C. App. 351 (2011) (holding that evidence of neglect of child who was removed at birth while mother was incarcerated was sufficient: prior to the child's birth the mother had been living in a home used for drug dealing with her other child who was adjudicated neglected; since release from prison the mother chose to live with co-defendants in the drug raid that was the source of her arrest; she had numerous short-term jobs and residences resulting in an unstable living and employment situation, all of which resulted in a substantial risk of impairment to the child).
- *In re Bradshaw*, 160 N.C. App. 677 (2003) (holding that, although the incarcerated parent's lack of contact with the child was beyond his control, other evidence and findings supported the conclusion that the neglect ground existed).
- *In re A.J.M.P.*, 205 N.C. App. 144 (2010) (upholding adjudication of the neglect ground where incarcerated parent had never written to child, sent him anything, paid support, or challenged a court order that ceased his visitation rights; court of appeals reiterated that incarceration alone is not sufficient to establish a ground for termination).
- *In re C.W.*, 182 N.C. App. 214 (2007) (holding that there was not sufficient evidence of neglect at the time of the hearing where the incarcerated father sent cards, letters, and money to the children and tried to stay in contact with them during incarceration, and DSS had never developed a case plan with the father).
- See also cases discussed above in 4.b involving incarcerated parents and the likelihood of a repetition of neglect: *In re J.K.C.*, 218 N.C. App. 22 (2012); *In re G.B.R.*, 220 N.C. App. 309 (2012); *In re J.H.K.*, 215 N.C. App. 364 (2011); *In re Shermer*, 156 N.C. App. 281 (2003).

6. Factors related to abuse and neglect. The following appellate cases have discussed factors that relate to neglect or abuse in the context of termination of parental rights. (See also *supra* § 6.3.E discussing evidence for neglect, outside the context of TPR; § 6.3.D discussing evidence for abuse, outside the context of TPR; and § 2.6.A and B discussing the definitions of abuse and neglect.)

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

(b) Parent's love and concern not determinative. Determinative factors are the child's circumstances and conditions; the fact that the parent loves or is concerned about the child will not necessarily preclude adjudication of the neglect ground. *In re Montgomery*, 311

N.C. 101 (1984). *See also In re T.J.C.*, __ N.C. App. __, 738 S.E.2d 759 (2013) (holding that despite findings that the parents loved their children and the children loved their parents, the parents' ongoing domestic violence was sufficient to support a finding of neglect).

(c) Nonfeasance as neglect. Parent's nonfeasance, as well as malfeasance, can constitute neglect. *In re Adcock*, 69 N.C. App. 222 (1984) (holding that mother's failure to intervene or protect child from another person's physical abuse was neglect). *See also In re D.A.H–C*, __ N.C. App. __, 742 S.E.2d 836 (2013) (finding sufficient evidence of neglect where despite mother's participation in classes, she continued to cohabit and associate with people violent toward her and her children, failing to protect them from abuse and neglect and creating a substantial risk of future neglect).

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

(e) Abandonment as neglect. Neglect in the form of abandonment does not require findings regarding the six-month period immediately preceding the filing of the petition as does the separate ground of abandonment. The court may examine the parent's conduct over an extended period of time. *In re Humphrey*, 156 N.C. App. 533 (2003); *see also In re Apa*, 59 N.C. App. 322 (1982) (affirming the determination that the father's willful failure to support or visit the child for an eleven-year period constituted neglect in the form of abandonment); *In re T.J.F.*, __ N.C. App. __, 750 S.E.2d 568 (2013) (affirming abandonment as neglect where the father had limited contact with the child despite consistently available opportunities for involvement; failure to contact the child in the six months preceding the TPR petition; failure to provide a reasonable amount for the cost and care of the child).

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

(g) Munchausen Syndrome (the DSM V has replaced this diagnosis with Factitious Disorder). Evidence was sufficient to establish the abuse ground (creation of substantial risk of serious non-accidental physical injury and probability of repeated abuse if child returned home) where court found that pediatricians diagnosed Munchausen Syndrome by Proxy, the mother had violated various court orders and had not benefited from treatment, and the child's recurring need for medical attention ended when the child was removed from the mother's custody. *In re Greene*, 152 N.C. App. 410 (2002).

(h) Ongoing domestic violence. Evidence was sufficient to establish an environment injurious to the children's safety where the children witnessed numerous episodes of domestic violence between the parents over the course of several years; after the children were

removed the parents continued to engage in violence; despite participating in programs the parents still did not appreciate the impact of their behavior; the children were negatively impacted with one admitted to a psychiatric hospital and the other two having violent emotional outbursts after visiting with their parents. *In re T.J.C.*, __ N.C. App. __, 738 S.E.2d 759 (2013).

B. Willfully Leaving in Foster Care for More than Twelve Months

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

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

2. Time period. It is not necessary that the period of time in foster care be continuous. *In re Taylor*, 97 N.C. App. 57 (1990) (holding that trial period during which children were placed with parents did not defeat this ground). The one year in foster care or other placement refers to the period between the time the child was removed from the home pursuant to a court order and the filing of the TPR petition or motion. *In re A.C.F.*, 176 N.C. App. 520 (2006). Time a child spent in placement pursuant only to a voluntary protection plan cannot be counted as part of the twelve-month period. However, time spent outside the home pursuant to a civil custody action could be counted (*In re L.C.R.*, __ N.C. App. __, 739 S.E.2d 596 (2013) (where a neglect matter had been converted to a civil custody action)), as could time spent with guardians appointed pursuant to G.S. 7B-600 (*In re D.H.H.*, 208 N.C. App. 549 (2010) (rejecting the father's argument to count only the time prior to guardianship, stating that this ground and G.S. 7B-600 are independent and do not intersect)).

3. Willfulness and reasonable progress. Appellate cases have emphasized and shaped the meaning of the term "willful" in this ground. The court of appeals reversed a TPR where the trial court order lacked findings to indicate willfulness, and the findings did not show that the progress the trial court expected of the mother was related to her ability to care for the children or was within the court's authority to order pursuant to G.S. 7B-904. *In re D.L.W.*, __ N.C. App. __, __ S.E.2d __ (May 19, 2015).

(a) Fault not required. Willfulness, for purposes of this ground, is something less than willful abandonment and does not require a showing of parental fault. *In re A.W.*, __ N.C. App. __ , 765 S.E.2d 111 (2014); *In re N.A.L.*, 193 N.C. App. 114 (2008); *In re Bishop*, 92 N.C. App. 662 (1989) (holding that the evidence was sufficient to support a finding of willfulness even though the parent had made some effort and some progress); *cf. In re Fletcher*, 148 N.C. App. 228 (2002) (affirming termination of mother's rights, but not the father's, on this ground). Termination of a father's rights pursuant to this ground was found to be appropriate where the child had come into custody while in the mother's care

before paternity was established, but the father made almost no efforts to obtain custody despite the repeated attempts by DSS to help him do so. *In re A.W.*, __ N.C. App. __, 765 S.E.2d 111 (2014).

(b) Parent's ability. For willfulness to attach, evidence must show a parent's ability (or capacity to acquire the ability) to overcome the factors that resulted in the child's placement. *See In re C.C.*, 173 N.C. App. 375 (2005) (holding that the evidence and findings were not sufficient to establish that respondent "willfully" left the children in care); *In re Baker*, 158 N.C. App. 491 (2003) (affirming the termination of parental rights where the evidence of willfulness included parents' refusal to inquire about or complete parenting classes, sign a reunification plan, or use mental health services). Whether a parent is in a position to actually regain custody of the child at the time of the TPR hearing is not relevant in determining whether the parent has made reasonable progress to correct the conditions that led to removal. *In re L.C.R.*, __ N.C. App. __, 739 S.E.2d 596 (2013) (where a neglect order had been converted to a civil custody order and current custodians were the petitioners for TPR).

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

(d) Incarcerated parent. A parent's incarceration, standing alone, neither requires nor precludes a finding that the parent willfully left the child in foster care. The parent's failure to contact DSS or the child is evidence of willfulness. *In re Harris*, 87 N.C. App. 179 (1987); *see also In re Shermer*, 156 N.C. App. 281 (2003) (holding that evidence was insufficient to find willfulness where the incarcerated father wrote to his sons while in prison and informed DSS that he did not want his rights terminated); *Whittington v. Hendren*, 156 N.C. App. 364 (2003) (affirming the termination of parental rights where the court found that "[e]ven though the respondent was incarcerated, he could have made more of an effort to maintain contact with his child," and respondent had foregone the opportunity to attend the termination hearing). In the case *In re D.L.W.*, __ N.C. App. __, __ S.E.2d __ (May 19, 2015), the trial court's findings to support this ground related to the mother's failure to be employed or support her children. However, the mother lost her employment due to weather and incarceration, and the trial court's failure to make findings related to willfulness led to a reversal on this ground.

(e) Some effort does not preclude willfulness. The fact that a parent makes some efforts does not preclude a finding of willfulness. *See, e.g.*, *In re A.W.*, __ N.C. App. __, 765 S.E.2d 111 (2014) (upholding TPR on this ground where although the father did visit the child seven times in six months, the father made almost no efforts to get the child placed in his custody despite repeated efforts from DSS to engage and assist him in doing so); *In re D.C.* __ N.C. App. __, 737 S.E.2d 182 (2013) (upholding TPR where a three-year-old had been removed from the home due to serious injuries sustained by a dog attack in the home, the dog was immediately destroyed and the mother's home had no dogs and was deemed "clean and tidy," but the mother still did not understand the nature of the child's

injuries or the trauma he experienced; she failed to set up appointments with the child's therapist; and she waited three and a half years before filing a motion for review to seek help with visitation); *In re J.L.H.* __ N.C. App. __, 741 S.E.2d 333 (2012) (upholding TPR on this ground where respondent mother had participated in some services but failed to participate with her own mental health treatment and was inconsistent in participating with her daughter's therapy); *In re D.H.H.*, 208 N.C. App. 549 (2010); *In re B.S.D.S.*, 163 N.C. App. 540 (2004); *In re Tate*, 67 N.C. App. 89 (1984); *but see In re Nesbitt*, 147 N.C. App. 349 (2001) (reversing termination because there was not sufficient evidence that the mother had failed to make reasonable progress and noting that, even if she had, there was no evidence any failure was willful).

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

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

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

2. Ability to pay. A finding that the parent is able to pay support is essential to termination on this ground, and the trial judge must make findings of fact concerning both the parent's ability to pay and the amount of the child's reasonable needs. *See In re Clark*, 151 N.C. App. 286 (2002); *In re Ballard*, 311 N.C. 708 (1984); *In re Phifer*, 67 N.C. App. 16 (1984). *See also In re J.K.C.*, 218 N.C. App. 22 (2012) (finding that the father could not be found to have willfully failed to pay child support because he had attempted to do so but was told by child support enforcement agency that it could not be arranged because he did not make enough income). In the case of a minor parent, the findings must show appropriate consideration of respondent's age. *In re Matherly*, 149 N.C. App. 452 (2002). A parent cannot assert lack of ability or means to contribute to support when the opportunity to do so is lost due to the parent's own misconduct. *In re Tate*, 67 N.C. App. 89 (1984); *In re Bradley*, 57 N.C. App. 475 (1982).

When a court has ordered child support as part of a dispositional order, the court has determined the reasonable portion of the cost of child care based on the parent's ability to pay and the child's needs. When a TPR is based on a parent's willful failure to pay a reasonable portion of the cost of the child's care, and there is an order for child support that was entered in the juvenile action, the petitioner is not required to independently prove the respondent parent's ability to pay. *In re S.T.B.*, __ N.C. App. __, 761 S.E.2d 734 (2014) (holding that the trial court's findings that (1) the father failed to pay any amount of his $50/month child support obligation and (2) the court was unaware of any disability that would prevent the father from paying some amount of support were sufficient to establish the father's ability to pay some amount greater than zero).

3. Reasonable portion of cost of care. A finding as to the cost of foster care can establish the child's reasonable needs. *In re Montgomery*, 311 N.C. 101 (1984). Determination of a reasonable portion of the cost of the child's care depends on the parent's ability to pay. *In re Manus*, 82 N.C. App. 340 (1986); *In re Bradley*, 57 N.C. App. 475 (1982). Appellate cases have held that this ground can be adjudicated only if there is clear and convincing evidence that respondent is able to pay some amount greater than zero. *See In re J.E.M.*, __ N.C. App. __, 727 S.E.2d 398 (2012) (finding that zero support was not a reasonable portion of the cost of care when respondent father was gainfully employed from time to time and was physically and financially able to make some payments); *In re T.D.P.*, 164 N.C. App. 287 (2004) (finding this ground was met even though respondent's prison wages ranged from forty cents to one dollar per day), *aff'd per curiam*, 359 N.C. 405 (2005), and cases cited therein.

Where a mother was earning approximately $300 per weekend, occasional small sums she gave to the foster parents and children (such as $1, $10, or $20) could not be deemed to be active financial support. Total expenditures by social services in caring for the mother's five children exceeded $315,000. *In re B.S.O.*, __ N.C. App. __, 760 S.E.2d 59 (2014).

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

5. Six-month time period. The relevant time period is six months preceding the filing of the petition or motion. *See supra* § 4.3.B. (addressing the expiration of a summons as it relates to the time period).

D. Failure to Pay Child Support to Other Parent

Where one parent has custody of the child pursuant to a court order or agreement of the parents, and the other parent (respondent), for one year or more immediately preceding the filing of the petition or motion, has willfully failed without justification to pay for the child's care, support, and education as required by court order or custody agreement, failure to pay support is grounds for termination of parental rights. G.S. 7B-1111(a)(4).

1. Agreement or order and failure to pay must be proven. The existence of a child support agreement or order as well as the parent's failure to pay the amount must be established by clear, cogent, and convincing evidence. *In re D.T.L.*, 219 N.C. App. 219 (2012) (holding that this ground could not be proven where the petition did not allege that there was a decree or custody agreement requiring respondent to pay and no such evidence was introduced at trial); *In re Roberson*, 97 N.C. App. 277 (1990).

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

3. Parent may rebut ability to pay. Even though the existence of an agreement or order creates a presumption that the parent has the ability to pay support, the parent may present evidence to prove he or she was unable to pay child support to rebut a finding of willful failure to pay. *See Bost v. Van Nortwick*, 117 N.C. App. 1 (1994); *In re Roberson*, 97 N.C. App. 277 (1990).

4. One-year time period. The relevant time period is one year or more immediately preceding the filing of the petition or motion. *See supra* § 4.3.B. (addressing the expiration of a summons as it relates to the time period).

E. Failure to Establish Paternity

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

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

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

1. All prongs of ground required. Petitioner must prove that respondent failed to take any of the listed actions. *See, e.g., In re S.C.R.,* 198 N.C. App. 525 (2009); *In re M.A.I.B.K.,* 184 N.C. App. 218 (2007) (both decided under prior law).

2. Failure to establish paternity. The petitioner or movant must inquire of the Department of Health and Human Services to determine whether an affidavit of paternity has been filed, and the Department's certified reply must be presented to and considered by the court. G.S. 7B-1111(a)(5). (This information is available from NC DSS, Adoption Review Team, 820 S. Boylan Ave., 2411 Mail Service Center, Raleigh, NC 27699-2411; 919-527-6370.)

3. Ability to pay need not be proven. The court of appeals has stated that the trial court is not required to find that the respondent had the ability to support the child in order to find that the respondent did not provide substantial financial support (part of the fourth prong of the statute). *In re Hunt*, 127 N.C. App. 370 (1997) (noting that the trial court made such a finding in any event). Cases have not addressed whether the respondent could defeat that prong of the ground by proving that he lacked the ability to provide substantial support or consistent care.

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

The issue of whether and how a father's lack of knowledge of the child's existence impacts his parental rights has also been analyzed in the constitutional context. The North Carolina Supreme Court analyzed the particular facts surrounding a putative father's attempt to protect his parental rights when he learned of his child's existence, of which the mother intentionally had not informed him, six months after the child's birth. The court concluded that the father's constitutional rights would not be violated by allowing a pending adoption to proceed without his consent. *In re S.D.W.*, 367 N.C. 386 (2014). In doing so, the supreme court did not address the analysis undertaken by the court of appeals, which had reversed the trial court and remanded out of concern that the statute regarding who must consent to adoption may be unconstitutional. The supreme court also did not examine prior North Carolina cases addressing the issue (such as *In re Baby Girl Dockery*, discussed below).

Instead, the court focused on "the extent to which a natural father's biological relationship with his child received protection under the Due Process Clause," the question articulated by the U.S. Supreme Court in *Lehr v. Robertson*, 103 S. Ct. 2985, 2992 (1983). *S.D.W.* at 391. Using *Lehr* as the "backdrop" for analysis, the supreme court in *S.D.W.* stated that North Carolina's statutory framework recognized that a concern for a biological father's interest exists only in those men who have "'grasp[ed] the opportunity [to develop a relationship with their offspring] and accept[ed] some measure of responsibility for the child's future.'" *S.D.W.* at 393, quoting *Lehr* at 2993. According to *Lehr*, however, statutes designating the class of biological fathers entitled to notice may be unconstitutional (1) if they omit too many responsible fathers, or (2) if the qualifications for notice are beyond the control of an interested putative father. Pursuant to this second prong, the North Carolina Supreme Court then examined whether obtaining notice of S.D.W.'s birth was beyond the putative father's control, concluding that it was not, and emphasizing the facts in the case:

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

> for he knew how to contact [the mother]. All the while, [the child] continued to live and bond with his adoptive parents.

S.D.W. at 395. The supreme court held that the father was not deprived of due process: the father "had the opportunity to be on notice of the pregnancy and . . . he failed to grasp that opportunity by taking any of the steps that would establish him as a responsible father," therefore falling outside "the class of protected fathers who may claim a liberty interest in developing a relationship with a child." *S.D.W.* at 396.

In an adoption case subsequent to *S.D.W.*, *For the Adoption of Robinson*, the court of appeals examined this same adoption statute, G.S. 48-3-601, in the context of a father's claim that his consent should have been required for his child's adoption and that his due process rights were violated by the determination under the adoption statutes that his consent was not required. *For the Adoption of Robinson*, __ N.C. App. __, 767 S.E.2d 395 (2014). Although in this case the father knew of the child's existence and filed a G.S. Chapter 50 custody action with a request for genetic testing prior to the filing of the adoption petition, the court of appeals cited both *Lehr* and *S.D.W.* in reasoning that the 17-year-old father's actions, many of which were consistent with his desire to develop a relationship with the child, were not sufficient to meet the statutory criteria in G.S. 48-3-601, nor sufficient to demonstrate that he had "grasped the opportunity" to develop a relationship with his child such that he had a constitutionally protected right of parentage.

It is worth noting that in both the *S.D.W.* case and the *Robinson* case, the appellate courts' holdings were very fact-specific. It is likely that the outcome of future cases addressing similar issues will likewise depend to a great extent on the facts surrounding a putative father's circumstances.

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

Other cases addressing the constitutionality of this ground but unrelated to the issue of knowledge of the child's existence, are discussed in subsection 8, below.

5. Birth certificate creates rebuttable presumption. The appearance of the father's name on the child's birth certificate may create a presumption of paternity. In a case in which the respondent father was not married to the child's mother but his name appeared on the child's birth certificate, the court of appeals affirmed the trial court's order concluding that the ground had not been established, holding that the father's name on the child's birth certificate created a rebuttable presumption that his paternity had been established by affidavit or court

order. *In re J.K.C.*, 218 N.C. App. 22 (2012). The court reasoned that the unmarried father could not have been listed as the father on the child's birth certificate unless his name was placed there in accordance with either G.S. 130A-101(f) or G.S. 130A-118(b). See *supra* § 5.4.B.7 for more discussion of paternity, putative fathers, and birth certificates.

6. Adoption cases. For adoption cases dealing with a similar ground for determining that a parent's consent to adoption is not required, see *In re Adoption of Anderson*, 360 N.C. 271 (2006), and *In re Adoption of Byrd*, 354 N.C. 188 (2001). For a case decided under the same wording in a former adoption statute, holding that the putative father's consent to adoption was required because he had filed a petition for legitimation, see *In re Adoption of Clark*, 327 N.C. 61 (1990).

7. Admissibility of paternity test. Even if paternity test results show a high likelihood that the respondent is not the child's father, the court may consider those results only if they are properly introduced into evidence. The results at most create a rebuttable presumption, and respondent must be allowed an opportunity to rebut the presumption. *In re L.D.B.*, 168 N.C. App. 206 (2005). When paternity is at issue and paternity testing is sought, the court must order paternity testing. *See In re J.S.L.*, __ N.C. App. __, 723 S.E.2d 542 (2012) (a private TPR case in which the court applied G.S. 8-50.1(b1), the evidence statute requiring paternity testing when requested at "the trial of any civil action in which the question of parentage arises," to reverse the trial court's adjudication of this ground, where the father had denied paternity and requested testing, and the court denied his request).

8. Constitutionality. The court of appeals, in *In re A.C.V.*, 203 N.C. App. 473 (2010), affirmed an order terminating a father's rights to his newborn child based on this ground. The court expressed concerns about the constitutionality of applying this ground to the facts of the case. Noting that none of the trial court's 123 findings indicated that the father was unfit to parent the child or that his home was unsuitable, the court said, "It is difficult, under the circumstances of this case, to conclude that [the father's] constitutional rights were assured through the application of section 7B-1111(a)(5)." *Id*. at 165. The court affirmed the termination order on the basis that it was bound by cases such as *Owenby v. Young*, 357 N.C. 142 (2003) (stating that a finding of any ground for termination under G.S. 7B-1111 will result in forfeiture of a parent's constitutionally protected status), and *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006). See also the discussion of constitutional issues related to this ground above in subsection 5.

F. Dependency

Where the parent is incapable of providing for the proper care and supervision of the child, there is a reasonable probability that the parent's incapability will continue for the foreseeable future, and the parent does not have an appropriate alternative child care arrangement, a ground for termination of parental rights exists. The parent's incapability may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the child. G.S. 7B-1111(a)(6).

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

2. Lack of alternative child care required. This ground cannot be established without findings supporting a conclusion that the parent lacks an appropriate alternative child care arrangement. *In re N.B.*, 200 N.C. App. 773 (2009); *see also In re C.N.C.B.*, 197 N.C. App. 553 (2009). In order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives; it is not enough that the parent merely goes along with a plan created by DSS. *In re L.H.*, 210 N.C. App. 355 (2011). *See also In re K.O.*, __ N.C. App. __, 735 S.E.2d 369 (2012) (holding that mother could not claim she had an alternative child care arrangement with an unrelated acquaintance where this acquaintance had been awarded permanent custody of the child by the court, the acquaintance did not have custody at the respondent's request, and the mother had no ability to decide custody).

Alternative child care arrangements suggested by the parent are not "appropriate" if they cannot be approved by DSS. In the case of *In re N.T.U.*, __ N.C. App. __, 760 S.E.2d 49 (2014), three alternative placements were provided to DSS by an incarcerated respondent mother, but none could be approved by DSS: one was incarcerated, one physically disciplined another child in front of DSS, and another demonstrated a lack of interest in the child. *See also In re L.R.S.*, __ N.C. App. __, 764 S.E.2d 908 (2014) (child care arrangement suggested by mother was not shown to be viable).

3. Evidence of incapability. The parent's incapability must be proved by clear and convincing evidence. *See, e.g., In re Scott*, 95 N.C. App. 760 (1989) (holding that the physician's testimony about a mother with a personality disorder did not provide clear and convincing evidence to support the trial court's findings and termination order); *see also In re Clark*, 151 N.C. App. 286 (2002) (holding that the ground was not established where the father was incarcerated, his release date was 17 months away, there was no proof that he was incapable of arranging for the child's care, and he testified that he had told DSS about several relatives whom DSS had not contacted); *In re Small*, 138 N.C. App. 474 (2000) (holding that the finding that the respondent was incapable of providing proper care to her children was not supported by clear and convincing evidence).

Termination under this ground does not require that the parent's incapability be permanent or that its precise duration known, only that there is a reasonable probability that such incapability will continue for the foreseeable future. *In re N.T.U.*, __ N.C. App. __, 760 S.E.2d 49 (2014) (trial court's order terminating the parental rights of respondent were upheld on this ground where the respondent mother had been incarcerated for three years on charges relating to homicide and bank robbery and had not received a trial date, the child had been in DSS custody for two-thirds of his life, and none of the alternative child care arrangements suggested by respondent could be approved for placement); *see also In re L.R.S.*, __ N.C. App. __, 764 S.E.2d 908 (2014) (where child had been in DSS custody since the age of two months due to mother's pretrial incarceration and subsequent conviction on federal charges

resulting in a sentence of 38 months, the trial court properly found there was a reasonable probability that the incapability would continue for the foreseeable future).

In the case *In re J.K.C.* 218 N.C. App. 22 (2012), the court of appeals cited *Clark* (above), in holding that this ground was not established where there was no evidence that the father, who was incarcerated, was incapable of providing care and supervision due to a condition specified in the statute or any other similar cause or condition. To the extent the court relied on *Clark*, that reliance was misplaced. *Clark* was decided under a previous version of this ground that said "incapability. . . may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or *any other similar cause or condition*." The version in effect now and at the time of the *J.K.C.* case says that "incapability . . .may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or *any other cause or condition that renders the parent unable or unavailable to parent the juvenile."* The significance of this change in the statutory language related to the *Clark* and *J.K.C.* case was discussed in *In re L.R.S.*, __ N.C. App. __, 764 S.E.2d 908 (2014), where the court of appeals held that respondent mother's "extended incarceration is clearly sufficient to constitute a condition that rendered her unable or unavailable to parent [her child]."

In the case of a minor parent, the court must adequately address "capacity" in light of the parent's youth. *In re Matherly*, 149 N.C. App. 452 (2002).

4. Diligent efforts not a prerequisite. The court will not read into this ground a requirement that DSS make "diligent efforts" to provide services to parents before proceeding to seek termination; any such requirement must come from the legislature. *In re Guynn*, 113 N.C. App. 114 (1993).

Note: Before a 2005 amendment, the trial court was required to appoint a guardian ad litem for the parent when this ground for termination was alleged, and a number of cases were reversed because the court failed to appoint a guardian ad litem. Under current law, appointment of a guardian ad litem for the parent is discretionary, except when the parent is a minor. G.S. 7B-1101.1. *See supra* § 9.4.B (relating to GAL appointments for parents).

G. Abandonment

Where the parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition or motion, a ground for termination of parental rights exists. G.S. 7B-1111(a)(7).

1. Six-month time period. The critical period for a finding of abandonment is at least six consecutive months immediately preceding the filing of a petition or motion to terminate parental rights. *See In re Young*, 346 N.C. 244 (1997) (reversing termination order on the basis that the mother's conduct during the relevant six-month period did not manifest "a willful determination to forego all parental duties and relinquish all parental claims to the child"). However, the trial court may consider the respondent's conduct outside this six month window for the purpose of evaluating the respondent's credibility and intentions. *See In re C.J.H.*, __ N.C. App. __ , __ S.E.2d __ (April 21, 2015) (citation omitted) (it was appropriate

for the trial court to examine the respondent's history of sporadic contact with the child outside the six-month period in order to evaluate whether his requests for visitation within the six-month period were made in good faith).

This six month time period may be affected by the expiration of a summons. Under Rule 4(e) of the Rules of Civil Procedure, if a summons expires and there is no endorsement or issuance of an alias and pluries summons within the required time, the action discontinues. If later there is an endorsement or issuance of a new or alias and pluries summons, the action will be deemed to have been filed on the date of the endorsement or of issuance of the new or alias and pluries summons. *See, e.g., In re Adoption of Searle*, 74 N.C. App. 61 (1985) (since the summons in an adoption case was endorsed 102 days after it was issued, the action commenced as to respondent on the day of endorsement); *see also supra* § 4.3.B (discussing expiration of a summons).

2. Defining abandonment. The state supreme court, in an adoption case, defined abandonment essentially as follows: A parent's willful or intentional conduct evincing a settled purpose to forego all parental duties and relinquish all parental claims. *Pratt v. Bishop*, 257 N.C. 486 (1962). Willful intent, an integral part of abandonment, is a question of fact. Abandonment also has been defined as willful neglect and refusal to perform natural and legal parental obligations of care and support. If a parent withholds the parent's presence, love, care, and opportunity to display filial affection, and willfully neglects to lend support and maintenance, the parent relinquishes all parental claims and abandons the child. *Id.*

3. Evidence of abandonment.

- The trial court's order terminating parental rights for willful abandonment was affirmed where: during the six months in question, the respondent did not provide timely and consistent financial support for the child; before the six month period in question, the respondent did not pay sufficient support until ordered to do so and then did not pay consistently; and the respondent failed to make a good faith effort to visit the child or to maintain or reestablish a relationship with the child. The respondent's last minute efforts at financial support and visitation did not undermine the trial court's conclusion of abandonment. *In re C.J.H.*, __N.C. App. __ , __ S.E.2d __ (April 21, 2015).
- The trial court's conclusion of willful abandonment was supported by its findings showing that during the six month determinative period the father made no effort to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support. The father's single phone call during the six month period could not be deemed material enough to potentially change the outcome. Although the father had been jailed and then deported during that time, the court of appeals analyzed deportation similarly to incarceration, stating that like incarceration, deportation should serve as "neither a sword nor a shield in a termination of parental rights decision." *In re B.S.O.*, __ N.C. App. __, 760 S.E.2d 59 (2014) (*quoting In re P.L.P.*, 173 N.C. App. 1, 10 (2005)). In comparing deportation and incarceration, the court of appeals stated that a deported parent has more opportunities than an incarcerated parent to support a child: a deported parent can communicate with a child, earn money that is sent to support a child, and even pursue legal action to attempt to have the child returned to his or her custody.

- In a private TPR case, the trial court's finding of willful abandonment during the six months immediately preceding the filing of the termination petition was not supported by the evidence because the respondent was under a court order not to have contact with the children during the six-month period, and he filed a civil action seeking visitation, which showed he did not intend to forego his role as a parent. *In re D.T.L.*, 219 N.C. App. 219 (2012).
- Evidence was not sufficient to establish the abandonment ground where the court's findings did not "clearly show that the parent's actions [were] wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. 79, 87 (2009) (finding that the mother had visited 11 times during the relevant six-month period); *see also In re F.G.J.*, 200 N.C. App. 681 (2009) (finding that the parents visited the child at least monthly).
- Although the father had not visited or asked for visits during the relevant six months and had not regularly sent cards or gifts, the appellate court held that findings did not support willful abandonment because the father had been instructed by his attorney in the criminal case not to contact the child or mother, the DSS protection plan provided for no contact, and he had been making support payments during the relevant six-month period. *In re T.C.B.*, 166 N.C. App. 482 (2004).
- Neither a parent's history of alcohol abuse nor a parent's incarceration, standing alone, necessarily negates a finding of willfulness for purposes of abandonment. *In re McLemore*, 139 N.C. App. 426 (2000).
- Failure to pay support, in itself, does not constitute abandonment. *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994). However, the fact that a parent paid some support during the relevant six-month period may not preclude a finding of willful abandonment. *In re Adoption of Searle*, 82 N.C. App. 273 (1986).

4. Safe surrender of infant. Abandonment includes the situation in which the parent has voluntarily abandoned an infant pursuant to the "safe surrender" law, G.S. 7B-500 (abandonment of infant within seven days after child's birth) for at least 60 consecutive days immediately preceding the filing of the petition or motion. G.S. 7B-1111(a)(7).

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

Grounds for termination of parental rights exist where the parent has:

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

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

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

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

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

I. TPR of another Child and Lack of Safe Home

Grounds for termination of parental rights exist where a court of competent jurisdiction has terminated the parent's rights with respect to another child of the parent and the parent lacks the ability or willingness to establish a safe home. G.S. 7B-1111(a)(9). *See In re D.J.E.L.*, 208 N.C. App. 154 (2010) (holding that evidence was sufficient to establish that respondent lacked the ability or willingness to establish a safe home); *In re L.A.B.*, 178 N.C. App. 295 (2006); *In re V.L.B.*, 168 N.C. App. 679 (2005).

J. Relinquishment for Adoption

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

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

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

K. Conception Resulting from Rape

A ground for termination exists when the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the child. G.S. 7B-1111(a)(11). This ground became effective October 1, 2012, and probably is not available when the conviction occurred before that date. See S.L. 2012-40.

Note that in some instances this ground overlaps with other laws, i.e., G.S. 14-27.2(c), 14-27.2A(d), and 14-27.3(c), which provide that a father convicted of rape has no parental rights with respect to a child who is conceived as a result of that rape, and G.S. 7B-1104(3), which states that "[a] person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile need not be named in the petition" to terminate parental rights.

9.12 Disposition and Best Interest Determination

A. Overview

After an adjudication that one or more grounds for termination exist, the court is never required automatically to terminate parental rights. Rather, the court must determine whether termination of parental rights is in the child's best interest. G.S. 7B-1110(a).

If the court concludes that grounds do not exist or that it is not in the child's best interest to terminate parental rights, the court must dismiss the petition or deny the motion, but only after making appropriate findings of fact and conclusions of law. G.S. 7B-1110(b), (c).

B. Evidentiary Standard

1. No burden of proof; court's discretion. At disposition, no party has a burden of proof. All parties may present evidence, and the court makes findings of fact and a discretionary determination as to whether it is in the child's best interest to terminate parental rights. *See In re Mitchell*, 356 N.C. 288 (2002), *rev'g per curiam for the reasons stated in the dissent*, 148 N.C. App. 483 (2002). Although appellate courts refer to the trial court's discretionary decision as to best interest, they also say that a best interest determination is a conclusion of law. *See, e.g.*, *In re Helms*, 127 N.C. App. 505, 510-511 (1997) (stating that "best interest determinations are conclusions of law because they require the exercise of judgment").

2. Separate hearings not required. Although the court applies different evidentiary standards at each stage, there is no requirement that adjudicatory and dispositional stages be conducted at two separate hearings. *In re F.G.J.*, 200 N.C. App. 681 (2009); *In re White*, 81 N.C. App. 82 (1986).

3. Rules of evidence. The court may consider any evidence, including hearsay evidence, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. G.S. 7B-1110(a).

C. Considerations for Best Interest Determination

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

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

G.S. 7B-1110(a). While a best interest determination will be reviewed by appellate courts for abuse of discretion, the trial court must consider and make findings about any of these factors that are relevant. *See In re D.H.*, __ N.C. App. __, 753 S.E.2d 732 (2014); *In re J.L.H.* __ N.C. App. __, 741 S.E.2d 333 (2012) (remanding the disposition portion of the trial court's order for failing to make the specific findings required by G.S. 7B-1110(a)). The court is not required to make findings on all six factors, only those that are relevant. *In re D.H.*, 753 S.E.2d 732 (rejecting the mother's argument that the court erred in making no findings regarding four of the factors, holding that two of the factors were not relevant—age because it was not raised as relevant *in this case*, and quality of a relationship with proposed placement because there was no proposed placement—and that the court did in fact make findings on the other two factors). *See also In re H.D. and K.R.*, __ N.C. App. __, 768 S.E.2d 860 (2015) (quoting *In re D.H.* and stating that one of the statutorily enumerated factors is relevant if there is conflicting evidence concerning that factor); *In re D.L.W.*, __ N.C. App. __, __ S.E.2d __ (May 19, 2015) (rejecting the father's argument that the court had to make specific findings regarding the juveniles' need for ongoing contact with their parents). Some appellate cases addressing whether the trial court handled these criteria appropriately were decided under a previous version of the statute that required the court to consider the criteria but did not require written findings. *J.L.H.*, cited above, specifically stated that such cases (*e.g.*, *In re S.R.*, 207 N.C. App. 102 (2010); *In re S.C.H.*, 199 N.C. App. 658 (2009)) are superseded by the new version of the statute requiring written findings.

Although written findings on the relevant statutory criteria are required, recitation of the statutory language is not required where findings indicate the criteria were considered. In the case *In re D.C.*, __ N.C. App. __, 763 S.E.2d 314 (2014), the respondent mother challenged the court's finding of best interest, arguing that factors 3, 4, and 5 of G.S. 7B-1110(a) were not properly considered by the court. The court of appeals rejected this argument, in part noting that although the trial court did not use the word "bond" that is contained in factor 4, it did find that the child was over five years old and had been in foster care for over two years, which indicated that he did not have a strong bond with his mother since he would barely, if at all, have remembered her. Best interest was also supported by the findings related to the child's positive relationship with his prospective adoptive family and their desire to adopt him.

2. Child's interests are paramount to parents' rights. The child's best interests, not the rights of the parents, are paramount. When the child's and parents' interests conflict, the child's best interests control. G.S. 7B-1100(3). *See also In re Montgomery*, 311 N.C. 101 (1984); *In re Tate*, 67 N.C. App. 89 (1984).

3. Relevant factors.

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

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

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

(d) Adoptability of child, but not financial benefits from adoption. While the statute now requires the court to consider the child's adoptability (G.S. 7B-1110(a)(2)), the court is not required to find that the child is adoptable before terminating parental rights. *See In re Norris*, 65 N.C. App. 269 (1983) (decided under an earlier version of the Juvenile Code). Consideration of the child's adjustment in a foster or preadoptive home is appropriate. *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re V.L.B.*, 168 N.C. App. 679 (2005); *see also In re H.D. and K.R.*, __ N.C. App. __, 768 S.E.2d 860 (2015) (finding that the trial court had properly considered the factor of adoptability in concluding that TPR was in the child's best interest).

In the case *In re A.B. and J.B.*, __ N.C. App. __, 768 S.E.2d 573 (2015), the court of appeals interpreted the trial court's order as improperly "tipping the best interest scales" in favor of TPR instead of guardianship or custody based on the availability of financial benefits conferred on the potential adoptive parents. The court of appeals noted that while the financial circumstances of potential adoptive parents could be relevant in determining the likelihood of adoption, therefore making it a "relevant factor" in analyzing best interest, in this particular case the factor of financial assistance to the potential adoptive

parents was used to outweigh the close emotional bonds between the children and their mother and her efforts to regain custody, raising questions about the internal consistencies of the order.

If adoption is a remote possibility, termination may be an abuse of discretion. *In re J.A.O.*, 166 N.C. App. 222 (2004) (holding that termination was an abuse of discretion where the chance of a troubled teen's being adopted was remote and there was possible benefit to the child from a continued relationship with his mother and relatives).

When a child who is 12 or older is being adopted, G.S. 48-3-601(1) requires the child's consent to his or her own adoption, unless the court waives that requirement. Thus, the child's desire to be adopted, especially when the child is age 12 or older, is relevant to whether the child is likely to be adopted.

(e) Efforts of DSS. A finding that DSS made diligent efforts to provide services to a parent is not a condition precedent to terminating a parent's rights. *In re J.W.J.*, 165 N.C. App. 696 (2004); *In re Frasher*, 147 N.C. App. 513 (2001).

(f) Failure to comply with review requirements. Where evidence established neglect, the petitioner's failure to comply with the periodic review requirements of [former] G.S. 7A-657 did not bar termination. *In re Swisher*, 74 N.C. App. 239 (1985).

(g) Compliance with case plan not relevant. Where the parent argued that the trial court abused its discretion in finding best interest to terminate parental rights since he had complied with the case plan, the court of appeals disagreed, stating that "compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination." *In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (2010). Although parents had completed substantial parts of their case plan, they had not accepted responsibility for or explained the child's injuries, supporting the conclusion that the child would be at risk if returned home. *Id.*

4. Examples of best interest evidence and findings. Following are some of the facts cited in cases in which the trial court's determination that termination of parental rights was in the child's best interest was affirmed.

- It was not abuse of discretion for the trial court to conclude that TPR was in the children's best interest where there was extensive evidence regarding domestic violence, lack of necessary medical care for the children, drug abuse and criminal activity by respondent, neglect of the children during visits with respondent involving lack of feeding and bathing, respondent's failure to obtain a job and pay child support, and respondent's struggle with mental illness. The trial court also found that the respondent had not made progress correcting conditions leading to removal, that the children would be subject to irreparable harm if returned to respondents, and that the children were likely to be adopted. *In re L.M.T.*, __ N.C. __, 752 S.E.2d 453 (2013).
- The trial court's conclusion in a private case that TPR was in the child's best interest was upheld where the findings were that the respondent father had failed to maintain contact

with the child despite the child's desire to have a relationship with him, the child had a close and loving relationship with her mother and maternal grandparents, and the maternal grandparents desired to adopt the child and the mother agreed. *In re T.J.F.*, __ N.C. App. __, 750 S.E.2d 568 (2013).

- It was not an abuse of discretion for the court to determine that TPR was in the child's best interest where the trial court found that the eight-year-old child was living with a foster family that wanted to adopt him as soon as possible; TPR would accomplish the permanent plan of adoption; although the child had a bond with his mother he told the therapist he did not wish to return to her custody; and the child had bonded with his foster family who had been meeting his needs and providing love and support. *In re D.J.E.L.*, 208 N.C. App. 154 (2010).
- Although the mother had made progress in doing what the trial court ordered and emphasized her bond with the children, she stated repeatedly that she could not handle the responsibility of parenting the children. *In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).
- The child had been in DSS custody over six years, the foster parents planned to adopt the child, and evidence supporting the ground for termination was strong. *In re Howell*, 161 N.C. App. 650 (2003).
- Although there was some improvement in the mental condition of a mother diagnosed with borderline personality disorder, after almost two years of DSS efforts, she could not demonstrate that she was capable of providing adequately for the child's needs. One expert testified about the negative effect of further delay in obtaining a permanent placement for the child given his age and close bond with the foster family. *In re Brim*, 139 N.C. App. 733 (2000).

5. Examples of best interest evidence and findings where appellate court found abuse of discretion.

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

D. Other Dispositional Issues

1. Compliance with ICWA. If the Indian Child Welfare Act applies because of the child's status as a Native American, "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the

child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). *See also In re Bluebird*, 105 N.C. App. 42 (1992). However, the U.S. Supreme Court held this requirement to be inapplicable to a case in which the Indian parent never had legal or physical custody of the Indian child. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court also held that 25 U.S.C. §1912(d), which requires a showing that active efforts have been made to provide remedial services to prevent the breakup of the Indian family, was not applicable when the Indian parent abandoned the child prior to birth and the child had never been in the parent's legal or physical custody. *Id*. The Court reasoned that the term "breakup" refers to discontinuing a relationship, and here there was no existing relationship; the "breakup of the Indian family" had long since occurred. Finally, the Supreme Court held that ICWA's adoption-placement preferences with Indian families were inapplicable in cases in which no alternative party formally sought to adopt the child. Note: there are proposed ICWA regulations that would affect the application of the U.S. Supreme Court's holding. *See infra* § 13.6 (discussing ICWA and its requirements in detail).

2. ADA not applicable to TPR. The Americans with Disabilities Act did not preclude termination of the respondent's rights. The North Carolina Court of Appeals reviewed other courts' treatment of the issue and adopted the rule followed by other states, i.e., termination of parental rights proceedings are not services, programs, or activities within the meaning of Title II of the ADA. At the same time, the court found that the requirements for and the trial court's findings about reasonable efforts constituted compliance with the ADA. *In re C.M.S.*, 184 N.C. App. 488 (2007).

9.13 Orders in Termination of Parental Rights Cases

See also supra § 4.9 (discussing orders in juvenile cases).

A. Requirements for Order

1. Address grounds. The court must find facts and adjudicate the existence or nonexistence of the grounds alleged in the petition or motion. G.S. 7B-1109(e), 7B-1110(c). The trial court's failure to address an alleged ground at all constitutes a conclusion that it does not exist. *In re S.R.G.*, 200 N.C. App. 594 (2009).

2. Standard of proof. With respect to the adjudication, the order must recite the clear, cogent, and convincing evidence standard of proof. *In re Matherly*, 149 N.C. App. 452 (2002); *In re Lambert-Stowers*, 146 N.C. App. 438 (2001); *In re Church*, 136 N.C. App. 654 (2000). *See also In re D.R.B.*, 182 N.C. App. 733 (2007) (holding that the termination order was deficient where it did not state the standard of proof and did not indicate which ground(s) the court was adjudicating).

However, there is no requirement as to where or how the standard is recited in the order. *In re J.T.W.*, 178 N.C. App. 678 (2006), *reversed per curiam on other grounds*, 361 N.C. 341

(2007). Also, there is no distinction between "clear, cogent and convincing" and "clear and convincing." *See In re Belk*, 364 N.C. 114 (2010); *In re Montgomery*, 311 N.C. 101 (1984).

3. Findings and conclusions. The order must include findings of fact and conclusions of law. Findings of fact are determinations from the evidence concerning facts averred by one party and denied by another. Conclusions of law are findings by a court as determined through the application of rules of law. *In re Johnston*, 151 N.C. App. 728 (2002); *see also supra* § 4.9.B (discussing findings of fact and conclusions of law) and *infra* § 12.8.B (discussing the difference between findings and conclusions, including the different standard of review on appeal).

(a) Findings based on clear, cogent, and convincing evidence. Findings in the adjudication order must be based on clear, cogent, and convincing evidence. G.S. 7B-1109(f). *See also In re Young*, 346 N.C. 244 (1997) (reversing termination based on neglect and abandonment grounds on the basis that there was not clear, cogent, and convincing evidence to support trial court's findings); *In re Montgomery*, 311 N.C. 101 (1984); *In re C.W.*, 182 N.C. App. 214 (2007) (reversing termination where none of the grounds was supported by clear and convincing evidence and a number of findings were supported by no evidence). *See also In re O.J.R.*, __ N.C. App. __, 769 S.E.2d 631 (2015) (one factor leading to reversal of trial court's TPR order in private case was the lack of competent evidence to support some findings).

(b) Sufficiently specific findings. Findings must be sufficiently specific. *See In re T.P.*, 197 N.C. App. 723 (2009) (holding that insufficient findings of fact required reversal where the findings mainly quoted statutory language and were not adequate for meaningful appellate review); *In re Anderson*, 151 N.C. App. 94 (2002) (explaining that findings of fact must do more than merely repeat the allegations in the petition); *In re Locklear*, 151 N.C. App. 573 (2002) (holding that where findings did little more than restate the statutory grounds and discuss DSS's efforts to reunify, the order was not sufficient to establish a ground for termination).

An order from a case on remand must be an entirely new and complete order, not one that "supplements" the previous order. *See In re A.R.P.*, 218 N.C. App. 185 (2012) (holding that where an order from a case on remand incorporated by reference the transcript of a prior hearing and made "supplemental" findings and conclusions, the recitation of facts could not be considered findings of fact, and the trial court should have entered an entirely new and complete order on remand).

(c) Conclusions. The court's adjudication of the existence or nonexistence of grounds alleged in the petition or motion is a conclusion of law and must be based on the findings of fact. *See, e.g., In re S.R.G.*, 200 N.C. App. 594 (2009) (holding that failure to address an alleged ground constitutes a conclusion that it does not exist); *In re L.C.*, 181 N.C. App. 278 (2007); *In re T.M.H.*, 186 N.C. App. 451 (2007); *see also In re D.L.W.*, __ N.C. App. __ , __ S.E.2d __ (May 19, 2015) (reversing the trial court's TPR order as to the mother on the basis of neglect because the findings to support the order did not address the mother's relationship to or care, visitation, or support of her children but instead addressed the

mother's interactions and relationship with DSS and the father); *In re O.J.R.*, __ N.C. App. __, 769 S.E.2d 631 (2015) (TPR order in private case was reversed and remanded in part due to lack of adequate conclusions and findings).

(d) Findings and conclusions on best interest. With respect to best interest, the court is required to consider specific criteria pursuant to G.S. 7B-1110(a) and make specific findings regarding those criteria that are relevant. See *supra* § 9.12.C.

Rule 52 of the Rules of Civil Procedure also requires the court, in any action tried without a jury, to "find the facts specially and state separately its conclusions of law thereon."

The court's determination that terminating the parent's rights is or is not in the child's best interest is a conclusion of law that must be supported by the findings.

4. Timing. The order must be entered within 30 days following completion of the hearing. If the order is not entered within 30 days, the juvenile clerk is required to schedule a hearing at the first session of juvenile court after the 30-day period, for an explanation of the reason for the delay and to obtain any needed clarification about the contents of the order. The court must enter the order within 10 days after this hearing. G.S. 7B-1109(e). Where the court fails to enter a timely order, the appropriate remedy is mandamus, not a new hearing. *In re T.H.T.*, 362 N.C. 446 (2008); *see also supra* § 4.9.D.3 (discussing mandamus as the remedy). Failure to comply with statutory timelines does not deprive the trial court of jurisdiction. *See In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).

B. Entry of Order

The order is entered when it is reduced to writing, signed by the judge, and filed with the clerk. *See* G.S. 7B-1109(e), 7B-1110(a); N.C. R. CIV. P. 58.

See supra § 4.9.A & C, discussing the following:

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

9.14 Effect of Order and Placement after Termination of Parental Rights

A. Effect of Order on Parent-Child Status

1. Severance of rights and obligations. An order terminating parental rights completely and permanently severs all rights and obligations of the parent to the child and the child to the parent. G.S. 7B-1112.

(a) No constitutionally protected interest. When parental rights have been terminated, parents no longer have any constitutionally protected interest in their children. *In re Montgomery*, 77 N.C. App. 709 (1985).

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

(c) When parent continues as party. A parent whose rights have been terminated continues to be a party for purposes of post-termination review hearings only if:

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

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

(d) Not entitled to notice of adoption. After termination, the parent is not entitled to notice of adoption proceedings and may not object to or participate in them. G.S. 7B-1112.

(e) No standing to seek custody. A parent whose rights have been terminated does not have standing to seek custody of the child as an "other person" under G.S. 50-13.1(a). *Krauss v. Wayne County Dep't of Soc. Servs.*, 347 N.C. 371 (1997).

2. Grandparents. When DSS has custody of the child pursuant to termination of one parent's rights and the other parent's relinquishment of the child for adoption, grandparents do not have standing under G.S. 50-13.1 to seek custody or visitation. *Swing v. Garrison*, 112 N.C. App. 818 (1993). *Cf. Smith v. Alleghany County Dep't of Soc. Servs.*, 114 N.C. App. 727 (1994).

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).

B. Child's Placement upon Termination

The court's authority to order placement of the child after terminating parental rights depends on whether the child was in the custody of DSS or another agency when the petition or motion was filed.

1. When child is in DSS/agency custody. If the child had been placed in the custody of (or released for adoption by one parent to) a county DSS or licensed child-placing agency and is in the custody of that agency when the petition or motion for termination is filed, upon entry of a termination order that agency acquires all rights for placement of the child that the agency would have acquired, including the right to consent to adoption, had the parent relinquished the child to the agency pursuant to G.S. Chapter 48. G.S. 7B-1112(1). *See also In re I.T.P-L.*, 194 N.C. App. 453 (2008) (holding that the trial court did not have subject matter jurisdiction to order the child placed with a relative following termination, because the statute gives DSS exclusive placement authority when the child was in DSS custody when termination petition or motion was filed); *In re Asbury*, 125 N.C. App. 143 (1997). Statutory changes made after these cases were decided create narrow exceptions. At a post-TPR review hearing, if the child has not been placed with prospective adoptive parents as selected according to G.S. 7B-1112.1, after considering the plan and recommendations of the DSS or child-placing agency with custody and making findings of fact, the court may order a placement or a different plan the court finds to be in the juvenile's best interest. G.S. 7B-908(d).

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

3. Selection of adoptive parents. The process of selecting adoptive parents is the responsibility of and within the discretion of DSS or the licensed child placing agency. G.S. 7B-1112.1.

(a) Who is considered. Any current placement provider wanting to adopt the child must be considered. G.S. 7B-1112.1.

(b) GAL's role. The GAL may request information from and consult with DSS concerning the selection process. If the GAL requests information, DSS must provide it within five business days. The GAL may move to review the selection and make recommendations at the review hearing (see below). G.S. 7B-1112.1

(c) Notice of selection and motions for review. Once DSS has selected prospective adoptive parents, it must notify the GAL and the foster parents within 10 days and before the filing of the adoption petition. If the GAL disagrees with the selection of adoptive parents or the foster parents want to adopt the child but were not selected, either may file a motion within ten days of receiving DSS's notification and schedule the case for hearing on the next juvenile calendar. DSS must provide a copy of a motion for review of adoption selection to the foster parents not selected. The foster parents do not acquire party status solely based on their right to receive notice and be heard. G.S. 7B-1112.1.

(d) Timing of adoptive placement. DSS may change the juvenile's placement to the prospective adoptive parents only after the time period for filing a motion to review the selection has expired and no motion has been filed. G.S. 7B-1112.1.

(e) Hearing on a motion. At a hearing on a motion to review the adoption selection, the court must consider the recommendations of DSS and the GAL and other facts related to the selection of adoptive parents, then determine whether the proposed adoptive placement is in the child's best interests. G.S. 7B-1112.1.

C. Post-TPR Reviews

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

- a DSS or licensed child-placing agency has custody of the child, and
- the termination petition or motion was filed by someone other than the other parent, the child's guardian ad litem, or a person who has filed a petition to adopt the child.

See infra § 10.1 (discussing post-TPR reviews).

D. Appeals and Modification of Order

See infra chapter 12 discussing TPR appeals; see *supra* § 4.9.E discussing modifying, vacating, and providing relief from orders.

9.15 Reinstatement of Parental Rights

A. Introduction

G.S. 7B-1114 provides a procedure through which the court, in narrowly defined circumstances, may reinstate the parental rights of a parent whose rights have been terminated. Note that the phrase "preliminary hearing" is used in this statute to refer to the first hearing on a motion to reinstate parental rights, and the phrase "interim hearing" is used to refer to subsequent periodic hearings.

B. Circumstances for Reinstatement

Circumstances in which the procedure is available are narrow:

- A motion to reinstate parental rights may be filed only by a child whose parent's rights have been terminated, the child's GAL attorney advocate, or a DSS that has custody of the child.
- The child must be at least 12 years old or, if the child is younger than 12, the motion must allege extraordinary circumstances requiring consideration of the motion.
- The juvenile must not have a legal parent, must not be in an adoptive placement, and must not be likely to be adopted within a reasonable time.
- The order terminating parental rights must have been entered at least three years before

the motion is filed, unless the juvenile's attorney advocate and the DSS with custody stipulate that the child's permanent plan is no longer adoption.

G.S. 7B-1114(a).

Note: Although it is not stated explicitly, the statute read as a whole limits the section's application to children who are in the custody of a county DSS.

C. Hearing Procedures

1. Notification to child and appointment of GAL. If a motion can be filed and a parent contacts DSS or the child's GAL about reinstatement of the parent's rights, DSS or the GAL must notify the child that the child has a right to file a motion for reinstatement of parental rights. G.S. 7B-1114(b). If the child does not have a GAL when a motion to reinstate parental rights is filed, the court must appoint one. The appointment, duties, and payment of the GAL and GAL attorney advocate are the same as in G.S. 7B-601 and 7B-603. G.S. 7B-1114(c).

2. Service of motion. The party filing the motion (the child, DSS, or the attorney advocate) must serve it on each of the following who is not the movant:

- the child,
- the child's guardian ad litem or guardian ad litem attorney advocate,
- the DSS with custody of the child, and
- the former parent whose rights the motion seeks to have reinstated.

G.S. 7B-1114(d).

3. Former parent not entitled to appointment of counsel. Although the former parent must be served, he or she is not a party and is not entitled to appointed counsel if indigent, but may retain counsel at his or her own expense. G.S. 7B-1114(d).

4. Timing. The party filing the motion must ask the clerk to calendar a preliminary hearing on the motion for reinstatement within 60 days of the filing of the motion and must give at least 15 days' notice to those who were required to be served and to the child's placement provider (who is not made a party by virtue of receiving notice). G.S. 7B-1114(e). At the conclusion of the preliminary hearing, the court must either dismiss the motion or order that the child's permanent plan become reinstatement of parental rights. If the motion is not dismissed at the preliminary hearing, the court must conduct interim hearings at least every six months until the motion is granted or dismissed. G.S. 7B-1114(h). The court must grant or dismiss the motion within 12 months from the date the motion was filed unless the court makes written findings about why that cannot occur and specifies a time frame for entering a final order. G.S. 7B-1114(j). After an order reinstating parental rights is entered, the court is not required to conduct further reviews. G.S. 7B-1114(k).

5. Pre-hearing reports. At least seven days before the preliminary hearing, DSS and the child's GAL must provide the court, the other parties, and the former parent with reports that

address a list of factors specified in G.S. 7B-1114(g).

6. Participants. At the preliminary hearing and any subsequent hearing on the motion, the court must consider information from the DSS that has custody of the child, the child, the child's GAL, the child's former parent whose parental rights are the subject of the motion, the child's placement provider, and any other person or agency that may aid the court in its review. G.S. 7B-1114(g).

7. Evidence and standard for review. The court may consider any evidence, including hearsay, that the court finds to be relevant, reliable, and necessary to determine the needs of the child and whether reinstatement is in the child's best interest. G.S. 7B-1114(g).

D. Criteria and Findings

The court must consider the following criteria and make written findings regarding those that are relevant:

- Efforts that were made to achieve adoption or a permanent guardianship.
- Whether the parent whose rights the motion seeks to have reinstated has remedied the conditions that led to the child's removal and termination of the parent's rights.
- Whether the child would receive proper care and supervision in a safe home if placed with the parent.
- The child's age, maturity, and ability to express his or her preference.
- The parent's willingness to resume contact with the child and to have parental rights reinstated.
- The child's willingness to resume contact with the parent and to have parental rights reinstated.
- Services that would be needed by the child and the parent if the parent's rights were reinstated.
- Any other criteria the court deems necessary.

G.S. 7B-1114(g).

E. Interim Hearings and Reasonable Efforts

Interim hearings may be combined with post-TPR review hearings. At each interim hearing the court must assess whether the plan of reinstatement continues to be in the child's best interest and whether DSS has made reasonable efforts to achieve the permanent plan. G.S. 7B-1114(h).

F. Orders

After every hearing, whether preliminary or interim, the court must make findings of fact and conclusions of law and may

- enter an order for visitation under G.S. 7B-905(c), or

- order that the child be placed in the former parent's home and supervised by DSS either directly or, when the former parent lives in a different county, through coordination with the DSS in that county, or by other personnel available to the court, subject to any conditions the court specifies.

G.S. 7B-1114(i).

Orders from any type of reinstatement hearing must be entered within 30 days following the completion of the hearing. If an order is not entered within that time, the clerk must schedule a subsequent hearing at the next session of juvenile court to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order must be entered within ten days of the subsequent hearing. G.S. 7B-1114(l).

G. Effect of Reinstatement

An order reinstating parental rights restores all rights, powers, privileges, immunities, duties, and obligations of the parent to the child, including those relating to custody, control, and support. G.S. 7B-1114(k). A parent whose rights are reinstated is not liable for child support or the cost of services provided to the child after the termination order and before the reinstatement order. G.S. 7B-1114(n). Reinstatement does not vacate or otherwise affect the validity of the original order terminating parental rights. G.S. 7B-1114(m).