UNC SCHOOL OF GOVERNMENT

2014 Parent Attorney Conference

August 14, 2014 / Chapel Hill, NC

ELECTRONIC MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

2014 Parent Attorney Conference
Defending Complicated Medical Cases

August 14, 2014 / Chapel Hill, NC

Cosponsored by the UNC-Chapel Hill School of Government & Office of Indigent Defense Services

AGENDA

8:00 to 8:45am	Check-in
8:45 to 9:00	Welcome Austine Long, Program Attorney UNC School of Government, Chapel Hill, NC
9:00 to 9:30	**Case Law Update** (30 min.) Sara DePasquale, Assistant Professor of Public Law and Government *UNC School of Government, Chapel Hill, NC*
9:30 to 10:30	**Medical Records and Protocols in A/N/D/ Cases** (60 min.) Dr. Cynthia Brown *Mission Children's Hospital, Asheville, NC* Deborah Flowers, Program Coordinator/Nurse Consultant *NC Child Medical Evaluation Program, UNC School of Medicine*
10:30 to 10:45	*Break*
10:45 to 11:45	**Abuse and Neglect Cases: Alternative Explanations** (60 min.) Dr. Cynthia Brown *Mission Children's Hospital, Asheville, NC*
11:45 to 12:30 pm	**Working with Your Own Experts** (45 min.) Susan J. Weigand, Assistant Public Defender *Mecklenburg County, NC*
12:30 to 1:30	Lunch *(provided in building)**
1:30 to 2:15	**Who Makes the Medical Decisions?** (45 min.) Angenette Stephenson, Child Welfare Attorney *North Carolina Office of the Attorney General*
2:15 to 3:15	**Panel Discussion: Advocating for Parents in Medical Cases** (60 min.) Lyana Hunter, Assistant Public Defender, *New Hanover County, NC* Robin Strickland, Attorney, *Raleigh, NC* Ty Ferrell, Attorney, *Wilkesboro, NC*
3:15 to 3:30	*Break (light snack provided)*

* IDS employees may not claim reimbursement for lunch

3:30 to 4:30	**Impact of Revised Rule 17 for GAL's and Parent Attorneys** (60 min.) (Ethics) Wendy Sotolongo, Parent Representation Coordinator *Office of Indigent Defense Services, Durham, NC* Robin Strickland, Attorney, *Raleigh, NC*

CLE HOURS: 6 (Includes 1 hour of ethics/professional responsibility)

* IDS employees may not claim reimbursement for lunch

Case Law Update

2014 Parent Attorney Conference

School of Government

August 14, 2014

JUVENILE LAW CASE UPDATE

Cases Decided from August 20, 2013 – August 5, 2014

By:

- Sara DePasquale
  sara@sog.unc.edu
  919-966-4289

Contents

Abuse/Neglect/Dependency

Parties

Intervention; Notice of permanency planning hearing

In Re T.H., ___ N.C. App. ___ (January 21, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy00MzMtMS5wZGY=

Held: **Affirmed in part, remanded in part, dismissed appeal in part**

- Adoption severs all parental rights of a biological parent such that the biological parent does not have a right to intervene in a juvenile proceeding for the adopted child or have standing to appeal an adjudication or disposition order for that child
- In a juvenile proceeding, permissive intervention allows the intervenor to provide full and accurate information regarding the child's welfare, but this purpose can be accomplished through the indirect participation of that individual as a witness or suggested relative placement rather than through intervenor status.*
- The findings of fact and conclusions of law were supported by clear and convincing evidence that both required prongs of dependency were proved by dss.
- By participating without objection in a disposition hearing that addressed a permanent plan, any lack of formal notice for a permanency planning hearing was waived.
- The court made sufficient findings of fact to support its conclusions of law when determining a non-relative placement was in the best interests of the juvenile.
- The visitation plan must contain a minimum outline of time, place and conditions.**
- **Facts:** This case involves six juveniles; four of whom had been adopted by their maternal grandmother in 2009 and two of whom were placed in the custody of their maternal grandmother. After their maternal grandmother was murdered, all six juveniles were

adjudicated dependent in 2012, and DSS was granted legal custody and placement authority for all the juveniles. Respondent mother of the two juveniles who were not adopted filed a motion to intervene as of right as the children's sister (her mother had adopted her four biological children). Her motion was denied, and she appealed. Respondent mother also appealed the adjudication and disposition orders for all six juveniles.

* Prior to S.L. 2013-129, G.S. Chapter 7B, Subchapter 1 (Abuse, Neglect and Dependency) only addressed intervention under the termination of parental rights statute, therefore, allowing the court to look to Rule 24 of the North Carolina Rules of Civil Procedure. As of October 1, 2013, G.S. 7B-401.1 limits who may intervene in a juvenile proceeding.

** S.L. 2013-129 adds G.S. 7B-905.1, which specifically addresses visitation.

Caretaker

In re R.R.N., ___ N.C. App. ___, (May 6, 2014),
http://appellate.nccourts.org/opinions/?c=2&pdf=31563

Held: **Reversed - STAYED BY NC SUPREME COURT 6/12/14**

- The purpose of the caretaker statute in the Juvenile Code is to protect juveniles from abuse and neglect inflicted by adult members of their household and by adult relatives entrusted with the responsibility of the child's health and welfare.
- A court must apply a totality of the circumstances test when determining if an adult relative is "entrusted with the care of a juvenile's health and welfare."
- Unlike a prolonged stay, an overnight sleepover is temporary in nature. A parent does not relinquish his/her responsibility over the health and welfare of his child to the adult supervisor, even if that adult is a relative, but rather, the adult supervisor is responsible for ensuring the visiting child's safety only.
- **Facts**: R.R.N. spent one night at a sleepover at a relative's, her step-cousin's, home. After the sleepover, she disclosed to her mother that she had an inappropriate relationship with the step-cousin (the father in the home), and that he had inappropriately touched her in a sexual manner. Respondent mother made a report to DSS, prohibited contact between R.R.N. and the step-cousins, and arranged for R.R.N. to go to counseling. DSS filed a petition, and R.R.N. was adjudicated abused and neglected. The court concluded the step-cousin was a caretaker. Respondent mother appealed.

Indian Child Welfare Act (ICWA)

In re E.G.M. ___ N.C.App. ___ (November 5, 2013)
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy01ODQtMS5wZGY=

Held: vacated and remanded

- Subject Matter Jurisdiction
    - State court must find subject matter exception to tribal court jurisdiction found at 25 U.S.C.A. §1919 applies. A Memorandum of Agreement (MOA) between the Eastern Band of Cherokee Indians, the N.C. Department of Health and Human Services, and four county dss agencies located in judicial district 30 that defers jurisdiction from tribal court to state court for all child protective cases under G.S. Chapter 7B is not an adjudicatory fact and therefore the court cannot take judicial notice of it. Remanded to determine subject matter jurisdiction.
- Expert Testimony
    - A determination under 25 U.S.C.A. §1912(e) that continued custody of the child to the parent is likely to result in serious emotional or physical damage to the child must be made contemporaneously with the placement, and the expert must testify at the permanency planning hearing where order for placement is made.
- "Active efforts"
    - The provision of 25 U.S.C.A. §1912(d) requires a party seeking foster care placement of or the TPR over an Indian child to prove that "active efforts" were made to provide remedial services and rehabilitative programs and that those efforts were unsuccessful. Although "active efforts," as opposed to "reasonable efforts" as set forth in G.S. 7B-507(b)(1), are required for ICWA cases, the court may order a cease reunification if it finds such efforts would clearly be futile.
    - Remanded for the trial court to make findings that support the conclusion that further efforts would be futile.
- **Facts:** A three year old Indian child as defined by the Indian Child Welfare Act (ICWA) was removed from her parents' care while they were domiciled on the Cherokee Tribe's Qualla Boundary land trust. Subsequently, the child was adjudicated neglected by the North Carolina district court. At disposition the court awarded legal custody to the respondent mother and placement in kinship care, where respondent mother was also residing. At an April 2012 dispositional hearing, an expert witness on Indian culture testified that continued custody or the return of custody to either parent would likely cause serious physical or emotional damage to the child. A permanency planning hearing was held in January 2013, and the Permanency Planning Order, after referencing the expert testimony from the April hearing, changed legal custody from the respondent mother to DSS with continued placement of the child with the kinship caregiver. Although the permanent plan continued to be reunification with the mother, the court relieved DSS of further reunification efforts with the respondent father based upon a finding that further efforts would be futile or inconsistent with the juvenile's health, safety and need for a safe, permanent home within a reasonable period of time. Both respondent mother and respondent father appealed, raising three issues under ICWA: subject matter jurisdiction between tribal and state court, the timing of expert testimony when proving by clear and convincing evidence that the child would likely suffer serious emotional or physical damage if the child remained in her parent's

custody, and whether ICWA allows for the cessation of "active efforts" to reunify an Indian family prior to a TPR. Noting that the last two issues are issues of first impression in North Carolina, the court of appeals addressed all three issues in the interests of expediting review.

Adjudication:

Collateral Estoppel and Preservation of Issue for Appeal

In re K.A., ___ N.C. App., ___, ___ S.E. 2d ___ (April 1, 2014).
http://appellate.nccourts.org/opinions/?c=2&pdf=31396

Held: Reversed and remanded

- Collateral estoppel does not apply when the two actions require different burdens of proof: preponderance of the evidence in a Chapter 50 action versus clear and convincing evidence in a Chapter 7B abuse, neglect, or dependency adjudication. No exception arises from the best interests of the child analysis that is applied in both types of proceedings.
- Respondent Mother preserved the issue for appeal when counsel argued during an objection to her line of questioning that collateral estopped and res judicata should not apply. Stating in closing argument that she accepted the court's ruling to the extent she needed to do so to try the case did not waive her preservation of the issue for appeal.
- **Facts**: A G.S. Chapter 50 civil custody action between Respondent Mother and Respondent Father awarded legal custody of the parties' three children to Respondent Father. The Court found that Respondent Mother had perpetuated a false set of beliefs, in alleging the father had molested and/or abused one of the children, and that the children now believed those false beliefs. Physical custody of two of the children was placed with the father, and the father was ordered to participate in counseling with the third child to prepare her for the transition to his home. One week later, DSS filed a petition alleging that all three children were abused, neglected, and dependent, and the child who was not in Respondent Father's physical custody was placed in foster care. At the adjudication hearing, the court determined Respondent Mother was collaterally estopped from re-litigating the issues that were litigated in the Chapter 50 action, specifically the allegations that Respondent Father had abused the children, thereby limiting the evidence Respondent Mother was able to introduce at the hearing. The court adjudicated all three children neglected and the child who was in foster care dependent as well. Respondent Mother appealed.

Substantial Risk of Harm

In re J.C.B., ___ N.C. App ___ (May 6, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31564

Held: **Adjudication reversed; dismissed in part - STAYED BY NC SUPREME CT, 6/12/14**

- Respondent father has no standing to appeal the adjudication of the child named in the companion action as he is not a specified party enumerated in G.S. 7B-1002.
- Respondent mother did not file a timely notice of appeal of the civil custody order. Although a court may infer an intent to appeal, the notice of appeal filed in the abuse, neglect, and dependency action did not reference the chapter 50 order, so no intent could be inferred. Writ of certiorari denied.
- A finding of prior abuse alone is not sufficient to support an adjudication of neglect; there must be evidence of others factor showing the abuse or neglect is likely to be repeated. The findings of fact do not support the conclusion of law that the children were neglected because there was a substantial risk that abuse or neglect might be repeated.
- **Facts**: This action involves three children who were adjudicated neglected when in a companion case (In re R.R.N.) another juvenile was adjudicated abused. The court found that the respondent father in this action sexually abused the child in the companion case when that child was staying overnight at respondent father's home. The court further found the three children in this action were present in the home when the abuse of the other juvenile took place and that created a substantial risk that abuse or neglect of the three children in this action might occur. The respondents are the parents of one of the children and joint custodians with the maternal grandmother of the other two children named in this action. As part of its order, the court initiated a Chapter 50 custody order and awarded custody of the two children who respondents were custodians of to the children's maternal grandmother. Respondent father appeals the adjudication of sexual abuse of the child named in the companion case. Respondent mother appeals the Chapter 50 action. Both respondents appeal the adjudication of neglect of the three children named in this case.

Disposition

Notice/Objection; Permanent Plan; Visitation

In Re J.P., ___ N.C.App. ___, ___ S.E. 2d ___ (November 19, 2013)
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy0zNS0yLnBkZg==

Held: Adjudication affirmed; disposition affirmed in part and reversed in part

- If it was error for the court to order a temporary permanent plan at adjudication, respondents showed no prejudice as a result, and any error was corrected by the court's later order of permanent plan at disposition.
- A party may waive the statutorily required notice of a permanency planning hearing by participating in the hearing without objecting to the lack of notice.
- Findings were sufficient to support the cessation of reunification efforts, and the court related those findings to a conclusion of law that reunification efforts would be futile and

inconsistent with the juvenile's safety and need for permanent home within a reasonable period of time.

- Visitation plan must contain a minimum outline, such as time, place and conditions of appropriate visitation plan; this portion of the disposition order reversed and remanded.
- **Facts**: The parties entered into a consent adjudication order, and the court ordered a temporary concurrent permanent plan of reunification or custody/guardianship and scheduled a disposition hearing. At the disposition hearing, the court ceased reunification efforts; ordered a permanent plan of custody or guardianship; and ordered that DSS offer the father supervised visitation every other week and that visitation be reduced to once a month if the father missed visits without notice or acted inappropriately. Respondent parents appealed

Parent act inconsistent with status; servicemember; appeal

In The Matter of A.S., III (August 20, 2013)
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy00Mi0xLnBkZg==

Held: **Appeal dismissed**

- In juvenile cases, adjudication and disposition orders are subject to review and modification. Additional findings made by the court in a subsequent review order support the conclusion that father acted inconsistently with his rights as a parent by failing to maintain contact with A.S. and by disobeying the earlier disposition order regarding being able to be contacted.
- The issues raised by father on appeal are moot, and none of the exceptions to the mootness doctrine (collateral legal consequences, capable of repetition but evading review or public interest) apply.
- The Court of Appeals declined to establish a minimum standard of care by which service members may fulfill their parental responsibilities.
- **Facts:** Father of A.S. served in the military after A.S.'s birth and was deployed to Afghanistan and stationed in Colorado when he was stateside. During his military service, Father maintained contact with A.S. and provided support for A.S. although he was no longer in a relationship with A.S.'s mother. During father's deployment, A.S. was taken into DSS custody and adjudicated neglected. Father was present at the disposition hearing, at which the court found that mother and father had acted inconsistently with their constitutionally protected parental rights. The trial court ordered physical custody of A.S. to her maternal grandmother and legal custody of A.S. to Father. Father was ordered to maintain a cell phone to facilitate his making legal decisions, to complete a parenting class, and to have unsupervised visitation with A.S. Father appealed. During the appeal, review hearings were held in the juvenile proceeding based upon new circumstances, and modification orders were entered by the trial court.

Cost of Supervised Visitation

In re J.C., ___ N.C. App.___ (July 15, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31756

Held: Affirmed as to neglect; Remanded for correction of clerical error regarding dependency (There is a dissent in part)

- Although written findings of fact regarding jurisdiction of NC being the child's home state under the UCCJEA is best practice, G.S. 50A-201 does not require written findings but rather only requires that circumstances for jurisdiction must exist. Evidence supporting those circumstances is sufficient to establish subject matter jurisdiction under the UCCJEA.
- When supported by clear and convincing evidence, findings of trail court are conclusive even when some evidence supports different findings.
- The new visitation statute, G.S. 7B-905.1, requires the court to order the conditions of visitation, which includes allowing the court to order that a parent pay the cost of supervised visitation. In so doing, the statute does not require the court to make a finding regarding the parent's ability to pay. If it becomes necessary, a parent may file a motion for review to address the ability to pay that cost. **Dissent**: court should consider parent's ability to pay
- **Facts**: Kentucky issued custody order regarding the children in 2008. The family moved to North Carolina in 2011. In 2013, DSS filed a petition alleging the children were neglected and dependent based in part on witnessing domestic violence between their parents, going back to 2008. At the conclusion of the adjudication hearing, the court made an oral finding that children were neglected, but the written order adjudicated the juveniles as neglected and dependent (COA found the dependency box on the order was inadvertently checked). The court ordered supervised visitation between the mother and children with the mother to bear the cost of the supervised visits. Respondent mother appealed.

Findings

Evidence

In the Matter of C.M. ___ N.C. App. __ (November 5, 2013)
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy01NDYtMS5wZGY=

Held: **Reversed and remanded**

- There was no competent evidence in the record to support the court's findings and conclusions. No testimony was taken, no evidence was admitted, and no judicial notice was taken at the hearing.
- On remand, court of appeals cautioned trial court to ensure respondent father's due process rights regarding appearing at the hearing and his right to effective assistance of counsel were protected.

- **Facts:** Child was adjudicated neglected in 2010 and placed in DSS custody. In January 2013, the permanent plan changed from reunification with respondent mother to guardianship with court approved caretakers. In March 2013, the court ordered legal guardianship to non-relatives and found no further reviews were required under the former G.S. 7B-906. Respondent father appealed.

Statutory Language; Cease Reunification and TPR

In the matter of L.M.T. and A.M.T., ___ N.C. ___ (Dec. 20, 2013)
http://appellate.nccourts.org/opinions/?c=1&pdf=31026

Held: Reversed decision of the court of appeals, thereby reinstating decision of trial court

- Although best practice is to include the language of the statute in an order, the order need not recite the exact language of the statute but instead must address the substance of the concerns contained in the statute.
- Competent evidence must support the findings of fact, and the findings of fact must support the conclusions of law.
- Although not using the phraseology of the statute, the specific findings fact in the cease reunification order indicate continued reunification efforts would be futile and inconsistent and support the conclusion of law to cease reunification efforts.
- In an appeal of both a cease reunification and termination of parental rights order, the appellate court may review the two orders together when determining if the necessary findings of fact required for both actions are present and supported by competent evidence in the record thereby curing incomplete findings of fact in one order by additional findings of fact in the other order.
- **Facts:** After making findings of fact regarding respondent mother's drug use, domestic violence, deception on the court, and unstable and injurious living environment for her children, the trial court entered a cease reunification order and a subsequent termination of parental rights order. Respondent mother appealed both orders, arguing that the cease reunification order did not contain the required findings of futility or inconsistency with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time as required by G.S. 7B-507(b)(1). In a unanimous opinion, the court of appeals reversed and remanded both orders after concluding the cease reunification order did not contain the requisite statutory findings of fact. Petition for discretionary review was granted by the N.C. Supreme Court.

Terminating Jurisdiction: UCCJEA; Findings

***In Re M.M*, ___ N.C. App. ___ (November 5, 2013)**
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy02MDAtMS5wZGY=

Held: **reversed and remanded**

- The UCCJEA requires that if a court determines its state is an inconvenient forum, it must make findings of fact and conclusions of law regarding the relevant factors enumerated at G.S. 50A-207(b).
- A court may not transfer jurisdiction to another state when no action is pending or commenced in that other state. The court must stay its proceeding and condition that stay upon the commencement of a child custody proceeding in that other state.
- Recitation of testimony and the incorporation of admitted reports are not findings of fact.
- Incorporating findings from prior orders without specifying portions of the order that identify the prior findings does not allow for proper appellate review.
- The court must make findings of fact and conclusions of law under G.S. 7B-907(b)* regarding a child's continued placement outside of her parents' home and -906(b)* regarding an order of no further reviews.
- A visitation plan must specify time, place and conditions and cannot be left to the discretion of a custodian.
- **Facts**: Child was adjudicated dependent in 2008. In 2013, a permanency planning order awarded legal custody and guardianship of the child to her paternal grandparents, with whom the child had been living since 2010. The child, respondent father, and paternal grandparents reside in Michigan. Respondent mother was awarded supervised visitation one day per month not to exceed 4 hours in MI, with travel costs shared between mother and father. The trial court relinquished its jurisdiction and transferred the case to Michigan. Respondent mother appeals.

* Note: G.S. 7B-906, -907 were repealed by S.L. 2013-129 and replaced with G.S. 7B- 906.1

TERMINATION OF PARENTAL RIGHTS

UCCJEA

Subject Matter Jurisdiction

In re J.D., ___ N.C. App. ___ (June 17, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31727

Held: **Vacated and Remanded for Order of Dismissal**

- G.S. 7B-1101 requires that the NC court specifically find in a termination of parental rights action involving a nonresident parent that it has subject matter jurisdiction under the UCCJEA pursuant to either an initial child custody proceeding (G.S. 50A-201) or modification jurisdiction (G.S. 50A-203).

- For modification jurisdiction pursuant to G.S. 50A-203, the initial state court's denial of a motion to intervene is not the equivalent of that state determining it no longer has exclusive continuing jurisdiction, or that NC was a more convenient forum to hear the child custody proceeding.
- The NC court lacked subject matter jurisdiction under the UCCJEA because there was nothing in the record demonstrating that the court of the other state determined it no longer had exclusive continuing jurisdiction as required by G.S. 7B-203.
- **Facts:** "Josh" was born in 2006 in Indiana where he resided with both his parents. In 2008, a custody action was filed in Indiana, and in 2009, a custody order was issued by the Indiana court. In 2011, Josh and his mother moved to North Carolina, where they continue to reside. In August 2011, the Indiana court modified its 2009 custody order twice regarding visitation between Josh and his father, who continued to reside in Indiana. Also in 2011, Josh's paternal grandparents filed a motion to intervene in the Indiana custody action for the sole purpose of obtaining grandparent visitation as established by Indiana statute, and the Indiana court denied the motion. In 2012, Josh's mother filed a petition to terminate father's parental rights, and respondent father included in his answer a motion to dismiss for lack of subject matter jurisdiction, personal jurisdiction, and failure to state a claim upon which relief could be granted. The NC court denied the motions to dismiss concluding that the Indiana court declined continuing jurisdiction in the custody action by denying the paternal grandparents' motion to intervene. After hearing, the NC court terminated father's parental rights, and respondent father timely appealed.

In re N.T.U., ___ N.C. App.___, (July 1, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31752

Held: Affirmed

- Pursuant to G.S. 50A-204(a), NC had temporary emergency jurisdiction because the child was present in NC and abandoned. G.S. 50A-204 does not require the court to make written findings of the circumstances that must exist for the court to exercise temporary emergency jurisdiction.
- At the time DSS filed the petition to terminate respondent mother's parental rights, NC had become the child's home state and no other custody action had been filed in another state, thus giving NC initial child-custody jurisdiction under G.S. 50A-201.
- **Facts:** In September 2010, N.T.U. was born in South Carolina where he resided with his mother. One year later, respondent mother was arrested in a motel room in North Carolina, where she fled to in an effort to evade the South Carolina police. She was arrested, while N.T.U. was in the motel room, for her alleged connection to a homicide and armed robbery in South Carolina. DSS filed a petition and obtained initial and then continued nonsecure custody after the court found it had temporary emergency jurisdiction under the UCCJEA. N.T.U. was adjudicated neglected and dependent. On April 12, 2013, DSS filed for termination of respondent mother's parental rights. After hearing, the court terminated respondent mother's parental rights and respondent mother appealed.

Subject matter jurisdiction; standing

In re S.T.B., ___ N.C. App. ___, (August 5, 2014);
http://appellate.nccourts.org/opinions/?c=2&pdf=31839

Held: Affirmed

- A child's guardian ad litem is the GAL program, which is a collective team (the individual volunteer, attorney advocate, GAL program coordinator and GAL Program clerical staff) and not one specific individual. The TPR petition that is signed and verified by a GAL program specialist by and through the attorney advocate and not the individual volunteer GAL is proper. This holding relies on the holdings in In re J.H.K., 365 N.C. 171 (2011) and In re A.N.L., 213 N.C.App. 266 (2011).

In re A.D.N. ___ N.C.App. ___, ___ S.E. 2d ___ (December 3, 2013)
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy03MDktMS5wZGY=

Held: **Affirmed**

- In determining if a child resides with or lives with someone, legal custody is not the determinative factor. Instead, similar to child support guidelines, the court looks to the number of nights the child spends with a person. The trial court reasonably concluded 85% of the nights established that the child resided with and was not visiting with petitioner.
- A continuous period of time allows for temporary absences from the person's home (similar to the UCCJEA).
- Although the court made the ultimate finding of fact necessary to establish the petitioner had standing, it did not make detailed supporting findings. The record, however, contained competent evidence supporting the ultimate finding that petitioner had standing and, therefore, the court had subject matter jurisdiction.
- Citing previous holdings, respondent mother failed to preserve the issue of the court not appointing a GAL to the child for appeal.
- **Facts**: On January 2, 2013, paternal grandmother petitioned for termination of parental rights. The trial court found the petitioner had standing because the child resided with her for a continuous period of two years or more preceding the filing of the petition. Child was born drug addicted, and after his hospital discharge, petitioner calendared when he stayed overnight with her. Petitioner documented that the child spent a minimum of twenty-four nights per month with her in January, February, March and April 2011. In May, 2011, the child stayed with petitioner sixteen nights prior to her obtaining a custody order on May 19, 2011. The court granted the TPR after finding petitioner had standing, three statutory grounds existed, and it was in the child's best interests. Respondent mother appealed asserting petitioner lacked standing to commence a TPR action, and the court erred by not appointing a guardian *ad litem* (GAL) to the child

Grounds

Incapable of Providing Proper Care & Supervision

In re N.T.U., ___ N.C. App.___, (July 1, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31752

Held: Affirmed

- Although a parent's incarceration is relevant, it is not determinative of a parent's incapability of providing proper care and supervision to his or her child as the parent may provide a viable alternative child care arrangement.
- A reasonable probability that the parent's incapability of proving proper care and supervision will continue for the foreseeable future does not require the court to find the incapability will last until a date certain or for a specific duration.
- **Facts:** In 2011, N.T.U. was adjudicated neglected and dependent. On April 12, 2013, DSS filed for termination of respondent mother's parental rights. After hearing, the court terminated respondent mother's parental rights on the grounds of (1) neglect and (2) her inability to provide the proper care and supervision of N.T.U. such that he is dependent and there is a reasonable probability that the incapability will continue for the foreseeable future. Since the time of the initial nonsecure custody order, respondent mother was incarcerated while waiting for her criminal trial date, and no custody action was initiated anywhere. Although respondent mother identified three proposed placements, the court concluded they were all inappropriate: the first due to the adult male's incarceration for sexual abuse of a child and a child protective action in South Carolina, the second due to the NC DSS case worker observing physical discipline and the adult's failure to come to visits to establish a relationship with N.T.U., and the third due to a denied ICPC, unstable housing, and a crack-cocaine addiction by the adult male. Respondent mother appealed arguing the court did not have subject matter jurisdiction over the entire action, and the evidence did not support either ground for termination of parental rights.

Failure to Pay Cost of Care

In re S.T.B., ___ N.C. App. ___, (August 5, 2014);
http://appellate.nccourts.org/opinions/?c=2&pdf=31839

Held: Affirmed

- A child support order is a determination of a parent's ability to pay for his child's needs. As a result, the finding that a parent failed to pay the court ordered child support is sufficient to terminate parental rights on the grounds of failure to pay for the reasonable cost of a child's care while in foster care. The petitioner is not required to prove the parent has an ability to pay, and the termination order need not find the parent has an ability to pay during the period the termination of parental rights is based upon.

- **Facts:** Respondent Father appealed termination of his parental rights to his two children (one who had been adjudicated dependent; and one who had been adjudicated neglected) on the grounds that he failed to pay the reasonable portion of the cost of care while his children were in foster care. Prior to the termination of parental rights hearing, he was ordered to pay $50/month in child support.

Notice; Incarceration and Deportation; Findings

In re B.S.O., ___ N.C. App. ___, (July 1, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31747

Held: **Affirmed**

- Although best practice is to state the ground for termination of parental rights specifically, the court may conclude a ground not specifically alleged so long as the facts in the petition are sufficient to put a party on notice of that ground. The facts and the use of the word "abandon" in the petition were sufficient to put the father on notice of the ground of wilful abandonment.
- Although incarceration and/or deportation result in limited opportunities for a parent to care for his or her child, opportunities still exist. A parent may still communicate with the child, pay for the cost of care, and inquire about the child.
- One single event, such as one phone call, does not negate a finding of wilful abandonment.
- The court may consider a parent's conduct toward the child prior to their adjudication so as to assess the likelihood of future neglect for TPR.
- Findings are supported by the evidence, and to the extent there were slight discrepancies between the evidence and findings, they were harmless.
- **Facts:** Years after the children were adjudicated neglected and dependent, DSS petitioned to terminate both parent's parental rights on the grounds of neglect . Respondent father's rights were terminated on the ground of wilful abandonment as the court found the father was deported to Mexico after his incarceration, his whereabouts were unknown, he wilfully failed to pay for the reasonable portion of the cost of the children's care despite having the ability to do so, he did not propose relative placements, and he did not make efforts to be informed about or remain in contact with the children while they were in care. Respondent mother's parental rights were terminated on the ground of neglect after the court found the likelihood of future neglect was high due to the mother's failure to address her mental health issues and complete the domestic violence program, and her unstable relationships and housing. Respondent parents appeal.

Disposition

Findings: Best Interests

In re T.J.F., ___ N.C. App., ___, ___ S.E. 2d ___ (November 19, 2013)
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy03MDctMS5wZGY=

Held: Affirmed

- Despite grounds of neglect, the petition sufficiently alleged facts, such as his failure to have contact with the child within the six months preceding the petition and his failure to pay for the cost and care of the child, to place the respondent father on notice that his parental rights may be terminated on the basis of abandonment.
- Based upon findings that the respondent father failed to maintain contact with his child, that the child had a close and loving relationship with her mother and maternal grandparents, and that the maternal grandparents desired to adopt the child, the court's conclusion that TPR was in the juvenile's best interests was not an abuse of discretion.
- Although the court found the juvenile would be entitled to financial benefits if adopted by her maternal grandparents, the additional findings that the respondent father failed to satisfy his parental obligations by withholding his presence, affection and support supported the court's conclusion that TPR was in the juvenile's best interests.
- **Facts**: Mother filed petition to terminate father's parental rights on the ground of neglect, and a TPR was ordered on the ground of willful abandonment. At disposition, the court concluded that TPR was in the best interests of the juvenile. Respondent father appeals.

In re D.H., ___ N.C. App., ___, ___ S.E. 2d ___ (February 4, 2014).
http://appellate.nccourts.org/opinions/?c=2&pdf=31214

Held: Affirmed

- Although age is one of the factors the court must consider, there was no evidence in the record that age was relevant in this case; therefore, the order was sufficient even though there were no written findings addressing each child's age.
- The lack of an adoptive placement at the time of the termination hearing is not a bar to a termination of parental rights. In addition, the factor addressing the quality of the relationship between the juvenile and proposed adoptive parent cannot be addressed and is, therefore, not a relevant factor requiring written findings in the TPR order.
- The findings were sufficient to address two factors that were relevant in this case: the likelihood of adoption and whether termination will aid in the accomplishment of a permanent plan for each juvenile. Those findings were supported by the evidence.
- The court's conclusion that TPR was in the juvenile's best interests was not an abuse of discretion as it was not "manifestly unsupported by reason."

- **Facts**: DSS filed a petition to terminate respondent mother's parental rights. The court found four grounds existed for the termination of parental rights, and at disposition, the court further found that termination of respondent mother's parental rights was in each juvenile's best interest. Respondent mother appeals, arguing the disposition portion of the order did not contain written findings for each statutory factor required to be considered as provided for in G.S. 7B-1110(a).

ADOPTION

Notice and Consent by Unwed Father

In re S.D.W., ___ N.C. ___ (June 12, 2014)
http://appellate.nccourts.org/opinions/?c=1&pdf=31739

Held: Reversed decision of Court of Appeals (thereby affirming the trial court decision)

- Relying on the reasoning of the U.S. Supreme Court *in Lehr v. Robertson*, the court held an unwed father must grasp the opportunity to develop a relationship with his child for constitutional due process protections to apply.
- The court must determine if an unwed father grasps the opportunity to be on notice of the pregnancy and/or birth, and if that opportunity is beyond the father's control.
- In a fact specific analysis for this case, notice of the birth was not beyond father's control
    - He had knowledge mother was fertile
    - He continued to have intercourse with mother without using a condom, placing the responsibility for birth control solely with mother
    - He did not inquire of mother if she was pregnant
- **Facts:** Unwed mother and father had repeated unprotected intercourse during their May 2009 through February 2010 relationship and on three of four occasions after the relationship ended. Mother had a child previously from another relationship, and early in the relationship with father, she became pregnant despite his belief that she had an IUD. The couple decided she would have an abortion. After the abortion mother informed father that she changed her method of birth control to what he believed was a shot but may have been a patch. Mother eventually cut off contact with father, and she had a baby boy on October 10, 2010. The day after the baby was born, mother signed an Affidavit of Parentage that incorrectly identified father's last name and left the father's address blank. She also signed a relinquishment, and on a birth form provided by the adoption agency, she again incorrectly identified father's last name. A petition for adoption was filed November 2, 2010. Mother saw father on November 26, 2010 and did not notify him that she had had a baby. They did not communicate again until April 2011 after father heard mother had a baby, and in a phone call with father, mother confirmed she had a his child and placed him for adoption. Afterwards, mother notified the adoption agency of father's

correct name. Father took steps to assert his intention to obtain custody of the child, including filing a motion to intervene in the adoption proceeding. Adoption petitioners filed a motion for summary judgment.

Parental Relinquishment; Oath

In Re Adoption of "Baby Boy," ___ N.C. App., ___, ___ S.E. 2d ___ (April 14, 2014). http://appellate.nccourts.org/opinions/?c=2&pdf=31105

Held: Reversed

- G.S. 48-3-702(a) requires a relinquishment to be signed and acknowledged under oath. Although the court stressed the seriousness of properly administering oaths and urging notaries to be diligent in performing that duty, it found an oath is a ministerial duty that may be administered by a person without official authority to administer an oath so long as a certifying officer is present and assents to the administration. This means a notary need only certify that he or she witnessed the signor make a vow of truthfulness, which could include any form of the word swear. In this case the notary was present when birth mother was read the relinquishment and signed the document that contained the language "duly sworn."
- The failure to include baby boy's gender in the relinquishment was not fatal as the relinquishment was executed in substantial compliance with the law pursuant to G.S. 48-3-702(a).
- **Facts**: Birth mother signs a relinquishment before an adoption agency worker and a hospital notary the day after her child is born. The adoption agency worker reads the relinquishment aloud, which states: "I, Amy Costin, being duly sworn, declare…." After being read the form, which included a 26 question questionnaire, birth mother signs the relinquishment in the presence of the notary. The notary was present during the reading of the relinquishment and questionnaire and the birth mother's signatures on those forms. The notary signed the acknowledgment. Eight days after signing the relinquishment, the birth mother texted the adoption agency worker that she changed her mind; however the adoption agency did not revoke the birth mother's relinquishment because she did not provide written notice within 7 days as required by statute and specifically included in the relinquishment and questionnaire birth mother signed. The birth mother filed a motion to void her relinquishment, and the trial court determined the relinquishment was not valid because it was not signed under oath and did not specify the infant's gender as required by the statute. As a result, the trial court granted birth mother's petition to declare her relinquishment void. The adoption agency and adoption petitioners appealed.

RELATED CASES

CIVIL

APPEAL: How to Count the Time

Magazian v. Creagh, ___ N.C. App. ___ (July 1, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31661

Held: **Dismissed, Appeal untimely**

- Pursuant to N.C.R. App. P. 3(c)(1),a notice of appeal must be filed within 30 days after entry of the judgment if the party was served with the judgment within 3 days. Under G.S. 1A-1, Rule 6(a), the three day period does not include weekends and court holidays.
- Email is not a valid method of service, but actual notice is a substitute for service.
- Plaintiff received actual notice within 3 day period of entry of judgment (weekends do not count); therefore, notice of appeal must have been filed within 30 days of the entry of the judgment, not 30 days from receipt of notice. The time to appeal expired on October 21.
- **Facts**: Order was entered on Friday, September 20, 2013. Plaintiff received actual notice of order by email on Wednesday, September 25, 2013. Plaintiff filed notice of appeal on Friday, October 25, 2013.

Service by Publication

Dowd v. Johnson, ___ N.C. App. ___ (July 15, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=30910

Held: Remanded to vacate default judgment

- Due diligence requires an attempt to serve Defendant at learned of "current address."
- Service of process by publication is void if due diligence did not occur first.
- A Defendant's general appearance in a matter after the judgment is entered is not a waiver of the defense of insufficient service of process. There was no personal jurisdiction over Defendant for the default judgment to issue.
- **Facts:** Default judgment was entered against Defendant who was served by publication. Prior to learning of Defendant's "current address," the plaintiff unsuccessfully attempted to serve Defendant at his former address. Plaintiff's attorney was notified by Defendant's attorney of the Defendant's "current address," which was included on the new civil summons that issued. The record does not show service was attempted at that current address; instead, Defendant was served by publication. Defendant filed a motion to set aside default judgment, which was denied.

Investigation, Day Care Licensing, Due Process

Nancy's Korner Care Center v. N.C. Dep't of Health & Human Services, ___ N.C. App. ___ (May 20, 2014) http://appellate.nccourts.org/opinions/?c=2&pdf=30694

Held: **Vacated and Remanded to DHHS to conduct its own investigation of substantial evidence of abuse**

- The statutes and administrative code found at G.S. 110-88(6B), -105, and -105.2, and 10A N.C.A.C. 09.1904(b) place an affirmative duty on DHHS to independently determine whether abuse or neglect occurred in a child care facility.
- A county DSS substantiation is not dispositive when determining an administrative action to be imposed by DHHS on a licensed child care facility.
- Although a collaborative investigation occurs, and evidence is shared, that collaboration does not relieve DHHS of its affirmative duty to conduct its own investigation and determine if abuse or neglect occurred.
- Because the petitioner's liberty interests (her livelihood) were impacted by DHHS' actions, she is entitled to due process, which can only occur if DHHS conducts and determines whether abuse or neglect occurred, rather than rely on a county dss substantiation that cannot be challenged by petitioner.
- **Facts:** After an 8-year old child attending a licensed child care facility alleged she was inappropriately touched by a staff member, the county department of social services (dss) and a consultant from the DHHS Division of Child Development and Early Education worked together to investigate the allegations. The county dss notified DHHS that it "substantiated" the employee as having sexually abused the child. As a result, the DHHS consultant recommended the center be issued a special provisional license along with the continuation of a protection plan that prohibited the employee from being present at the facility during operational hours. The sanction was reduced by the DHHS Internal Review Panel to a written warning and implementation of the corrective action or protection plan. The petitioner appealed to an administrative hearing, where the child, the child's parent, and the dss worker did not testify. The hearing officer concluded that the substantiation by the county dss allowed DHHS to issue a written warning and corrective action plan. The hearing officer also found that the preponderance of the evidence at the hearing raised serious questions about whether the abuse occurred, but the hearing did not have jurisdiction to revisit the county dss substantiation. Petitioner appealed the administrative decision to the Superior Court, which affirmed the hearing decision concluding DHHS could rely on the county dss substantiation when issuing administrative sanctions. Petitioner appeals the final agency decision issuing a written warning and implementation of a corrective action plan.

CRIMINAL

Expert testimony qualification/opinion

State v. King, ___ N.C. App ___ (July 15, 2014)

http://appellate.nccourts.org/opinions/?c=2&pdf=31622

Held: No error (Defendant's conviction of one count of indecent liberties with a child)

- Although the pediatrician was not designated as an expert, the court's qualification of her as an expert is implicit in its admission of her testimony regarding characteristics of children who have been sexually abused.
- Testimony describing a common characteristic of children who are sexually abused as not initially disclosing or only partially disclosing the abuse is not opinion testimony as to the individual child victim's credibility.

Child Witness: Closing the Courtroom in Criminal Trial

State v. Godley, ___ N.C. App. ___, (July 1, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31461

Held: No error

- Under the VI Amendment, a criminal defendant has a right to a public trial; however, the court may close the courtroom by applying 4-part test:
  1. The party seeking to close the courtroom must advance an overriding interest that is likely to be prejudiced
  2. The closure must be no broader than necessary to protect this interest
  3. The trial court must consider reasonable alternatives to closing the proceeding, and
  4. The trial court must make findings adequate to support the closure.
- There must be competent evidence to support the finding, and the court's own observations may be a basis for a finding of fact.
- **Facts:** Defendant was charged with three counts of first –degree rape and taking indecent liberties with a child. The victim, who was 12, testified, and over defendant's objection, the court granted the state's oral motion to close the courtroom during her testimony. Defendant was convicted of taking indecent liberties with a child. Defendant appeals the closing of the courtroom.

Note: Although the VI amendment right to a public trial does not apply to an A/N/D proceeding, Art. 1, Section 18 of the NC Constitution states "All courts shall be open…" For more information see, http://www.sog.unc.edu/programs/judicial_authority_administration

See G.S. 7B-801(a) and (b) regarding factors the court must consider before closing the courtroom in a A/N/D or TPR action.

Felony Child Abuse

Definition of Sexual Act Includes Vaginal Intercourse

State v. McClamb, ___ N.C. App. ___, (July 1, 2014)

http://appellate.nccourts.org/opinions/?c=2&pdf=31218

Pursuant to G.S. 14-318.4(a2), it is a Class D felony for any parent or legal guardian of a child younger than 16 to commit or allow to be committed any "sexual act" on the child. Defendant, the father of the victim, appeals his conviction of felony child abuse by sexual act based on having vaginal intercourse with his daughter. G.S. 14, Article 7A addresses "Rape and Other Sex Offenses" and defines "sexual act" at G.S. 14-27.1(4) to exclude vaginal intercourse. This allows for a distinction between crimes of rape, which is limited to vaginal intercourse, and sexual offenses, which excludes vaginal intercourse. However, that definition does not apply to G.S. 14, Article 39 "Protection of Minors." The term, "sexual act," found at G.S. 14-318.4(a2) includes vaginal intercourse since a distinction between rape and sexual offenses is not required in Article 39.

Counts; Separate Acts

State v. Mosher, Jr., ___ N.C. App. ___ (August 5, 2014)
http://appellate.nccourts.org/opinions/?c=2&pdf=31166

Held: Affirmed

- Felony child abuse convictions based upon G.S. 14-318.4(a3) intentional infliction of serious bodily injury and (a4) serious bodily injury resulting from a willful act or grossly negligent omission that shows a reckless disregard for human life are not mutually exclusive when there are two separate successive acts. Here, defendant was convicted of two counts of felony child abuse, the first under subsection (a4) by leaving the children unattended in a bathtub filled with scalding hot water, and then under subsection (a3) by intentionally holding one child in the scalding water after returning to them.

Medical Records and Protocols in A/N/D/ Cases

Required
DSS Authorization Form (#5143) attached? ☐ Yes ☐ No

SIS #:

Payment Source:
☐ CMEP ☐ Medicaid (#)
☐ Other

Child/Patient Name:
Date of Birth:
Date of Exam:

North Carolina Child Medical Evaluation Program (CMEP)
MEDICAL REPORT

Part A: Referral Information *(Note: **Pages 1-4** to be completed by DSS **prior to** CMEP evaluation)*

1. Referral Source(s)

DSS Involvement:
County:
Social Worker:
Address:
Phone Number:
Fax Number:

Law Enforcement Involvement
Agency:
Contact:
Address:
Phone Number:
Fax Number:

2. Child, Caregiver, and Household Member Information

Child (Patient)

Gender:
Race/Ethnicity
First Name:
Middle Name:
Last Name:
Date of Birth:
Age:
Address:
County of Residence:
Phone Number:
Alternate Number:

Mother

Relationship
Name:
Age:
Highest Level of Education:
Address:
County of Residence:
Phone Number:
Alternate Number:

Father

Relationship
Name:
Age:
Highest Level of Education:
Address:
County of Residence:
Phone Number:
Alternate Number:

Child/Patient Name:
Date of Birth:
Date of Exam:

Other Adult Caregivers (if applicable)

Name:
Relationship to child:
Age:
Highest Level of Education:
Address:
County of residence:
Phone Number:
Alternate Number:

Other adult caregivers *(if applicable)*

Name:
Relationship to child:
Age:
Highest Level of Education:
Address:
County of residence:
Phone Number:
Alternate Number:

Household Composition:

Household #1

Name	Age	Relationship to Patient

Household #2 *(If applicable)*

Name	Age	Relationship to Patient

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

3. Referral Concerns

This child has been referred for medical diagnosis related to the following concerns: *(Check all that apply)*

Sexual Abuse/Assault/Victimization	☐ Yes	☐ No	☐ Unknown
Physical Abuse/Assault	☐ Yes	☐ No	☐ Unknown
Emotional Abuse	☐ Yes	☐ No	☐ Unknown
Neglect	☐ Yes	☐ No	☐ Unknown
Domestic Violence exposure	☐ Yes	☐ No	☐ Unknown
Dependency	☐ Yes	☐ No	☐ Unknown
Other concerns	☐ Yes	☐ No	☐ Unknown

*Brief description of each concern (Including disclosure details; type of abuse; frequency; last abusive encounter; neglect contributing to abuse)**:***

a. Has the child disclosed to a professional? ☐ Yes ☐ No ☐ Unknown/ NA

If yes, please describe:

b. Has the child disclosed to a *non*-professional? ☐ Yes ☐ No ☐ Unknown/ NA

If yes, please describe:

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

c. Perpetrator(s) name; relationship to child; and last known contact with child

*(If known/applicable)***:**

d. Has there been a medical evaluation prior to this CMEP*? ☐ Yes ☐ No ☐ Unknown/ NA

If applicable Evaluation Date/Location: _____

Evaluator Name and Contact Information: _____

Sexual assault evidence collection kit obtained? ☐ Yes ☐ No ☐ Unknown/ NA

Summary of evaluation findings:

DSS caseworker: Please provide a written copy of this evaluation at time of CMEP

e. Has this child been referred for a CFE/formal interview? ☐ Yes ☐ No ☐ Unknown/ NA

f. Has this child/family had prior DSS/LE involvement? ☐ Yes ☐ No ☐ Unknown/ NA

If yes, please describe:

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

Part B: Medical Team Interview of DSS/Law Enforcement

(Completed by medical team/examiner)

Child/Patient Name:
Date of Birth:
Date of Exam:

Part C: Patient History *(Completed by the medical team/examiner)*

1. Medical History

Patient history provided by:

Primary care provider:

Immunizations up-to-date ☐ Yes ☐ No ☐ Unknown
Pregnancy/birth issues: ☐ Yes ☐ No ☐ Unknown
Chronic or active disease ☐ Yes ☐ No ☐ Unknown
Drug allergies/allergies ☐ Yes ☐ No ☐ Unknown

Hospitalizations ☐ Yes ☐ No ☐ Unknown
Surgeries ☐ Yes ☐ No ☐ Unknown
Trauma/Injury ☐ Yes ☐ No ☐ Unknown

Specify:

Medications ☐ Yes ☐ No ☐ Unknown ***Specify:***

Describe any significant medical history:

2. Genitourinary History

Genital pain/lesions/bleeding/discharge ☐ Yes ☐ No ☐ Unknown
Rectal pain/lesions/bleeding/discharge ☐ Yes ☐ No ☐ Unknown
Prior Urinary Tract Infection ☐ Yes ☐ No ☐ Unknown
Prior Sexually-Acquired Infection ☐ Yes ☐ No ☐ Unknown
Menarche ☐ Yes ☐ No Age: _____ LMP *(if applicable)*: _____

Describe any significant genitourinary and/or reproductive health history:

Child/Patient Name:
Date of Birth:
Date of Exam:

3. Developmental and/or Educational History

Developmental Concerns ☐ Yes ☐ No ☐ Unknown

Educational Concerns ☐ Yes ☐ No ☐ Unknown ☐ Not Applicable

School: Grade Level:

Describe any significant developmental and/or educational history:

4. Family History

Significant Family History ☐ Yes ☐ No ☐ Unknown

Describe significant family history:

5. Psychosocial History

Prior DSS involvement ☐ Yes ☐ No ☐ Unknown

Domestic violence ☐ Yes ☐ No ☐ Unknown

Traumatic exposure/experience ☐ Yes ☐ No ☐ Unknown

Substance abuse ☐ Yes ☐ No ☐ Unknown

Alcohol abuse ☐ Yes ☐ No ☐ Unknown

Serious mental health problems ☐ Yes ☐ No ☐ Unknown

Criminal/gang involvement ☐ Yes ☐ No ☐ Unknown

Describe any significant psychosocial history:

Regular child care arrangement:

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

6. Behavioral and Mental Health History

Currently receiving mental health treatment? ☐ Yes ☐ No ☐ Unknown

If in treatment, please list name of provider and contact information:

Sleep disturbance	☐ Yes	☐ No	☐ Unknown
Eating disorder	☐ Yes	☐ No	☐ Unknown
Enuresis/encopresis	☐ Yes	☐ No	☐ Unknown
Self-injurious behavior	☐ Yes	☐ No	☐ Unknown
Hyperactivity**/**Impulsivity	☐ Yes	☐ No	☐ Unknown
Angry outbursts/violence	☐ Yes	☐ No	☐ Unknown
Sadness/depression	☐ Yes	☐ No	☐ Unknown
Suicidal ideation/attempts/plan	☐ Yes	☐ No	☐ Unknown
Excessive masturbation	☐ Yes	☐ No	☐ Unknown
Sexual acting-out	☐ Yes	☐ No	☐ Unknown

Adolescent Behavioral Supplement *(if applicable)*

Gang involvement	☐ Yes	☐ No	☐ Unknown
Delinquency	☐ Yes	☐ No	☐ Unknown
Alcohol use	☐ Yes	☐ No	☐ Unknown
Tobacco use	☐ Yes	☐ No	☐ Unknown
Substance use	☐ Yes	☐ No	☐ Unknown
Sexual activity	☐ Yes	☐ No	☐ Unknown
Pregnancy/pregnant partner	☐ Yes	☐ No	☐ Unknown

Describe above and/or any other significant mental health history and/or medically-concerning risk behaviors:

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

7. Review of Systems

Are there significant concerns? *(If so, please describe)*

General	☐ Yes	☐ No	☐ Unknown		GI	☐ Yes	☐ No	☐ Unknown
Dental	☐ Yes	☐ No	☐ Unknown		Respiratory	☐ Yes	☐ No	☐ Unknown
Hearing	☐ Yes	☐ No	☐ Unknown		Musc/Skel	☐ Yes	☐ No	☐ Unknown
Vision	☐ Yes	☐ No	☐ Unknown		GU	☐ Yes	☐ No	☐ Unknown
ENT	☐ Yes	☐ No	☐ Unknown		Endo	☐ Yes	☐ No	☐ Unknown
Ophtho	☐ Yes	☐ No	☐ Unknown		Heme/Lymph	☐ Yes	☐ No	☐ Unknown
Skin	☐ Yes	☐ No	☐ Unknown		Neuro	☐ Yes	☐ No	☐ Unknown
CV	☐ Yes	☐ No	☐ Unknown		Psych	☐ Yes	☐ No	☐ Unknown

Please describe significant findings:

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

Part D: Medical Evaluation *(To be completed by medical team/examiner)*

1. <u>Caregiver HPI and Medical Interview</u> *(Child/patient should **<u>not</u>** be present during caregiver interview)*

Caregiver interviewed:

Describe caregiver's appropriateness and level of concerns about child safety:

Caregiver narrative (Key Points):

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

2. <u>Child Medical Interview</u> *(Child/patient should be interviewed **<u>alone</u>** in most cases)*

Interpreter (if applicable)	☐ Yes ☐ No	Name:	
Communication skills age-appropriate	☐ Yes ☐ No	☐ Unknown/Unclear	
Audio/video recording of interview	☐ Yes ☐ No	☐ N/A	
Child interviewed alone	☐ Yes ☐ No	☐ N/A	

If not, please describe reason:

CMEP Examiner: Please document key points: perpetrator(s); details of abuse/neglect; frequency of events; last abusive encounter/last contact with perpetrator; threats of harm; and neglect contributing to abuse. Whenever possible, specify question posed **<u>and</u>** child's responses in his/her "own words."

Child/Patient Name:
Date of Birth:
Date of Exam:

3. Physical Examination

Who was present during the physical examination?

General Appearance/Demeanor:

Vital Signs

Temperature:
Heart Rate:
Respiratory Rate:
Blood Pressure:

Growth Parameters (please include units)

Head Circumference: (%-tile)
Weight: (%-tile)
Height: (%-tile)
Body Mass Index:

Are there significant concerns upon general physical exam? *(Label significant findings on Page 13)*

Vision/Hearing	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Skin	☐ Yes	☐ No	☐ Unknown/Not Assessed	
HEENT	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Neck	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Chest	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Heart	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Lungs	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Abdomen	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Back	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Extremities	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Lymph nodes	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Neurological	☐ Yes	☐ No	☐ Unknown/Not Assessed	

Tanner/SMR Breast/Penis _____ Pubic Hair _____

Female Genital Examination *(With rare exception, a speculum should **not** be used during genital examination)*

Position ☐ Frog Leg ☐ Lithotomy ☐ Knee-chest
Technique ☐ Labial Separation ☐ Labial Traction
Colposcopy/Photography ☐ Yes ☐ No

Significant Findings *(Document: Lesions, discharge, bleeding, ecchymosis, erythema, etc.)*

Labia majora/minora	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Clitoris/Urethra	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Peri-hymenal tissue	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Posterior fourchette	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Vagina/Cervix	☐ Yes	☐ No	☐ Unknown/Not Assessed	
Hymen	☐ Yes	☐ No	☐ Unknown/Not Assessed	

Description (Configuration; estrogenized; notches; transections; etc):

Other:

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

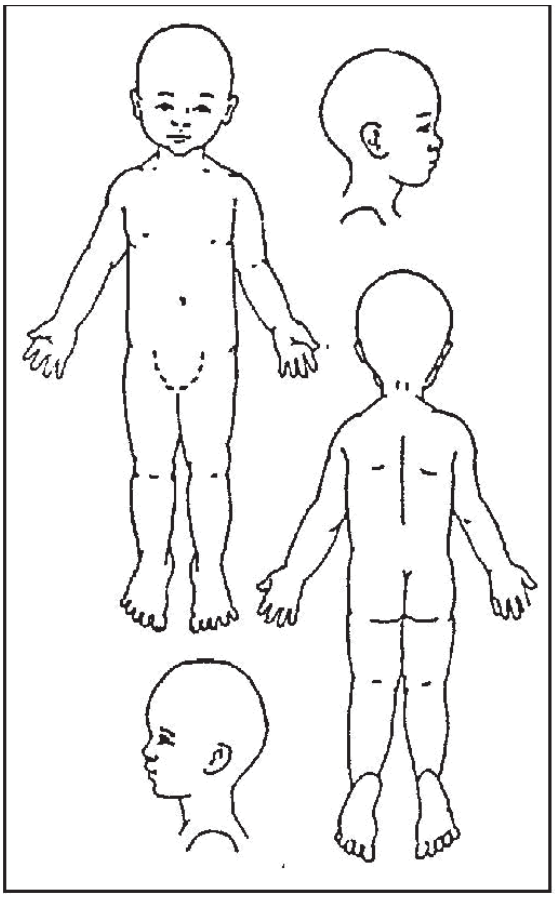
Male Genital Examination

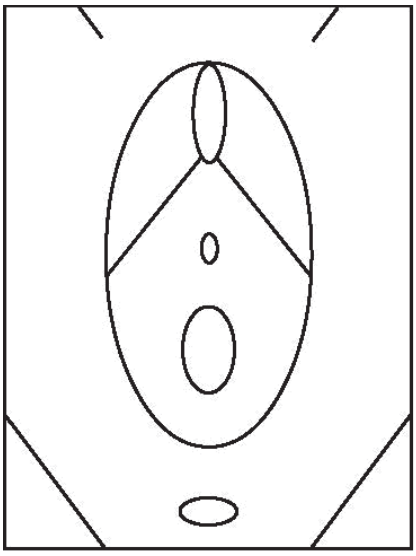
Photography ☐ Yes ☐ No

Significant findings ☐ Yes ☐ No

Anus and Perineum, eg. bruising, warts, fissures (Describe significant findings):

4. Diagrams





Child/Patient Name:	
Date of Birth:	
Date of Exam:	

5. Laboratory/Radiological Studies and Results

☐ Wet Mount Preparation	
☐ GC Culture (specify sites)	
☐ Chlamydia Culture (specify sites)	
☐ Other viral/bacteria culture (specify)	
☐ RPR (Use CDC guidelines)	
☐ HIV (use CDC guidelines)	
☐ Urine/serum pregnancy test	
☐ UA/Urine culture	
☐ PCR/NAAT	
☐ CBC	
☐ PT/PTT/Bleeding time	
☐ Skeletal Survey	
☐ MRI/CT	
☐ Other (specify)	

Part E: Additional Information/photographs

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

Part F: Impressions and Recommendations *(Completed by medical team/examiner)*

1. General Impressions

Briefly describe any general medical, mental health, developmental, or psychosocial concerns:

2. Impressions Related to Maltreatment, Assault and/or Risk

a. Based upon the information available at the time of this evaluation, we have the following concerns:

Sexual Abuse/Assault	☐ Yes	☐ No	☐ Unknown/Not Assessed
Including:			
Physical contact	☐ Yes	☐ No	☐ Unknown/Not Assessed
Use of force/threats	☐ Yes	☐ No	☐ Unknown/Not Assessed
Inappropriate Sexual Exposure	☐ Yes	☐ No	☐ Unknown/Not Assessed
Pornography exposure/particip.	☐ Yes	☐ No	☐ Unknown/Not Assessed
Sexual exploitation/prostitution	☐ Yes	☐ No	☐ Unknown/Not Assessed
Enticement	☐ Yes	☐ No	☐ Unknown/Not Assessed
Physical Abuse/Assault	☐ Yes	☐ No	☐ Unknown/Not Assessed
Emotional Abuse	☐ Yes	☐ No	☐ Unknown/Not Assessed
Neglect	☐ Yes	☐ No	☐ Unknown/Not Assessed
Domestic Violence Exposure	☐ Yes	☐ No	☐ Unknown/Not Assessed
Dependency	☐ Yes	☐ No	☐ Unknown/Not Assessed
Significant Psychosocial Risk	☐ Yes	☐ No	☐ Unknown/Not Assessed

Other Concerns

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

b. Based upon the information available at the time of this evaluation, the following preliminary and/or final diagnosis(s) have been made with regard to child abuse; neglect; dependency and/or significant risk exposure:

CMEP Examiners: Please comment on each type of type of suspected abuse/neglect/risk with particular reference to: Current/past disclosure; supportive physical/forensic findings; corroborative information; likelihood of abuse/ neglect; and your level of concern regarding this child's safety and well-being.*

***Note:** An unremarkable examination does NOT preclude the possibility of physical, sexual, or psychological maltreatment. Specifically, an unremarkable genital and/or anal examination does not exclude the possibility of sexual abuse, assault, or victimization.*

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

3. Recommendations *(CMEP Examiners: Please provide specific recommendations on lines provided)*

☐ Yes	STD/HIV testing/treatment	*(Especially if there has been body fluid contact)*
☐ Yes	Medical/follow-up	*(Including pregnancy prophylaxis, STD prophylaxis, etc)*
☐ Yes	"Second opinion" physical exam	
☐ Yes	Further interview and/or CFE	
☐ Yes	Routine/well-child medical care	
☐ Yes	Routine reproductive healthcare	
☐ Yes	Mental health follow-up	
☐ Yes	Developmental evaluation	
☐ Yes	Educational evaluation/testing	
☐ Yes	Continued DSS/LE investigation	
☐ Yes	Safety recommendations	
☐ Yes	Sibling evaluation *(Specify)*	
☐ Yes	Offender evaluation	
☐ Yes	Domestic violence evaluation	
☐ Yes	Substance abuse evaluation (child)	
☐ Yes	Substance abuse evaluation (caregiver)	

4. Contact Information: Examining Clinician

Signature (*Do not type)*	
Name and Title (Please print or type)	
Practice Name	
Address	
Phone: incl. area code	
Fax: incl. area code	

CMEP Examiner: Please retain all original evaluation materials.

Please send a copy of this report to the referring DSS office; send a copy to the CMEP office only if you intend to bill CMEP for evaluation services.

NC Child Medical Evaluation Program

CB #3415

Chapel Hill, NC
27514-9864
phone: 919-843-9365 fax: 919-843-9368

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

ADDITIONAL DATA FROM PREVIOS PAGES
(PLEASE REFERENCE THE SECTIONS TO WHICH THE ADDITIONAL DATA PERTAINS)

Reference	

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

ADDITIONAL DATA FROM PREVIOS PAGES
(PLEASE REFERENCE THE SECTIONS TO WHICH THE ADDITIONAL DATA PERTAINS)

Reference	

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

ADDITIONAL DATA FROM PREVIOS PAGES
(PLEASE REFERENCE THE SECTIONS TO WHICH THE ADDITIONAL DATA PERTAINS)

Reference	

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

ADDITIONAL DATA FROM PREVIOS PAGES
(PLEASE REFERENCE THE SECTIONS TO WHICH THE ADDITIONAL DATA PERTAINS)

Reference	

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

ADDITIONAL DATA FROM PREVIOS PAGES
(PLEASE REFERENCE THE SECTIONS TO WHICH THE ADDITIONAL DATA PERTAINS)

Reference	

Child/Patient Name:	
Date of Birth:	
Date of Exam:	

ADDITIONAL DATA FROM PREVIOS PAGES
(PLEASE REFERENCE THE SECTIONS TO WHICH THE ADDITIONAL DATA PERTAINS)

Reference	

Cynthia J. Brown, MD
August 14, 2014

Child Abuse Evaluations

Process and Medical Record Documentation

Objectives

- Medical evaluation process
- Medical record documentation

Child Medical Evaluation Program

- Administered out of UNC School of Medicine
- Roster of providers with expertise in child abuse
- Ongoing education requirements
- QI - review of provider reports
- Use standardized forms

Contact information: (919) 843-9365

cmep@med.unc.edu

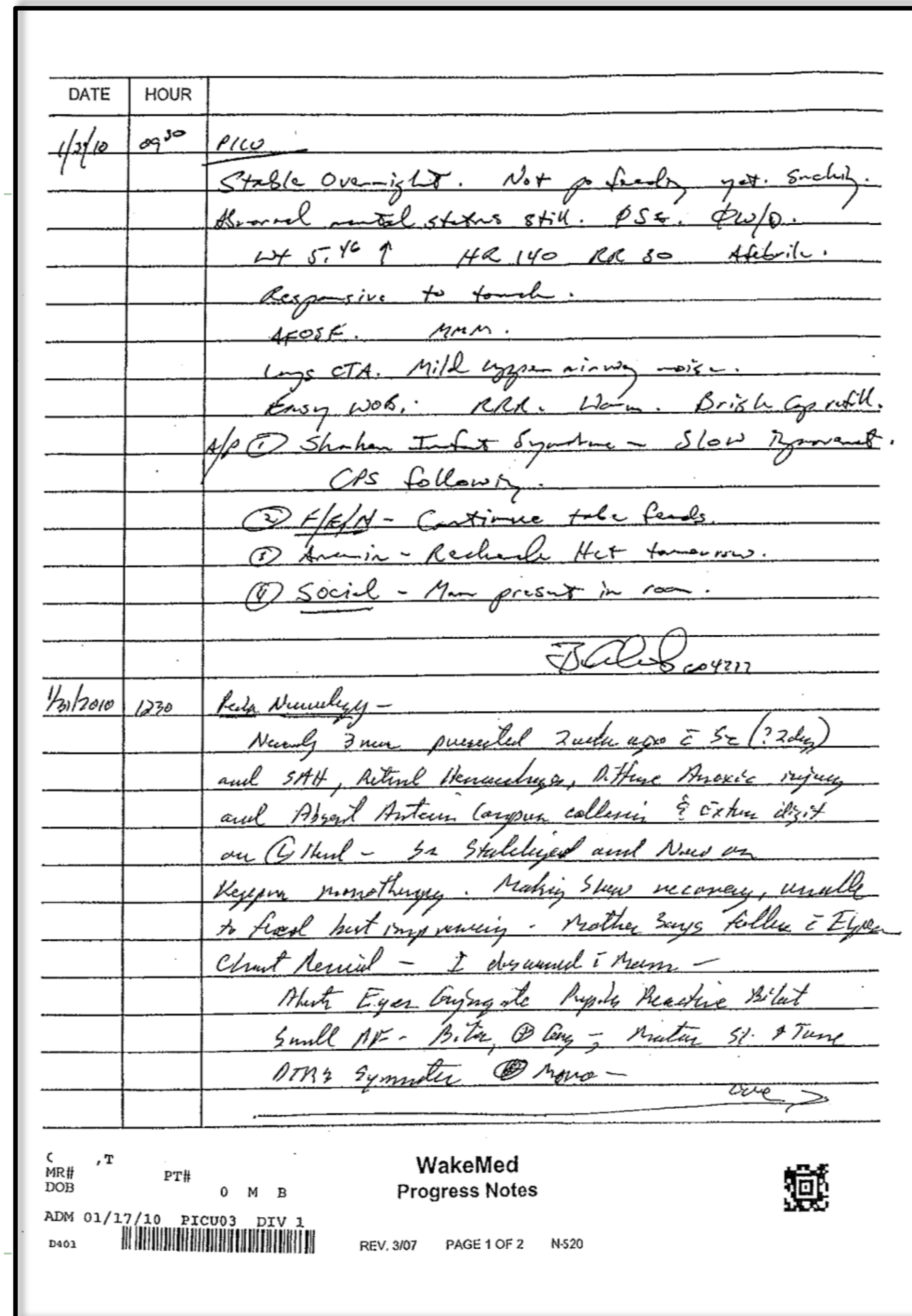
We have different training . . .

Steps in a medical evaluation

- History
- Physical examination
- Labs/radiology studies
- Diagnosis
- Recommendations

Medical records

Hand written notes



DATE	HOUR	
1/31/10	0930	PICU
		Stable overnight. Not po feeding yet. Suctioning.
		Abnormal mental status still. PS+. Φ W/D.
		Wt 5.46 ↑ HR 140 RR 30 Afebrile.
		Responsive to touch.
		AFOSF. MMM.
		Lungs CTA. Mild upper airway noise.
		Easy WOB. RRR. Warm. Brisk cap refill.
		A/P ① Shaken Infant Syndrome – Slow Improvement.
		CPS following.
		② F/E/N – Continue tube feeds.
		③ Anemia – Recheck Hct tomorrow.
		④ Social – Mom present in room.
		[signature] 604217
1/31/2010	1230	Peds Neurology –
		Nearly 3 mo presented 2 weeks ago c̄ Sz (? 2 days)
		and SAH, Retinal Hemorrhages, Diffuse Anoxic injury
		and Absent Anterior Corpus callosum & extra digit
		on (L) hand – Sz stabilized and now on
		Keppra monotherapy. Making slow recovery, unable
		to feed but improving – Mother says follows c̄ Eyes
		Chart Reviewed – I discussed c̄ Mom –
		Alert Eyes Conjugate Pupils Reactive Bilat
		Small AF – Bitemp, ⊕ long – Motor Sl. ↑ Tone
		DTR's Symmetric ⊕ Moro –
		over →

MR# DOB PT# 0 M B

WakeMed
Progress Notes

ADM 01/17/10 PICU03 DIV 1

D401 REV. 3/07 PAGE 1 OF 2 N-520

Medical records

EMR

CD

Result Type: Consultation
Result Date: [redacted]
Result Status: Auth (Verified)
Result Title: Consultation
Verified By: Brown MD[S], Cynthia H on 01 July 2014 16:21
Encounter info: 268639344012, Mission Hosp, Inpatient, 06/30/2014 -
Contributor system: eScription

Consultation (Verified)

NAME: [redacted] MRN: [redacted]
DICTATOR: Dr. Cynthia H Brown FIN#: [redacted]
DICTATION DATE: [redacted] ROOM#: [redacted]
ADMISSION DATE: [redacted] JOB ID: 162558

CONSULT

DATE OF BIRTH
[redacted]

DATE OF SERVICE
[redacted]

REFERRAL
Colby Colasacco, MD.

CHIEF COMPLAINT
Traumatic brain injury.

HISTORY OF PRESENT ILLNESS
[redacted] is a 3-year-old female, who was admitted to Mission Hospital last evening for further evaluation and treatment of traumatic brain injury. History was obtained in separate interviews from her mother, [redacted], and her mother's boyfriend, [redacted].

[redacted] reports that [redacted] was in her usual state of good health until this past weekend. She reported that [redacted] was less active Saturday and had a decrease in her appetite. On Sunday, [redacted] threw up a couple of times and appeared to develop fever (felt warm). They decided to go swimming during the afternoon - an activity Harmony typically enjoyed. However, [redacted] only got briefly into the kiddie pool and then once in the larger pool and then mostly sat by her mother.

Medical records

- Patient name and other identifier on each page
- Name/signature of provider entering information

Anatomy of the medical report

Anatomy of the medical report

- CC
- HPI
- PMH
- ROS
- FH
- SH

History

- PE
- LAB/RADIOLOGY
- IMP
- REC

Anatomy of the medical report

- CC — Chief complaint
- HPI — History of present illness
- PMH — Past medical history
- ROS — Review of systems
- FH — Family history
- SH — Social history
- PE — Physical examination
- LAB/RADIOLOGY — Lab results/Radiology imaging
- IMP — Impressions
- REC — Recommendations

Anatomy of the medical report

- CC
- **HPI**
- PMH
- ROS
- FH
- SH
- PE - LAB/X-RAY
- **IMP**
- **REC**

Medical Reports

Child Abuse Evaluations

HPI – pediatric medicine

- Gathering history from
  - Child
  - Caregivers

HPI – pediatric medicine + child abuse

- Gathering history from
  - Child
  - Caregivers
  - Investigators

Impressions

- General concerns about the child's health
- Concerns about possible maltreatment
  - Physical abuse
  - Sexual abuse
  - Emotional abuse
  - Neglect
  - Exposure to domestic violence
  - Dependency
- Concerns about psychosocial risk

Impressions

- Discuss basis of opinions
- Other diagnoses considered – differential diagnosis

Impressions

"Angela has bruising present today on both buttocks, both lateral thighs and her right flank. There are 13 bruises in a linear pattern that measure 1½ inches in width and vary from 4 – 7½ inches in length. (*See photographs and diagrams*)

These bruises are consistent with inflicted injuries and her history of being struck by a belt multiple times. These injuries are on different planes of Angela's body which is not compatible with the history provided by the babysitter of a fall off a couch onto a carpeted floor.

Angela has no personal or family history of a bleeding disorder and there are no clinical findings today suggestive of this disorder."

Impressions

"Erik is a 14 month old male diagnosed with a left distal spiral tibial fracture. His parents did not report known fall or trauma but reported that yesterday afternoon he refused to bear weight and started crawling to move around the home.

The physical examination was entirely normal with the exception of mild point tenderness over the distal left tibia.

His skeletal survey was reviewed and no other fractures were present. The bone density appears normal. Erik's diet, growth and development have been normal. There is no family history of skeletal or dental disorders.

This fracture type is common in toddlers and can result from planting their foot and pivoting. It is not uncommon for the injury event to be unwitnessed by caretakers. His family sought care in a timely fashion and there are no psychosocial risk factors present. At this time, I do not have concerns for inflicted injury."

Recommendations

- Labs/x-rays
- Additional evaluations
  - Medical specialists
  - Developmental
  - Educational
  - Psychological/psychiatric
- Safety issues
- Other family issues

CMEP report form

Required
DSS Authorization Form (#5143) attached? ☐ Yes ☐ No

SIS #:

Payment Source:
☐ CMEP ☐ Medicaid (#)
☐ Other

Child/Patient Name:
Date of Birth:
Date of Exam:

North Carolina Child Medical Evaluation Program (CMEP)
MEDICAL REPORT

Part A: Referral Information *(Note: **Pages 1-4** to be completed by DSS **prior to** CMEP evaluation)*

1. Referral Source(s)

DSS Involvement:
County:
Social Worker:
Address:
Phone Number:
Fax Number:

Law Enforcement Involvement
Agency:
Contact:
Address:
Phone Number:
Fax Number:

2. Child, Caregiver, and Household Member Information

Child (Patient)

Mother

CMEP report form

Medical report form – pdf form, 23 pages

- Part A (pages 1 – 4)
  - Investigators
  - Caregivers
  - Referral concerns
  - Previous disclosures/evaluations
  - Perpetrator
- Part B (page 5)
  - History from investigators
- Part C (pages 6 – 9)
  - Medical history from parent/caregiver

First 11 pages are history

CMEP report form

Medical report form – pdf form, 23 pages

- Part D (pages 7 – 14)
  - Caregiver and Child interviews
  - Physical examination
  - Lab/radiology studies
  - Additional information/photographs
- Part E (page 14)
- Part F (pages 15 – 17)
  - Impressions and Recommendations
- Additional information (pages 18 – 23)

First 11 pages are history

Developing questions during review

- What is the diagnosis?
- What is the basis for the diagnosis?
- Can the time of the injury/event be determined?
- Are there alternative explanations for the findings?
- How were other possible diagnoses ruled out?
- What are the relevant articles?
- Who can assist me in interpreting the medical report?

Hospital Records: What are you getting?

Deb Flowers, MSN, CPNP-PC
NC Child Medical Evaluation Program
UNC-CH Department of Pediatrics
Clinical Assistant Professor
deborah_flowers@med.unc.edu

I have no financial disclosures.

Objectives

1. Describe what is in the hospital medical record
2. Discuss how to get the medical records you need
3. Describe challenges with interpreting the medical records

UNC SCHOOL OF MEDICINE

What is in the hospital medical record?

- Encounters
  - Clinic visits
  - ED visits
  - Admissions
- Components of medical records
  - Physician notes
  - Nursing records
  - Specialty consultations
  - Social work notes
  - Diagnostic studies
  - Letters to caregivers, phone messages

UNC SCHOOL OF MEDICINE

What is in the hospital medical record?

- Photographs
- Sexual assault exam documentation

UNC SCHOOL OF MEDICINE

Hospital Medical Records

- What medical records do you want?
  - Specific encounter
  - Entire medical record
- Making the request
  - Consents
  - Be specific about what you want and list each category or state “entire medical record”

Electronic Documentation – It's here but is it better?

- Legible and easier to read
- Understanding the format
- Pre-designed wording
- Errors in documenting

One visit – Different Interpretations

- Terminology – Why are there differences among providers?
  - "Shaken Baby Syndrome" vs "Abusive Head Trauma"
- Accidental vs Abusive Injuries
  - Training, education, experience, specialty consultations
- Hospitals and levels of expertise
  - Child abuse medical experts

Case 1

- 5 mos old with painful arm & limited movement presents to local ED
- Xray shows right humerus spiral fracture
- ED physician documents in record "this is definitely child abuse"
- Report made to DSS

UNC SCHOOL OF MEDICINE

What happens?

- 5 mos old baby with arm fracture identified by physician as being “abusive” injury
- Based on information by MD what decisions may be made?
  - » Substantiate abuse
  - » Criminal charges
  - » Other thoughts?

UNC SCHOOL OF MEDICINE

Is the fracture “child abuse”?

- What is the history?
- What is the mechanism?
- What is the experience of the medical provider?
- What kind of medical work-up should the baby get?
- What is the information from DSS/Law enforcement?

UNC SCHOOL OF MEDICINE

Interviews and Scene Re-enactment

- DSS/Law Enforcement interview parents & 5 year old
- Have scene re-enactment using baby doll and 5 year old demonstrating rolling baby over
- Medical evaluation by expert child abuse medical provider

UNC SCHOOL OF MEDICINE

Burn Case

- 8 mo old admitted for scald burns to chest/abdomen
- History:
  - » Crawled onto counter
  - » Opened microwave
  - » Pulled out hot cup of water
  - » Spilled on self

UNC SCHOOL OF MEDICINE

Concerns based on how the history is obtained and repeated

- Does it make sense that an 8 mos old baby could "climb onto the counter" and "open the microwave"?
- What further history was obtained?
  - » Mother holding baby, took hot cup of water out of microwave, baby grabbed at cup causing cup to tip and hot water to spill onto baby

UNC SCHOOL OF MEDICINE

Level of concern based on clarification of history

- Does burn pattern fit history?
- Other red flags?
- Physical Abuse vs Neglect vs Accidental injury?

UNC SCHOOL OF MEDICINE

Case 3

- 15 month old admitted for burns to soles of feet
- History:
  - Climbed onto the stove
  - Stepped on the burner
  - Began screaming and could not move

UNC SCHOOL OF MEDICINE

Decision to report to DSS?

- Concerns for physical abuse
- Scene investigation required
- Child's ability to get on top of the stove

UNC SCHOOL OF MEDICINE

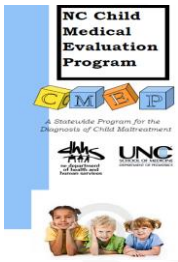
Communication & Information

- DSS provided further information and photos

UNC SCHOOL OF MEDICINE

Child Medical Evaluations (CME)

- DSS has the ability to request child abuse evaluation



UNC SCHOOL OF MEDICINE

Helpful Hints for Attorneys

- Has the child been seen by a child abuse medical expert?
- Expert interview in age-appropriate children
- Scene re-enactments when appropriate
- Attempt to have a child abuse medical expert involved with the review of the case

UNC SCHOOL OF MEDICINE

Helpful Hints for Attorneys

- Make sure you have all of the medical records, photos
- Understand how documentation is formatted
- Have a medical expert assist with interpretation

UNC SCHOOL OF MEDICINE

QUESTIONS ?

Abuse and Neglect Cases: Alternative Explanations

Cynthia J. Brown, MD
August 14, 2014

Alternative Explanations

Complex Abuse and Neglect Cases

Objectives

- Diagnostic process
- Alternative explanations
  - AHT
  - Retinal hemorrhages
  - Fractures

Multidisciplinary approach

- Medical evaluation
- Investigation information

Medical evaluations

- History
- Physical examination
- Lab/radiology studies
- Differential diagnosis
- Impressions
- Recommendations

Differential diagnosis (DDx)

"The distinguishing of a disease or condition from others presenting with similar signs and symptoms."

Merriam-Webster

Differential diagnosis – ear pain

CC: “My ear hurts”

Differential diagnosis – ear pain

CC: "My ear hurts"

HPI: Pain onset, type, duration, intensity, associated symptoms, other associated symptoms, family history

ROS

PMH

FH

SH

EXAM

LAB/RADIOLOGY

Differential diagnosis – ear pain

DDx:

Infection: Otitis media/externa, dental infection, abscess, tonsillitis, sinusitis, mastoiditis

Trauma: Barotrauma, mechanical trauma

MS: TMJ syndrome, cervical arthritis

Onc: Tumors in the region (ear, mouth, salivary glands, brain, skull)

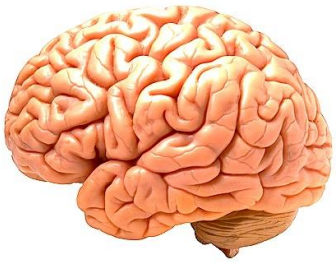
Other: Foreign body

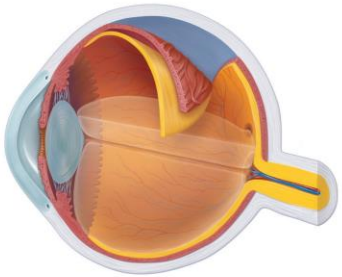
Differential diagnosis

Complex Child Maltreatment Cases

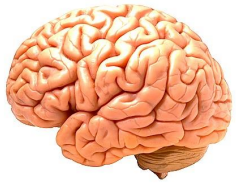
Complex child maltreatment cases

- AHT
- Retinal hemorrhages
- Fractures



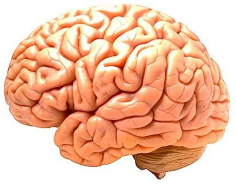


AHT



- Mechanisms of injury
  - Shaking
  - Impact
  - Combination
- Intracranial hemorrhages (subdural, subarachnoid)
- Secondary injury pathways: hypoxia, ischemia, metabolic cascades
- Retinal hemorrhages
- Neck injuries
- Other injuries of soft tissue, bone

AHT

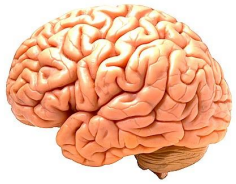


Shaking Video

Author: James R. Lauridson, MD

AHT

Infant with AHT



AHT – Radiology studies

- CT
- MRI
- MRA/MRV
- Findings:
  - SDH
  - SAH
  - Parenchymal injury – contusions
  - Secondary: cerebral edema
    hypoxic-ischemic changes

MRI scanner

Subdural hemorrhages (SDH)

Differential Diagnosis

Diagram meninges

Subdural hemorrhages (SDH)

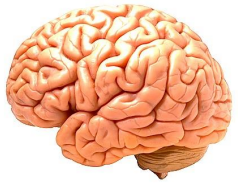
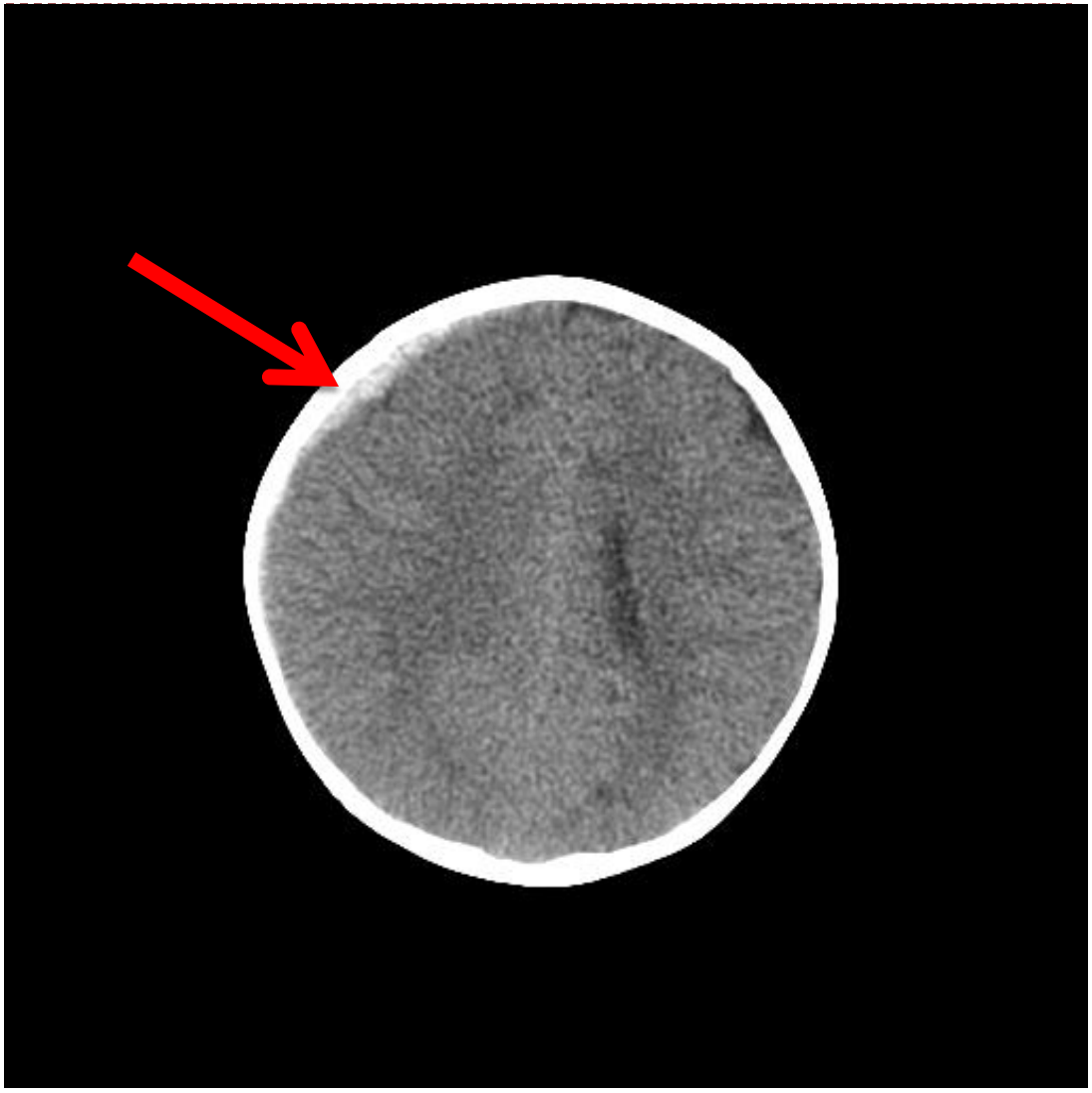


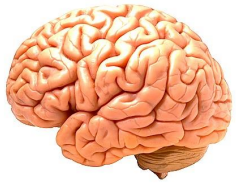
Diagram
SDH

SDH

Small SDH in 3 month old infant

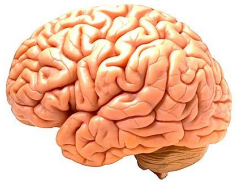


SDH



- Differential diagnosis
  - Trauma
    - Inflicted injuries
    - Accidental injuries
    - Birth
  - Bleeding disorders
  - Metabolic disorders
  - Genetic
  - Infectious disorders
  - Neoplastic disorders
  - Vascular disorders

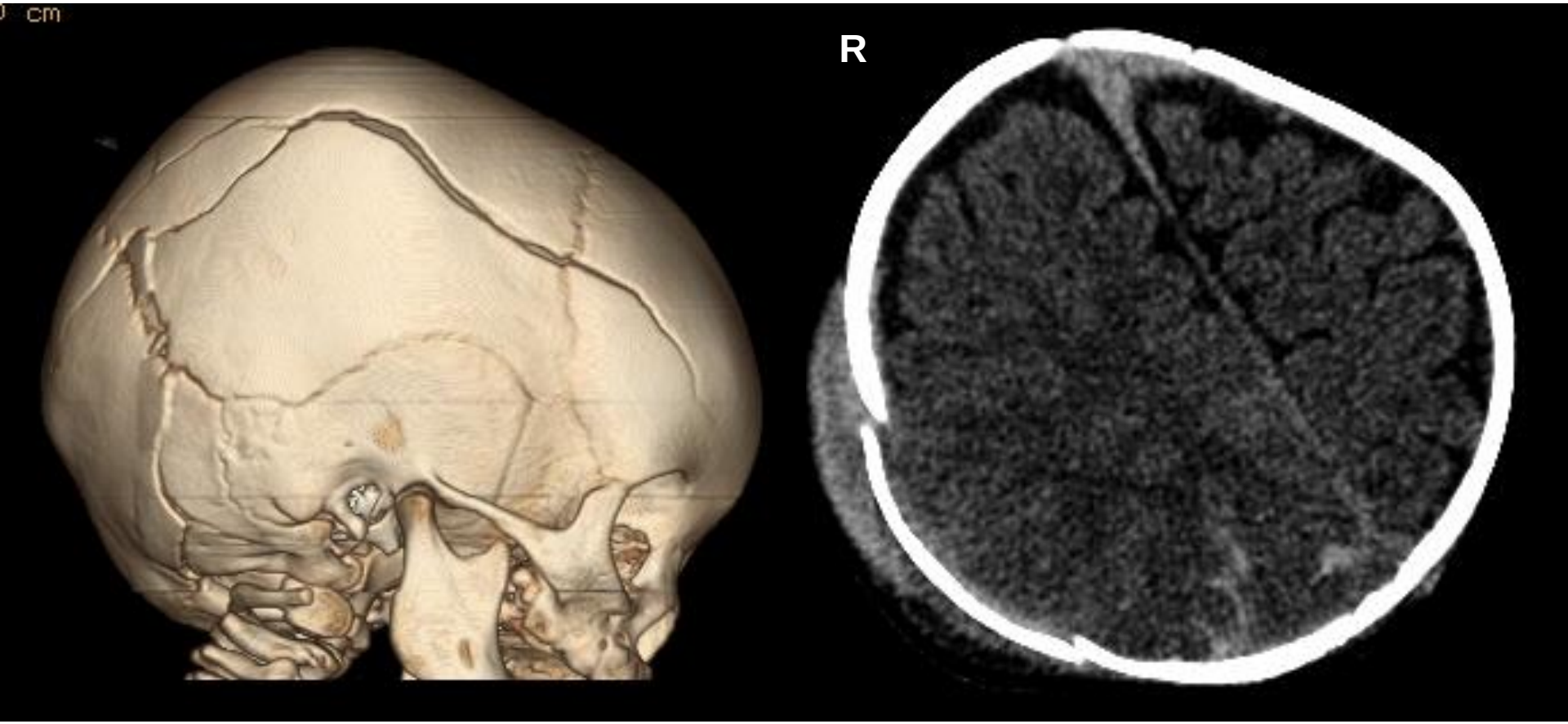
SDH



- SDH – accidental injuries (typically contact injuries)
  - Multiple fall studies - intracranial injury rare after short fall
    (Common false history provided for AHT)
  - Focal impact injury
  - Usually less impaired consciousness – unless mass effect
  - Critical: investigation of circumstances of accident

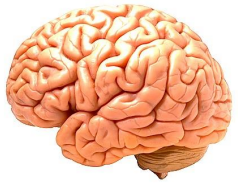
*Epidural hematoma – most often accidental injury

SDH



- 10 month old with scalp hemorrhage, skull fracture and ICH

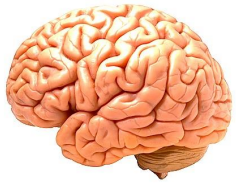
SDH – birth injury



- Birth is traumatic!

Vaginal birth

SDH – birth injury



- Birth injuries 25 – 46% of neonates
  - Very small SDH
  - Focal areas, posterior fossa
  - Most resolve within 1 month, all by 3 months
- Can consider in infants < 3 months
  - Review of birth records
  - Pattern of head circumference growth
- Differentiate from AHT:
  - Location and acuity of blood (scans/surgery/autopsy) may help differentiate
  - Other clinical findings

Whitby 2004
Looney 2007
Rooks 2008

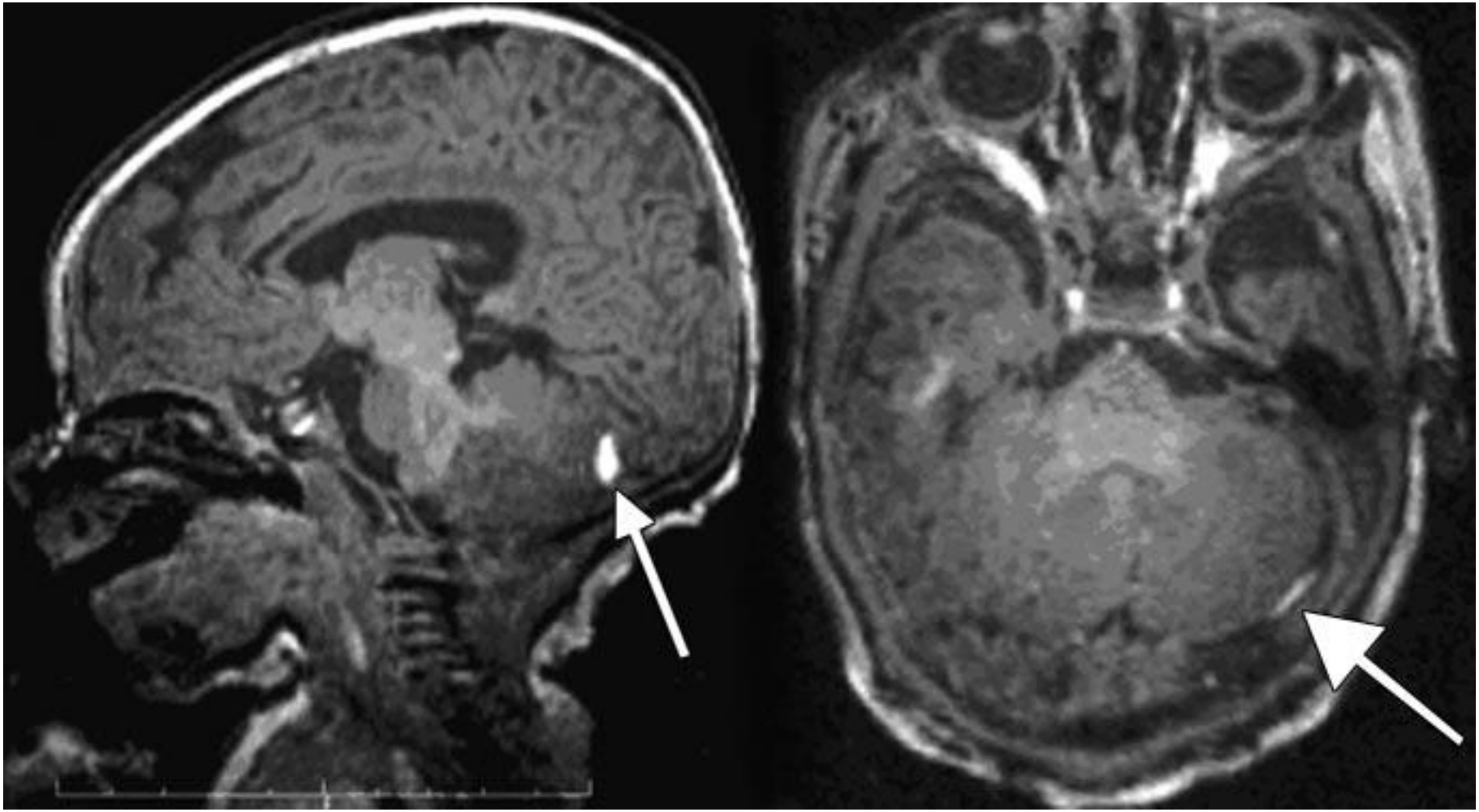
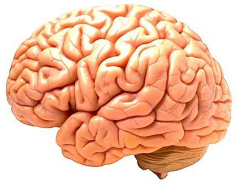


Figure 1: Sagittal (left) and transverse (right) T1-weighted three-dimensional magnetization-prepared rapid gradient-echo MR images (1820/4.38/400; flip angle, 7°; section thickness, 1 mm) in a neonate show typical size and location of subdural hemorrhage (arrow).

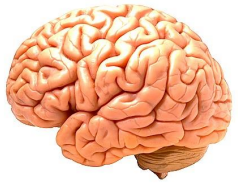
- Looney 2007

SDH – bleeding disorders

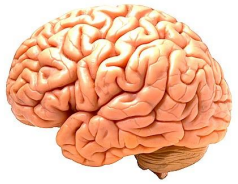


- Vitamin K deficiency
- Hemophilia A
- Hemophilia B

SDH – Vitamin K deficiency

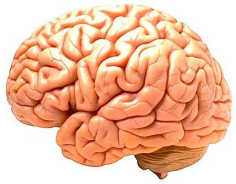


Baby getting vitamin K



Vitamin K deficiency

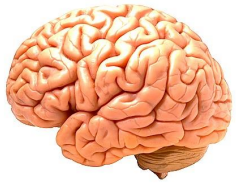
- Early onset: < 24 hours after birth
- Classic: first week of life
- Late onset: 2 – 12 weeks of life
- Signs:
  - Bleeding from umbilicus, GI tract (melena), skin, nose, surgical sites (circumcision), venipuncture sites, brain, cephalohematoma
- Consider in:
  - Infants who did not get vitamin K, especially if only breast fed
  - Maternal medications that interfere with vitamin K
  - Babies with abnormal GI tract
- Comprehensive coagulation work up



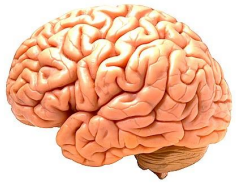
SDH – Hemophilia A or B

- Hemophilia A – factor VIII deficiency
  - 1/5000 male births
- Hemophilia B – factor IX deficiency
  - 1/20,000 males
- Bleeding sites
  - Joint, soft tissues
  - ICH (SDH, SAH, epidural, intraparenchymal)
- Family history in 2/3
- Comprehensive coagulation work up

SDH – von Willebrand Disease

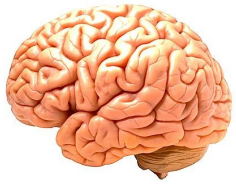


- Von Willebrand
  - Most common hemophilia – 1% prevalence
  - Most asymptomatic – 0.1% have symptoms
  - Types 1, 2 and 3
- Bleeding sites
  - Generally mild symptoms, except type 3
  - ICH rarely reported



Rare, rare, rare

- Factor VII – 1/300,000 – 500,000
- Factor X – 1/500,000 – 1/1,000,000
- Factor XI – 1/100,000
- Factor XIII – 1/5,000,000
- Factor V – 1/1 million
- Factor II (Prothrombin) – 1/2 million
- Fibrinogen disorder
- Platelet disorder



SDH – other bleeding problems

- DIC – disseminated intravascular coagulation
  - Derangement of clotting that develops in very ill child
  - Can be seen as a consequence of brain trauma

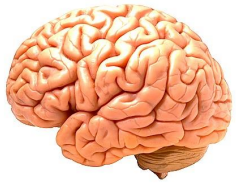
- Immune Thrombocytopenic Purpura (ITP)
  - Low platelet count
  - ICH - 0.5 – 1%, if platelets below 10,000

SDH – anatomy

- Benign enlargement of the subarachnoid space (BESS)

  May be predisposed to SDH after minimal trauma

- Differentiate from AHT:
  - Clinical history
    - Macrocrania at birth
    - Head growth pattern
  - SDH less symptomatic
  - Benign outcome

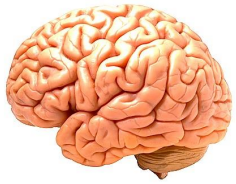


SDH – Menkes

- Menkes 1/50,000 – 1/250,000

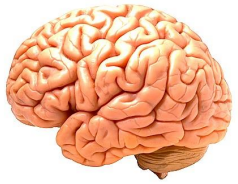
Child with Menkes

SDH – Menkes



Subdural effusion is evident in the left frontal lesion. Brain atrophy is also evident.

CT with SDH



SDH – other conditions

- Infectious
  - Meningitis
  - Herpes encephalitis
  - Complicated sinus disease
- Neoplastic
  - Leukemia
- Vascular
  - Aneurysm
- Metabolic disorder
  - Glutaric acidemia, type I – 1/40,000
  - Presentation is different
  - Brain imaging has findings unique to GA-1

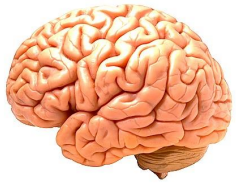
SDH – other conditions

- Hypoxia
  - Geddes hypothesis unsupported

Byard 2007
Rafaat 2008
Hurley 2010

- Intracranial venous thrombosis (IVT)
  - Does not cause SDH
  - Can be a complication of trauma

DeVerber 2001
McLean 2012



SDH – final words

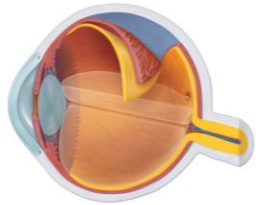
- Trauma most common cause of SDH
- Detailed investigation if accidental mechanism is proposed
- Rule out bleeding disorder in infant or if bleeding is only finding
- Consider other disorders based on history, clinical findings and lab/radiology studies
- Age/dating of SDH
  - CT scan – problematic
  - Better on MRI, surgery, autopsy

Advice

- Get expert assistance reviewing medical records

Retinal hemorrhages

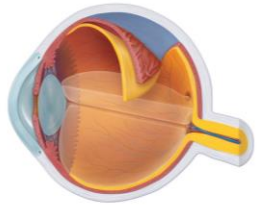
Retinal hemorrhages



- Differential diagnosis
  - Abusive head trauma
  - Accidental head trauma
  - Birth
  - Bleeding disorder
  - Infection:
    - CMV retinitis
    - Meningitis
  - Glutaric Acidemia
  - Hypernatremia/hyponatremia
  - Increased ICP
  - Leukemia
  - Thrombocytopenia
  - Carbon monoxide poisoning

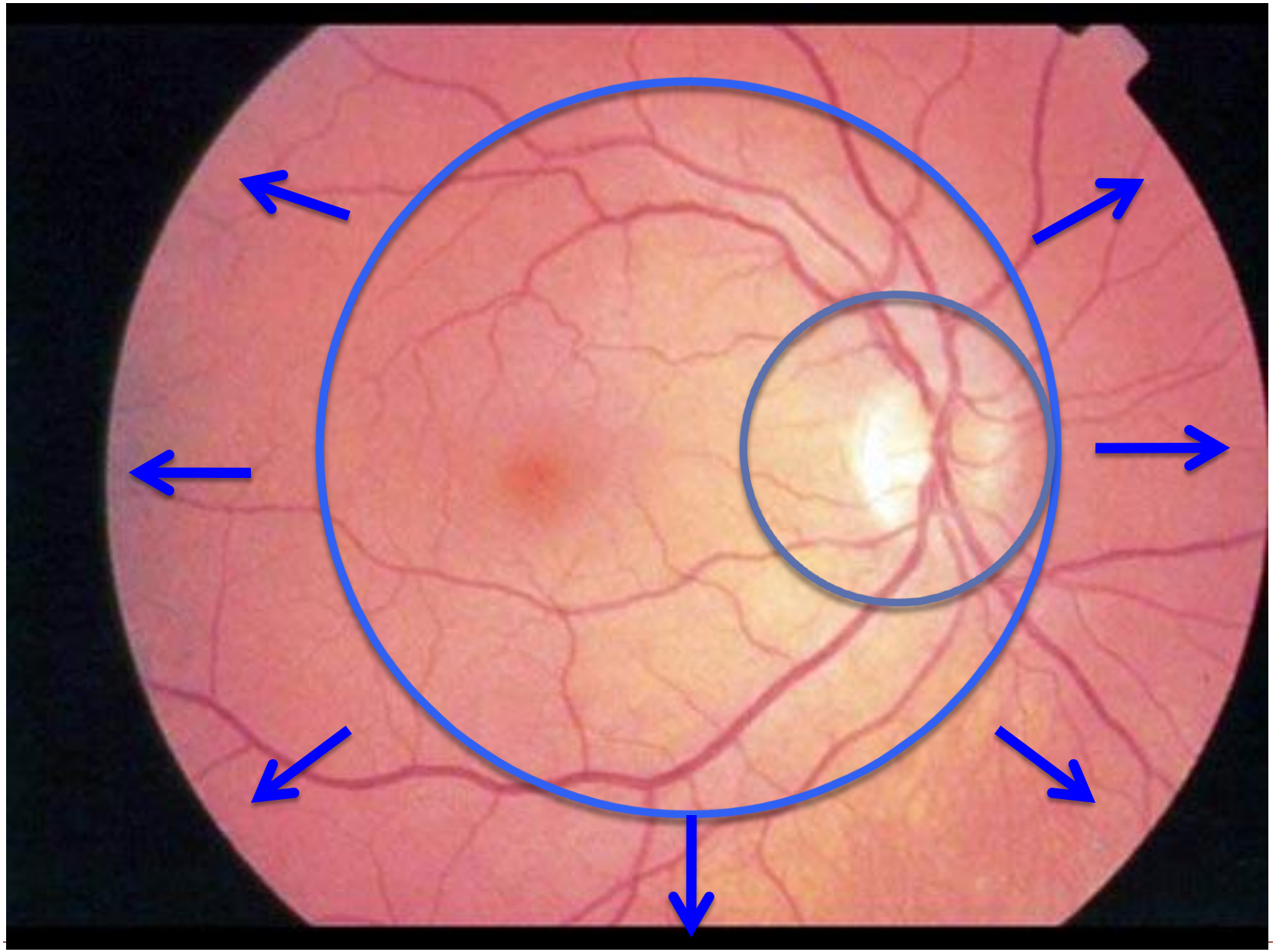
- Levin 2010

Retinal hemorrhages

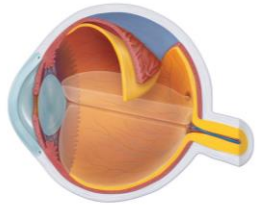


- Specialist examination
  - Ophthalmologist - dilated pupils
- Nuanced interpretation of type, location and pattern
  - Layer: Preretinal or subhyloid
    Intraretinal: superficial – flame shaped/splinter
    deeper – dot/blot
    Subretinal
  - Number of retinal hemorrhages
  - Distribution: Peripapillary
    Posterior pole
    Mid peripheral
    Peri peripheral – ora serrata

Diagram of retina



Retinal hemorrhages – PICU study

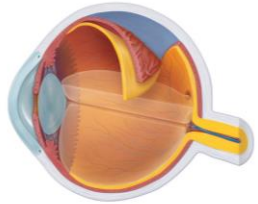


- Mild retinal hemorrhages
  - Sepsis
  - Accidental head trauma
  - Aneurysms
- Moderate retinal hemorrhages
  - Sepsis
  - Severe trauma
- Severe retinal hemorrhages
  - Fatal trauma
  - Leukemia/sepsis
  - Vitamin K deficiency + trauma

(*159 non-abused PICU patients*)

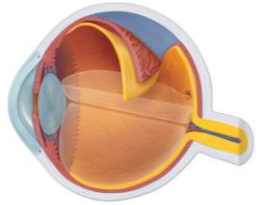
- Agrawal 2012

Retinal hemorrhages



Location, number and distribution of retinal hemorrhages will influence interpretation

Retinal hemorrhages – final words



- Location, number and distribution matter
  - Increased severity highly associated with abusive head trauma
- Present in other clinically apparent conditions
  - (Retinal hemorrhage is minor part of the serious condition)

Advice

- Get expert assistance reviewing medical records

Fractures

Fractures

- Common accidental injuries in active, older children
- Some conditions can increase risk of fracture
  - Genetic disorders
  - Metabolic bone disorders
  - Immobility

Fractures – type

- Transverse fracture
  - indirect bending, or
  - blunt force trauma

Fractures – type

- Spiral fracture
  - – torsion, or twisting force

Fractures – type

- Oblique fracture
  - bending + torsion forces

Fractures – type

- Buckle fracture
  - compression axial loading force

Fractures – type

- CML

  (Classic Metaphyseal Lesion)

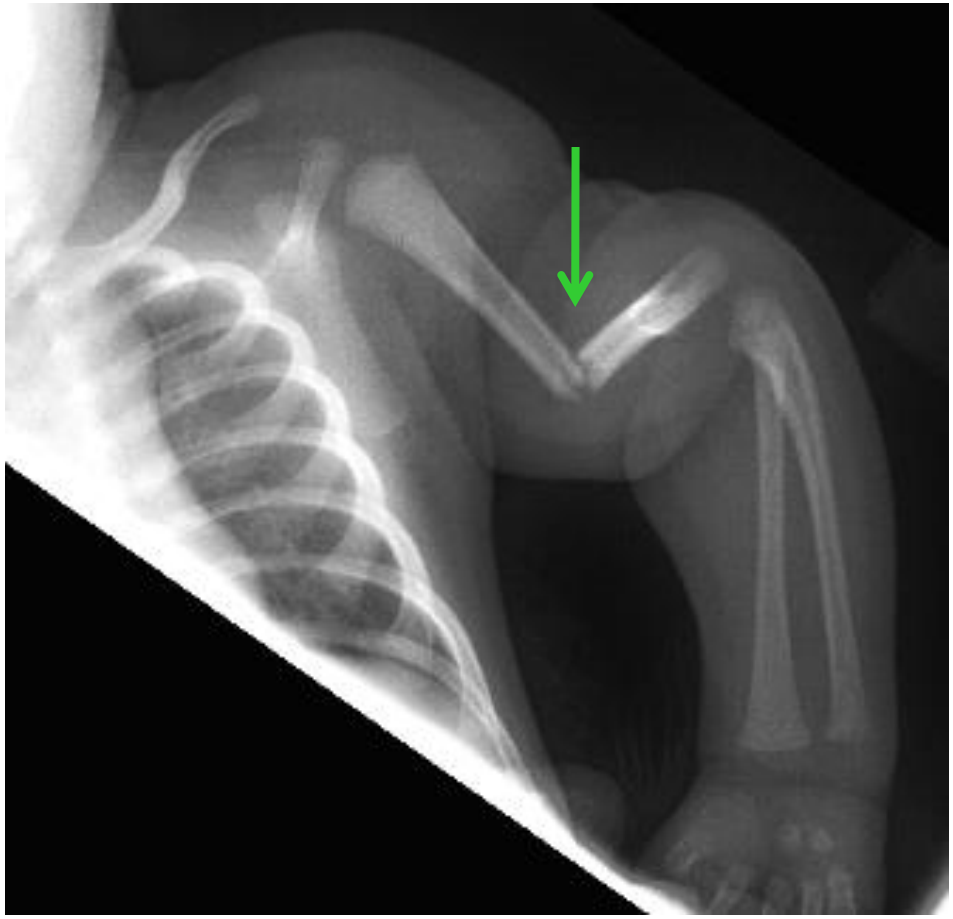
- From radiopaedia.org

Fractures – dating

- Fractures of long bones – heal by callus formation
  - Leg: femur, tibia, toes
  - Arm: humerus, radius, ulna, fingers
  - Ribs
  - Clavicles

- Cannot date skull fractures or CMLs
- Dating is not “calendar” precise.

Fractures – dating



Acute left humerus fracture

Healing left humerus fracture

Fractures – history

- Injury mechanism
- Signs/symptoms of injury
- Medical history
  - Extreme prematurity
  - Medications
  - Development capabilities
  - Dietary intake
- Family health history
  - Bone health/fracture history

Fractures – signs/symptoms

- Cry at the time of injury
- External sign of injury
  - Redness, swelling, bruising, laceration, deformity
- Use of extremity is affected
  - Stop using the extremity
  - Preferential use of uninjured extremity

Fractures – signs/symptoms

No crying: 9% (8% stopped within 30 minutes)

No visible external injury: 15%

Used extremity normally: 16% upper extremity

5% lower extremity

- All patients had at least one sign/symptom of injury
- Delay seeking care if fewer symptoms/signs of injury

2

- no external sign of injury
- used the extremity normally (but cried after their injury)

➔ Buckle fracture of the forearm

- Farrell 2011

Fractures – bruising

192 children with inflicted fractures

Bruising infrequently found

- Extremity fracture sites (3.8 – 16.7%)
- Rib fractures (7%)

Bruising more frequently found

- Skull fracture (45%)

- Peters 2008

Fractures – inflicted

- Age - non-ambulatory, < 12 months
- High specificity
  - CMLs
  - Rib fractures (*esp. posteromedial*)
  - Spinous process
  - Sternal
  - Scapular
- Moderate specificity
  - Multiple fractures
  - Different ages
  - Epiphyseal separations
  - Vertebral body fractures
- Low specificity
  - SPNBF
  - Clavicular fractures
  - Long-bone shaft fractures
  - Linear skull fractures

Kleinman 2012

Fractures – increased risk

- Osteopenia of prematurity – nutritional disorder
- Osteogenesis imperfecta – disorder of collagen
- Immobility – demineralization from disuse
- Menkes syndrome – connective tissue affected

Osteopenia of prematurity

- Increased risk
  - Birth < 28 weeks gestation
  - Weight < 1500 g (~ 3.3 lb)
  - Nutrition – TPN > 4 weeks
  - Lung disease – BPD
  - Prolonged steroids/diuretics use
- Fractures - first year of life
  - Rib
  - Long bone

Osteogenesis imperfecta

- Genetic disorder – collagen abnormalities
- 1/20,000 births
- Family history
  - Bone or dental disorders
  - Short stature
  - Blue sclera
  - Hearing impairment
- X-rays: low bone density or osteopenia
- Single fractures: transverse -long bones or rib
- Can be misdiagnosed as child abuse prior to OI diagnosis
- Genetic consult and testing

Osteogenesis imperfecta

Wormian bones

Demineralization from disuse

- Children with severe disabilities
- Decreased ambulation
- Fractures are usually diaphyseal
- Can occur
  - Routine handling
  - During physical therapy
- Difficult to distinguish accidental from inflicted

Menkes disease

- Genetic syndrome – defect in copper metabolism
- X-linked recessive (only boys)
- 1/50,000 – 250,000
- Bone findings
  - Metaphyseal fragmentation
  - Flaring of anterior ribs
  - Wormian bones (skull)

X-ray with metaphyseal hooks

Small metaphyseal hooks can be seen that resemble corner fractures.

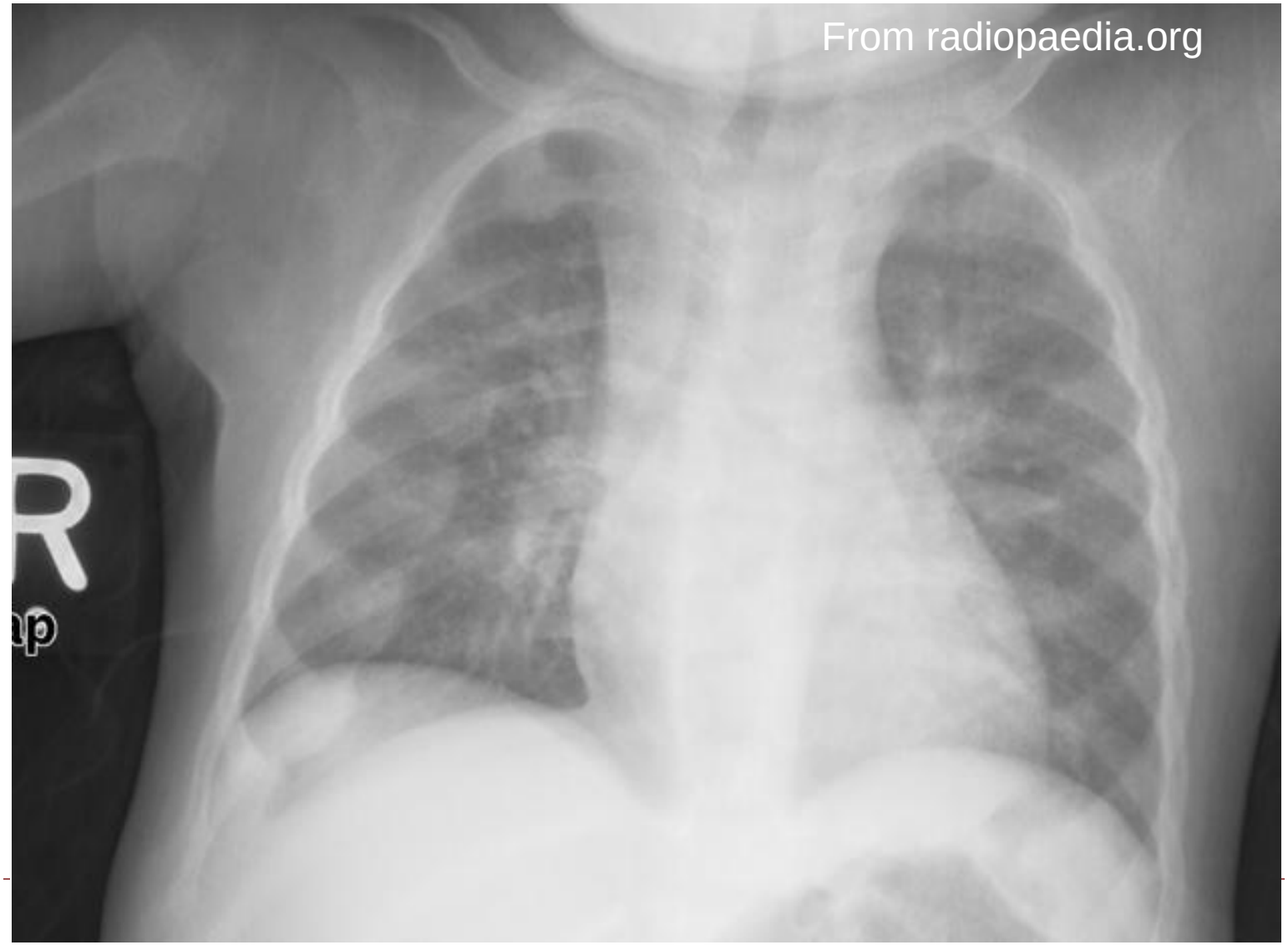
Vitamin D deficiency - Rickets

- Lab diagnosis
  - Insufficiency: Vitamin D 250HD 20 - 30 ng/mL
  - Deficiency: Vitamin D 250HD < 20 ng/mL
- Radiographic evidence – severe cases
  - Metaphyseal changes (appearance is different from CMLs)
  - Rachitic changes costochondral junction
  - Osteopenia
- Fractures in rickets
  - Mobile toddlers and infants
  - Long bones, anterior and anterio-lateral ribs, metatarsal

Vitamin D deficiency - Rickets

- From radiopaedia.org

Vitamin D deficiency - Rickets



Temporary Brittle Bone Disease

- Proposed by Paterson
  - Trace elemental insufficiency
  - Not supported by research
- Proposed by Miller
  - Decreased fetal movement
  - Not supported by research studies

Fractures – final words

- Multidisciplinary approach
  - Medical evaluation – comprehensive
  - Investigation – detailed history, scene info, re-enactment

Advice

- Get expert assistance reviewing medical records
- Consultants to consider:
  - child abuse pediatrician
  - pediatric radiologist
  - pediatric hematologist

Alternative Explanations

Complex Child Injury Cases

- Thorough investigation of proposed mechanism of injury
- Medical evaluation should address appropriate differential diagnoses

- Get expert assistance to review medical records

Bibliography

1. Abusive Head Trauma in Infants and Children
   American Academy of Pediatrics Policy Statement
   Pediatrics 123:1409-1411 2009
2. Prevalence and Evolution of Intracranial Hemorrhage in Asymptomatic Term Infants
   Rooks, VJ *American Journal of Neuroradiology* 29:1082-89 2008
3. Intracranial Hemorrhage in Asymptomatic Neonates: Prevalence on MR Images and Relationship to Obstetric and Neonatal Risk Factors
   Looney, CB *Radiology* 242(2): 535-541 2007
4. Frequency and natural history of subdural haemorrhages in babies and relation to obstetric factors.
   Whitby, EH *Lancet* 363:846-851 2004
5. Evaluating for suspected child abuse: Conditions that predispose to bleeding.
   Carpenter, SL *Pediatrics* 131:31357 2013
6. Abusive Head Trauma: Judicial Admissions Highlight Violent and Repetitive Shaking
   Adamsbaum, C *Pediatrics* 126:546-555 2010

Falls

7. Injuries resulting when small children fall out of bed.
   Helfer, RE *Pediatrics* 60:533-535 1977
8. Falling out of bed: A relatively benign occurrence.
   Lyons, TJ *Pediatrics* 92:125-127 1993
9. The likelihood of injuries when children fall out of bed.
   Nimityongskul P *J Ped Ortho* 7:184-186 1987
10. Bunk bed injuries.
    Selbst, SM *AJDC* 144:721-723 1990
11. Stairway inuries in children.
    Joffe M *Pediatrics* 82:457-461 1998
12. Stairway-related injuries in children.
    Chiaviello CT *Pediatrics* 94:679-681 1994
13. Things that go bump…bump…bump: An analysis of injuries from falling down stairs in children based at Sheffield Children's Hospital.
    Docherty, E *Emerg Med J* 27:207-208 2010
14. Infant walker-related injuries: a prospective study of severity and incidence.
    Chiaviello CT *Pediatrics* 93:974-976 1994
15. Injuries to children related to shopping carts.
    Smith, GA *Pediatrics* 97:161-165 1996
16. Patterns of injury associated with routine childhood falls.
    Pitone, ML *Pediatric Emergency Care* 22:470-4 2006

17. Population-based study of fall injuries in children and adolescents resulting in hospitalization or death.
Rivara, FP *Pediatrics* 92:61-3 1993
18. Short vertical falls in infants.
Tarantino, CA *Ped Emerg Care* 115:5-8 1999
19. Annual risk of death resulting from short falls among children: less than 1 in 1 million.
Chadwick, DL *Pediatrics* 121:1213-24 2008
20. Fatal falls in childhood.
Reiber, GD *Am J Forensic Med Path* 14:201-207 1993
21. Pediatric short-distance household falls: Biomechanics and associated injury severity.
Thompson, AK *Accident Analysis and Prevention* 43:143-150 2011

Hypoxia

22. Dural hemorrhages in non-traumatic infant deaths: does it explain the bleeding in "shaken baby syndrome"?
Geddes JF *Neuropathol Appl Neurobiol* 29:14-22
23. Lack of evidence of a causal relationship between hypoxic-ischaemic encephalopathy and subdural hemorrhage in fetal life, infancy and early childhood.
Byard RW *Pediatr Dev Pathol* 10: 348-50. 2007
24. Cranial computed tomographic findings in a large group of children with drowning: Diagnostic, prognostic, and forensic implications.
Rafaat KT *Pediatr Crti Care Med* 9(6):567-572 2008

Intracranial venous thrombosis

25. Cerebrosinus thrombosis in children.
DeVerber G *NEJM* 345(6): 417-423 2001
26. Does intracranial venous thrombosis cause subdural hemorrhage in the pediatric population?
McLean L *AJNR* 33:1281-84 2012

Retinal hemorrhages

27. Retinal hemorrhage in abusive head trauma
Levin AV
Pediatrics 126:961-970 2010
28. Prevalence of retinal hemorrhages in critically ill children
Agrawal S
Pediatrics 129:e1388-e1396 2012
29. Odds of abuse associated with retinal hemorrhages in children suspected of child abuse
Binenbaum, G *Journal of AAPOS* 13:268-272 2009

Fractures

30. Evaluating children with fractures for child physical abuse
    Flaherty, EG *Pediatrics* 133:e477-e489 2014
31. Delayed identification of pediatric abuse-related fractures
    Ravichandiran, N *Pediatrics* 125:60-66 2010
32. Symptoms and time to medical care in children with accidental extremity fractures
    Farrell, C *Pediatrics* 129:1-6 2012
33. The presence of bruising associated with fractures
    Peters, ML *Arch Pediatr Adolesc Med* 162(9):877-881
34. Symptoms and time to medical care in children with accidental extremity fractures
    Farrell, C *Pediatrics* 129(1):1-6 2011
35. Prevalence of the classic metaphyseal lesion in infant at low versus high risk for abuse
    Kleinman, PK *AJR* 197:1005-1008 2011
36. Diagnostic Imaging of Child Abuse, 2nd edition.
    Kleinman, PK St. Louis, MO: Mosby, 1998
37. Osteogenesis imperfecta: the distinction from child abuse and recognition of a variant form
    Paterson, CR *Am J Med Genet* 45:187-192 1993
38. Temporary brittle bone disease: association with decreased fetal movement and osteopenia
    Miller, ME *Calcif Tissue Int* 54:137-143 1999

Vitamin D

39. Vitamin D status in abused and nonabused children younger than 2 years old with fractures.
    Schilling, S *Pediatrics* 127:835-841 2011
40. Rachitic changes, demineralization, and fracture risk in healthy infants and toddlers with vitamin D deficiency
    Perez-Rossello, FM *Radiology* 262(1):234-241

Working with Your Own Experts

WORKING WITH YOUR EXPERT

Susan J. Weigand

Assistant Public Defender

WORKING WITH YOUR OWN EXPERT

I. WHAT CAN YOUR EXPERT DO FOR YOU?

OR

WHY YOU NEED YOUR OWN EXPERT

1. Teach you about the subject matter and Literature Review
2. Review records and give a second opinion
3. Talk with your client and their family
4. Testify

II. HOW TO FIND YOUR EXPERT

1. IDS Website
2. Criminal Defense Attorneys
3. Civil Attorneys
4. State's Experts in prior cases

III. WORKING WITH YOUR OWN EXPERT

1. Get them appointed and tell them to keep track of the funding
2. Ask them about prior testimony and previous consultations
3. Ask them what records they need-and you get them the records
4. Don't sandbag your expert

Interesting Websites:

1. www.ncids.com/forensic
2. www.ocme.dhhs.nc.gov
3. www.ncmedboard.org

STATE OF NORTH CAROLINA

_____ County

File Nos.

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Indigent Defendant Or Respondent	**APPLICATION AND ORDER FOR DEFENSE EXPERT WITNESS FUNDING IN NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES AT THE TRIAL LEVEL** G.S. 7A-314(d), 7A-454, 7A-498.5(f), 15A-905(c)(2)
Highest Original Charge (Criminal) Or Nature Of Proceeding (Civil)	

INSTRUCTIONS: *Use this form only if you are representing an indigent person at state expense, and then only in a case in which the Court is responsible for approving funds for experts, i.e., non-capital and non-criminal cases at the trial level. Do NOT use this form in case types where counsel must seek prior approval for expert funding from the Office of Indigent Defense Services (IDS) (e.g., potentially capital cases). Do NOT use this form for non-expert flat fee services, such as polygraph examinations, medical procedures, lab testing, or defense requested sentencing plans; to seek prior approval for such services, the attorney should submit a motion and proposed Order to the Court.*

The attorney for the defendant or respondent completes Section I and submits the form and a supporting motion justifying the requested expert services to the Court. If permitted by case law, the attorney for the defendant or respondent may submit this form and the supporting motion ex parte. If funding is approved, the Court completes Section II and the attorney provides a copy of the form to the approved expert. The expert completes Section III and Section IV after services are rendered to apply for payment. The expert then submits the completed form, along with an itemized invoice and any required receipts to IDS Financial Services, P.O. Box 2448, Raleigh, NC 27602. The expert also submits a copy to the requesting attorney.

I. DEFENSE REQUEST

Based on the factual showing in the attached supporting motion as required by *Ake v. Oklahoma* and its progeny, the undersigned attorney for the defendant or respondent named above requests funding for the following expert services. The attorney certifies that the information provided below is true and accurate.

☐ Check here if request and motion are being submitted *ex parte*

Name And Address Of Expert	Is the expert a current State government employee? ☐ Yes ☐ No If Yes, Name And Address Of Employing Government Agency
Total Amount Of Funding Requested (time and expenses) $	Prior Total Funds Approved For This Expert $

Type Of Expert *(check one; if none apply, skip to expert's highest education level or area of expertise)*

☐ Paralegal ☐ Licensed Private Investigator ☐ Attorney Serving As Expert
☐ Transcriptionist (English Language) ☐ Mitigation Expert/Social Worker

If None Of The Above, Expert's Highest Level Of Education Or Area Of Expertise

☐ High School or GED ☐ Associate's Degree ☐ Linguist *(Federally Certified)* ☐ Bachelor's Degree
☐ Master's Degree ☐ Crime Scene and Related ☐ CPA/Financial Expert ☐ Pharmacy/PharmD
☐ Information Technology ☐ Ph.D./Psy.D. ☐ Medical Doctor ☐ MD With Specialty

NOTE: *The IDS Director may grant deviations from the hourly rates in Section III when necessary and appropriate based on case-specific needs. To request a deviation, complete form AOC-G-310. If a deviation has been approved, attach a copy to this form.*

Expert's Years Of Experience *(check one if applicable)*

☐ Expert has more than 10 years of experience in the field in which he/she is providing services. Start date of experience: _____
☐ Expert has more than 20 years of experience in the field in which he/she is providing services. Start date of experience: _____

Date	Name Of Attorney Requesting Expert Funding	Telephone Number Of Attorney	Signature Of Attorney

II. COURT ORDER

☐ The Court finds that the expert identified in Section I would materially assist in the preparation of the defense in this case and that the denial of such expert assistance would deprive the defendant or respondent of a fair trial or other case resolution. Therefore, it is ORDERED that the defendant or respondent named above is entitled to $ _____ in funds appropriated to the Office of Indigent Defense Services (IDS) to employ the expert witness named in Section I; that the expert's fees and expenses shall not exceed this amount except by further Order of the Court; and that the expert witness named in Section I shall be compensated at the hourly rate specified in Section III and the applicable IDS policy.

☐ The Court finds that the expert identified in Section I would not materially assist in the preparation of the defense in this case. Therefore, it is ORDERED that this motion is denied.

It is ORDERED that *(check one only)*:

☐ The motion submitted by counsel and this Order shall be sealed in the court file and only opened upon further order of the Court.
☐ The motion submitted by counsel and this Order shall be sealed, and counsel shall retain the sealed motion and Order while this case is pending and file both in the court file within 30 days of final disposition at the trial level.

The motion and Order shall not be distributed beyond the defense team and IDS.

Date	Name Of Judge	Signature Of Judge

III. STANDARDIZED RATE SCHEDULE, EXPERIENCE, ENHANCEMENTS, AND DEFINITIONS

Standardized **Set** Compensation Rates *(check one box from this section if any apply; if none apply, skip to base rates below)*

☐ Paralegal	$15 per hour	☐ Mitigation Expert/Social Worker	$50 per hour
☐ Transcriptionist (English Language)	$20 per hour		
☐ Licensed Private Investigator	$50 per hour	☐ Attorney Serving as Expert	Same rate as the appointed attorney in the case

Standardized **Base** Compensation Rates *(if no set rates above apply, check one box from this section that represents highest level of education or expertise)*

☐ High School or GED	$30 per hour	☐ CPA/Financial Expert	$100 per hour
☐ Associate's Degree	$50 per hour	☐ Pharmacy/PharmD	$125 per hour
☐ Linguist *(Federally Certified)*	$60 per hour	☐ Information Technology	$150 per hour
☐ Bachelor's Degree	$70 per hour	☐ Ph.D./Psy.D.	$200 per hour
☐ Master's Degree	$85 per hour	☐ Medical Doctor	$250 per hour
☐ Crime Scene and Related	$100 per hour	☐ MD with Specialty	$300 per hour

NOTE: *For experts with base compensation rates, Time In Court Waiting and Time Traveling is compensated at 1/2 of the base rate. This reduction does not apply to experts with set compensation rates.*

Experience Enhancements *(does not apply to experts with set compensation rates; applies only to experts with base compensation rates as identified above)*

☐ For expert with more than 10 years of experience in the field in which he or she is providing services, add $10 per hour.

☐ For expert with more than 20 years of experience in the field in which he or she is providing services, add $20 per hour.

Time In Court: time testifying or observing if asked to observe by the attorney requesting the expert's services.

Time In Court Waiting: time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in; does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.

Time Out Of Court: time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

IV. EXPERT COMPENSATION CALCULATOR

Time In Court	
Time Out Of Court	
Time In Court Waiting *(divide by 2 for experts with base rates only)* **NOTE**: *Do NOT divide by 2 for experts with set rates*	
Time Traveling *(divide by 2 for experts with base rates only)* **NOTE**: *Do NOT divide by 2 for experts with set rates*	
Total Time *(add all time above)*	
Hourly Rate *(as determined by Section III above or form AOC-G-310)*	$
Total Hourly Compensation *(Total Time multiplied by Hourly Rate)*	$
Mileage/Transportation	$
Meals	$
Lodging	$
Other *(explain)* _____	$
Total Reimbursable Expenses *(based on IDS reimbursement rates)*	$
TOTAL COMPENSATION TO BE PAID EXPERT	$

NOTE: *Total Compensation To Be Paid Expert may not exceed amount preapproved by Judge.*

Name And Address Of Expert	*Name And Address Of Payee (write same if same as expert)*

Telephone Number Of Expert	*Email Address Of Expert*	*Federal Tax ID Or Social Security Number Of Payee*

I, the undersigned expert, make application for payment of pre-authorized services rendered for the indigent defendant or respondent named above, and for reimbursement of necessary expenses incurred. I certify that the above information is complete and correct to the best of my knowledge. I further certify that I have submitted a copy of this form and my itemized time sheets to the attorney of record listed in Section I.

Date	*Signature Of Expert*

For payment, mail form to IDS Financial Services, P.O. Box 2448, Raleigh, NC 27602.
Attach itemized time sheets and receipts.

STATE OF NORTH CAROLINA

COUNTY OF [redacted]

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

STATE OF NORTH CAROLINA)
)
V.)
)
[redacted])
Defendant.)

MOTION FOR MEDICAL RECORDS

NOW COMES the defendant, [redacted] by and through counsel and requests this Court pursuant to N.C.G.S. 8-53 to order Carolinas Medical Center – University to release to defense counsel, Assistant Public Defender, Susan J. Weigand and Assistant District Attorney, Kelly F. Miller any and all records concerning [redacted] (Date of Birth: February 18, 2007).

In support of this motion, the undersigned shows unto the Court the following:

1. The defendant is indigent and is charged with one count of Felony Child Abuse.

2. The defendant is accused of abusing [redacted] who was treated at CMC-University.

3. That the discovery materials indicated that Assistant District Attorney, Kelly F. Miller has been provided some of, but not all of [redacted]'s medical records.

4. That these medical records are necessary for a proper administration of justice.

WHEREFORE, the undersigned requests that the Court:

1. Issue an order requiring CMC-University to release to defense counsel and Assistant District Attorney, Kelly F. Miller any and all records concerning [redacted]

This the 4 day of August, 2010.

Susan J. Weigand

Susan J. Weigand
Assistant Public Defender

Attorney for Defendant

2. That these records are to be provided to Assistant Public Defender, Susan J. Weigand and Assistant District Attorney, Kelly F. Miller no later than August 20, 2010.

3. To the extent there is any bill for the retrieval and copying of these records for this indigent defendant, the bill will be paid by the North Carolina Administrative Office of the Courts.

This the 4th day of August, 2010.

Superior Court Judge Presiding

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

STATE OF NORTH CAROLINA)
)
VS.)
)
)
)
[redacted])
Defendant)

MOTION RE: CAROLINAS MEDICAL CENTER

NOW COMES the defendant, [redacted] by and through counsel and requests the court pursuant to N.C.G.S. 8-53 to order Carolinas Medical Center to release to defense counsel, Assistant Public Defender, Susan J. Weigand and Assistant District Attorney Tim Sielaff any and all records (including CT SCANS, MRI results, long bone series and films) of [redacted] (date of birth: 10/3/2010).

In support of this exparte motion, the defendant shows unto the court the following:

1. The defendant is an indigent and is accused of one count of Felony Child Abuse.
2. The defendant is accused of abusing [redacted] who was treated at Carolinas Medical Center.
3. Assistant District Attorney Tim Sielaff has been provided with some but not all of [redacted]'s records.
4. That the medical records including the scans and films are necessary for a proper administration of justice.

WHEREFORE, counsel requests the Court to:

1. Issue an order requiring Carolina Medical Center to release to defense counsel and Assistant District Attorney Tim Sielaff any and all records (including CT SCANS, MRI results, long bone series and films) of [redacted]
2. For such other relief as the Court deems appropriate.

This the 4 day of January, 2012.

Susan J. Weigand
Susan J. Weigand
Assistant Public Defender
Attorney for Darrius Brice

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

STATE OF NORTH CAROLINA)
)
VS.)
)
[redacted])
)
Defendant.)

ORDER RE: CAROLINAS MEDICAL CENTER RECORDS

THIS MATTER came on before the undersigned Judge presiding in the Superior Court for Mecklenburg County, North Carolina on the defendant's MOTION RE: CAROLINAS MEDICAL CENTER RECORDS.

Based upon matters before the court, the court makes the following FINDINGS OF FACT:

1. The defendant is indigent and is charged with one count of Felony Child Abuse. His attorney is Assistant Public Defender, Susan J. Weigand.
2. That the records of [redacted] (date of birth: 10/3/2010) including CT SCANS, MRI results, long bone series and films are necessary to a proper administration of justice in this case.

IT IS HEREBY ORDERED THAT:

1. Carolinas Medical Center is to send and/or provide to defense counsel and Assistant District Attorney Tim Sielaff all records, including CT SCANS, MRI results, long bone series and films of [redacted] (date of birth: 10/3/2010).

2. Defense counsel's contact information is as follows:
   Assistant Public Defender Susan J. Weigand
   700 East 4th Street, Suite 400
   Charlotte, NC 28202
   704-686-0993

3. Prosecutor's contact information is as follows:
   Assistant District Attorney Tim Sielaff
   720 East 4th Street, Suite 403
   Charlotte, NC 28202

4. That this information is to be provided to Assistant Public Defender Susan J. Weigand and Assistant District Attorney Tim Sielaff no later than January 18, 2012.

5. To the extent there is any bill for providing said records, the bill will be paid by the Administrative Office of the Courts.

This the 4th day of January 2012.

Superior Court Judge Presiding

State of North Carolina
General Court of Justice
Defender District 26

KEVIN P. TULLY
PUBLIC DEFENDER

SUITE 400
700 EAST FOURTH STREET
CHARLOTTE, N.C. 28202

TEL: 704-686-0900
FAX: 704-686-0901

January 5, 2012

By Fax: Carolinas Medical Center
Medical Records-Release of Information
Fax Number: 704-355-5731

By Mail: Carolinas Medical Center-Medical Records
PO Box 32861
Charlotte, NC 28232

Re: Medical records, Including CT SCANS, MRI results, long bone series and films of [redacted]
Date of Birth: 10/3/2010

I have attached and sent by mail a court order signed by Superior Court Judge Yvonne Mims Evans requiring CMC to provide me and Assistant District Attorney Tim Sielaff all medical records, including CT SCANS, MRI results, long bone series of films of [redacted] (dob: 10/3/2010) no later than January 18, 2012.

As you can see from the court order you are to send me a copy of the records as well as Assistant District Attorney Tim Sielaff.

My mailing address is as follows:

Susan J. Weigand
Assistant Public Defender
700 East 4th Street, Suite 400
Charlotte, NC 28202

Mr. Sielaff's address is as follows:

Tim Sielaff
Assistant District Attorney
720 East 4th Street, Suite 403
Charlotte, NC 28202

If you have any questions regarding this request do not hesitate to contact me at 704-686-0993. Thank you for your assistance in this matter.

Very Truly Yours,

Susan J. Weigand
Assistant Public Defender

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

STATE OF NORTH CAROLINA)
)
)
)
)
[redacted])
Defendant.)

MOTION FOR RECORDS FROM CMC-MAIN-DEPARTMENT OF RADIOLOGY

NOW COMES the defendant, Shannon Merriman by and through counsel and requests this Court pursuant to North Carolina General Statute 8-53 to order Carolinas Medical Center-Radiology Department to release to defense counsel, Assistant Public Defender Susan J. Weigand any and all scans, films and/or x-rays made by the Department of Radiology concerning [redacted] (date of birth: 10/23/2009.)

In support of this motion, the undersigned shows unto the Court the following:

1. The defendant is an indigent and is accused of one count of First Degree Murder and one count of Felony Child Abuse.
2. That the defendant is accused of killing [redacted] who was treated at CMC-Main.
3. That all scans, films x-rays and/or surveys are necessary for a proper administration of justice.

WHEREFORE, the undersigned requests that the Court order:

1. Issue an order requiring CMC-Main, Department of Radiology to release to defense counsel any and all scans, x-rays and/or surveys concerning [redacted]

This the 16 day of September 2012.

Susan J Weigand

Susan J. Weigand
Assistant Public Defender

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

STATE OF NORTH CAROLINA)
)
V.) ORDER RE: CMC MAIN
) The Department of Radiology
[redacted])
)
Defendant.)

THIS MATTER came on before the undersigned Judge presiding in the Superior Court for Mecklenburg County North Carolina on the defendant's MOTION FOR RECORDS FROM CMC-MAIN-DEPARTMENT OF RADIOLOGY.

Based upon matters before the Court, the Court makes the following FINDING OF FACT:

1. The defendant is indigent and is accused of one count of First Degree Murder and one count of Felony Child Abuse.
2. That defense counsel is in need of all scans, films, x-rays and/or surveys that were made during the treatment of [redacted]
3. That the release of the scans from the Department of Radiology is necessary for the proper administration of justice.

IT IS HEREBY ORDER, ADJUDED AND DECREED THAT:

1. CMC-Main-Department of Radiology will provide to defense counsel:
   Susan J. Weigand
   Assistant Public Defender
   700 East 4th Street, Suite 400
   Charlotte, NC 28202
   704-686-0993

   Any and all scans, films, x-rays and/or surveys that were made in providing treatment to [redacted] (date of birth: 10/23/2009.)

2. That the treatment dates were from September 25, 2010-November 2010 and July 10, 2011-July 14, 2011.
3. That these items are to be provided to Ms. Weigand no later than September 24, 2012.

4. To the extent there is any bill for said scans for this indigent defendant, the bill will be paid by Indigent Defense Services and/or North Carolina Administrative Office of the Courts.

This the 13th day of September, 2012.

Superior Court Judge Presiding

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

STATE OF NORTH CAROLINA)
)
V.)
[redacted])
Defendant.)

MOTION FOR PRODUCTION OF PHOTOGRAPHS IN THE POSSESSION OF THE NORTH CAROLINA MEDICAL EXAMINER

NOW COMES the defendant, by and through counsel and respectfully moves that the Court order the North Carolina Medical Examiner to provide the defense with copies of all photographs that were taken during organ recovery concerning [redacted] that are in the possession of the North Carolina Medical Examiner's Office.
In support of this motion, the undersigned shows unto the Court the following:

1. The defendant is charged with First Degree Murder of [redacted] That according to the Mecklenburg County Medical Examiner's office, photographs were taken during organ recovery.
2. The undersigned attorney for the defendant reasonably needs to review the photographs in preparation of the defense's case.
3. The North Carolina Medical Examiner's office has copies of the aforementioned photographs and will release them to defense counsel if presented with a court order requiring production of them.

This the 13 day of September, 2012.

Susan J. Weigand
Assistant Public Defender
700 East 4th Street, Room 400
Charlotte, NC 28202
704-686-0993

ORDER

BASED UPON the forgoing MOTION of the defendant, and for good cause shown, it is hereby ORDERED that the North Carolina Medical Examiner's office will furnish defense counsel with copies of all photographs taken during organ recovery concerning [redacted]

This the 13th day of September, 2012.

Superior Court Judge Presiding

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
)
VS.)
)
)
DEFENDANT)
Defendant.)

EX PARTE MOTION FOR DEFENDANT'S DISCOVERY

NOW COMES the undersigned attorney for the defendant and respectfully moves the court to enter an exparte order requiring Attorney Susie Sunshine to release to defense counsel all discovery that she obtained from the Department of Social Services concerning his representation of the defendant in Family Court.

In support of this exparte motion, the defendant shows the court following:

1. That the defendant is accused of one count of Felony Child Abuse. The alleged victim is the defendant's daughter,

2. That the defendant is being represented in Family Court by Attorney Susie Sunshine. The petition alleges that the defendant abused his daughter.

3. That according to the Local Rules Of Court specifically Local Rule 27 Absent a court order discovery, provided to the respondent's attorney under these rules shall not be thereafter provided to the clients or to outside counsel not involved in the abuse/neglect matter.

WHEREFORE, counsel respectfully requests the Court to:

1. Issue an exparte order requiring Attorney Susie Sunshine to provide the undersigned defense counsel with a copy of defendant's discovery.

This the _____ day of _____, 2014.

_____
Susan J. Weigand
Assistant Public Defender

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
)
VS.) EX PARTE ORDER
)
)
)
Defendant.)

THIS CAUSE coming on to be heard exparte and being heard by the undersigned Superior Court Judge for Mecklenburg County, North Carolina on the Exparte Motion of the defendant's criminal attorney that she be provided with a copy of the defendant's discovery in Family Court.

IT IS HEREBY ORDERED THAT:

1. Attorney Susie Sunshine who is representing the defendant in Family Court in an action entitled, is to provide defense counsel Assistant Public Defender Susan J. Weigand with a copy of her discovery.

This the _____ day of _____, 2014.

_____
Superior Court Judge Presiding

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
[redacted]

STATE OF NORTH CAROLINA)
)
VS.) ORDER RE EXPERT WITNESSES
)
[redacted])
Defendant.)

THIS MATTER came on before the undersigned Judge presiding in the Superior Court of Mecklenburg County North Carolina on April 11, 2012 on request of defense counsel for the Court to determine the date the defendant and the State must identify their expert witnesses and provide their experts' written reports and curriculum vitae.

Based upon the defendant's motion, the Court makes the following FINDINGS OF FACT:

1. The defendant, [redacted] is accused of one count of Second Degree Rape, one count of Second Degree Sexual Offense and one count of Sexual Battery.
2. The trial of State of North Carolina v. [redacted] is scheduled for the the week of July 23, 2012.

IT IS HEREBY ORDERED THAT:

1. Defense counsel Assistant Public Defender Susan J. Weigand and Assistant District Attorney Samantha Pendergrass will identify their expert witness no later than 14 days before trial.
2. That each expert witness will prepare a report which includes the expert's opinion and the underlying basis for their opinion. The expert will also provide a curriculum vitae. The report and the CV are to be provided no later than 14 days before trial.

This the 11 day of April, 2012.

Superior Court Judge Presiding

Who Makes the Medical Decisions?

Medical Treatment of Juveniles
(G.S. 7B-903(a)(2)(c)& (a)(3))

- Director may consent to routine or emergency medical treatment.
- Unless otherwise ordered, director may arrange for evaluations and treatment after reasonable efforts are made to obtain consent by parent or guardian. If no consent, promptly notify and give updates, including copies of records if requested.
- Court may order juvenile examined by physician, psychiatrist, psychological, other expert. Upon completion, court has hearing to determine whether treatment needed and who shall pay the cost. County manager receives notice and opportunity to be heard.
- If evidence juvenile is mentally ill or developmentally disabled, juvenile referred for treatment. Juvenile cannot be directly committed, but voluntary consent of parents. If no consent, then court may order.

*From 2014 NC Juvenile Court Improvement Program's adjudication/disposition training.

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name And Address Of Juvenile

Juvenile's Date Of Birth	*Age*	*Race*	*Sex*

ORDER FOR NONSECURE CUSTODY
(ABUSE/NEGLECT/DEPENDENCY)

G.S. 7B-502 through -505, -508

Name And Address Of Parent/Guardian/Custodian/Caretaker

Name And Address Of Parent/Guardian/Custodian/Caretaker

1. As grounds for the issuance of this Order, the Court finds that there is a reasonable factual basis to believe that the matters alleged in the petition are true, that there are no other reasonable means available to protect the juvenile, and *(check one or more)*
   - ☐ a. the juvenile has been abandoned.
   - ☐ b. the juvenile has suffered physical injury or sexual abuse.
   - ☐ c. the juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker has created conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection.
   - ☐ d. the juvenile is in need of medical treatment to cure, alleviate, or prevent suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and the juvenile's parent, guardian, custodian, or caretaker is unwilling or unable to provide or consent to the medical treatment.
   - ☐ e. the parent, guardian, custodian, or caretaker consents to the nonsecure custody order.
   - ☐ f. the juvenile is a runaway and consents to nonsecure custody.

☐ 2. Efforts by DSS to prevent or eliminate the need for the juvenile's placement include:_____

_____

_____

_____

_____

OR

☐ 3. Efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, and placement of the juvenile in the absence of such efforts was reasonable. *(Describe immediate threat of harm.)*

_____

_____

_____

4. Based on the above findings the court concludes that it is contrary to the juvenile's welfare to remain in the home.

TO ANY LAW ENFORCEMENT OFFICER OR DIRECTOR OF A COUNTY DEPARTMENT OF SOCIAL SERVICES

YOU ARE ORDERED to assume custody of the above named juvenile(s) for placement in nonsecure custody and to make due return on this order. You are also ordered to give a copy of this Order to the juvenile's parent, guardian, custodian or caretaker named above.

The juvenile(s) shall be placed in nonsecure custody with:

☐ 1. the Department of Social Services of the county named above. The department may place the juvenile in a licensed foster home, a home otherwise authorized by law to provide temporary residential care, a facility operated by the department, or the following relative's or nonrelative kin's home or other home or facility, which the Court hereby approves:

_____.

The department is authorized to arrange for and consent to:

- ☐ a. any medical, surgical, remedial, educational, psychological, or psychiatric testing, treatment or evaluation, including CME or CMHE evaluations, that the department determines to be appropriate for the juvenile.
- ☐ b. only the following types of testing, treatment, or evaluation:

_____.

AOC-J-150, Rev. 10/13

☐ 2. *(designate person, if the Court places the juvenile directly, not through DSS)* _____

A further hearing to determine the need for continued nonsecure custody, whether with DSS or someone else shall be held:

Date of Hearing	*Time Of Hearing* ☐ AM ☐ PM	*Place of Hearing*

☐ 3. The juvenile is a member of a State-recognized tribe. The Department of Social Services shall notify the juvenile's State-recognized tribe of the need for nonsecure custody for the purpose of locating relatives or nonrelative kin for placement.

Date	*Signature Of Judge/Judge's Designee*
Maximum Duration Of Custody	*Name Of* ☐ *Judge* ☐ *Judge's Designee (Type Or Print)*

If the person above gives telephonic approval:

Time ☐ AM ☐ PM	*Name And Title Of Person Receiving Telephonic Approval*	*Signature Of Person Receiving Telephonic Approval*

RETURN ON ORDER

Date Order Received	*Date Order Returned*

☐ 1. The juvenile named above was taken into custody at _____ ☐ AM ☐ PM, on *(date)* _____, and taken to _____ :,

I gave a copy of this Order to the person named below.

☐ 2. Though diligently sought, the juvenile named above could not be found in this county. *(Add any comments or information about the juvenile's possible whereabouts.)*

Name Of Person Who Has Personally Received A Copy Of This Order	*Signature And Title Of Person Making Return*
Relationship To Juvenile	*Department Or Agency*

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
District Court Division

IN THE MATTER OF:

Name Of Juvenile

ORDER ON NEED FOR CONTINUED NONSECURE CUSTODY
(ABUSE/NEGLECT/DEPENDENCY)

G.S. 7B-506

This matter is properly before the Court for a hearing, under G.S. 7B-506, to determine the need for the continued nonsecure custody of the juvenile named above. This Court has jurisdiction over the subject matter of this proceeding and of the person of the juvenile. A Petition was filed and an Order For Nonsecure Custody was entered, as the record shows. Present were:

NAME	RELATIONSHIP OR TITLE	NAME	RELATIONSHIP OR TITLE

FINDINGS

The Court makes the following findings of fact based on clear and convincing evidence: *(attach additional page(s) if necessary)*

☐ 1. One or both of the juvenile's parents are absent and have not been served. Related facts, including efforts undertaken to identify and/or locate and serve the missing parent(s), include: _____

☐ 2. A relative of the juvenile, _____ *(name of relative),* is willing and able to provide proper care and supervision in a safe home, and placement of the juvenile with this relative ☐ would ☐ would not be in the juvenile's best interest for the following reasons: _____

☐ 3. The juvenile ☐ is ☐ is not a member of a State-recognized tribe. Nonrelative kin of the juvenile _____ *(name of nonrelative kin),* is willing and able to provide proper care and supervision in a safe home, and placement of the juvenile with nonrelative kin ☐ would ☐ would not be in the juvenile's best interest for the following reasons: _____

☐ 4. There are _____ other juvenile(s) remaining in the home *(give names and ages)* _____

Specific findings of the DSS investigation regarding the child(ren) and actions taken or services provided for the child(ren)'s protection include: _____

5. ☐ a. Efforts by DSS to prevent or eliminate the need for the juvenile's placement include: _____

☐ b. Efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, and placement of the juvenile in the absence of such efforts was reasonable.

6. There ☐ is ☐ is not a reasonable factual basis to believe that the matters alleged in the petition are true, and:

☐ a. the juvenile has been abandoned.
☐ b. the juvenile has suffered physical injury or sexual abuse.
☐ c. the juvenile is exposed to a substantial risk of physical injury or abuse because the parent, guardian, custodian, or caretaker has created conditions likely to cause injury or abuse or has failed to provide or is unable to provide adequate supervision or protection.
☐ d. the juvenile is in need of medical treatment to cure, alleviate or prevent suffering or serious physical harm which may result in death, disfigurement or substantial impairment of bodily functions, and the juvenile's parent, guardian, custodian or caretaker is unwilling or unable to provide or consent to the treatment.
☐ e. the parent, guardian, custodian or caretaker consents to a nonsecure custody order.
☐ f. the juvenile is a runaway and consents to nonsecure custody.

7. There ☐ is ☐ is not a reasonable factual basis to believe that no reasonable means other than nonsecure custody are available to protect the juvenile.

8. Efforts undertaken to establish paternity, if at issue in this case, include:

9. Other Findings:

CONCLUSIONS OF LAW

Based on the above findings of fact, the Court concludes as a matter of law that:

1. Grounds for continued nonsecure custody under G.S. 7B-503 and G.S. 7B-506 ☐ do ☐ do not exist.
2. The Department of Social Services:
   - ☐ a. has made reasonable efforts to prevent the need for the juvenile's placement.
   - ☐ b. has made reasonable efforts to eliminate the need for the juvenile's placement.
   - ☐ c. has not made reasonable efforts to prevent and/or eliminate the need for the juvenile's placement.
   - ☐ d. was precluded, by an immediate threat of harm to the juvenile, from making efforts to prevent and/or eliminate the need for the juvenile's placement.
3. ☐ The best interests of the juvenile would be served by continuing the juvenile in the custody of DSS pending a further hearing.
4. Other:

ORDER

The Court orders that:

1. Pending further hearings, the juvenile:
   - ☐ a. shall remain or be placed in the nonsecure custody of:
     ☐ the petitioner. ☐ Other *(name person)*
     for the purposes stated herein, subject to the following conditions:
   - ☐ b. shall be returned to the custody of *(name person)*
2. Pending further hearings, the petitioner shall:
   - ☐ a. make the following efforts to identify and/or locate and serve the missing parent(s):
   - ☐ b. provide or arrange for the following services aimed at eliminating the need for the juvenile's placement or at facilitating the juvenile's placement with a relative:
   - ☐ c. notify the juvenile's State-recognized tribe of the need for nonsecure custody for the purpose of locating relatives or nonrelative kin for placement.
3. ☐ a. With the consent of all parties, further hearings to determine the need for continued nonsecure custody pending the hearing on the petition are waived.
   ☐ b. A further hearing to determine the need for continued nonsecure custody shall be held:

Date of Hearing	*Time Of Hearing*	*Place of Hearing*
	☐ AM ☐ PM	

   ☐ c. The adjudication hearing on the petition filed in this case shall be held:

Date of Hearing	*Time Of Hearing*	*Place of Hearing*
	☐ AM ☐ PM	

4. The Department Of Social Services is authorized to arrange and consent to:
   - ☐ a. any medical, surgical, remedial, educational, psychological, psychiatric testing, treatment, or evaluation the Department finds to be appropriate for the juvenile.
   - ☐ b. only the following types of testing, treatment, or evaluation:
5. Other:

Date	*Name Of Judge (Type Or Print)*	*Signature*

Consent & Notification for Medical Treatment of Foster Youth N.C.G.S. § 7B-903(c)

START HERE

Is the foster youth's consent sufficient because the care is covered under G.S. § 90-21.5(a) (treatment of venereal disease, pregnancy, substance abuse, emotional disturbance)?

- Yes → The youth may be able to consent to own treatment
- No → Is the treatment, surgery or medical care routine or emergency?

Is the treatment, surgery or medical care routine or emergency?

- Yes → Unless otherwise ordered by the Court, the director has authority to consent to treatment of the foster youth.
- No → Are both parents unknown, unavailable, or unable to act on behalf of the juvenile?

Are both parents unknown, unavailable, or unable to act on behalf of the juvenile?

- Yes → The director shall first make reasonable efforts to obtain consent from a parent or guardian of the affected foster youth.
- No → Is a court order already in place giving the director the authority to consent to medical treatment?

Is a court order already in place giving the director the authority to consent to medical treatment?

- Yes → Unless otherwise ordered by the Court, the director has authority to consent to treatment of the foster youth.
- No → Will a parent consent to treatment?

Will a parent consent to treatment?

- Yes → The parent provides consent to foster youth's treatment.
- No → Is the treatment necessary or in the youth's best interest?

Is the treatment necessary or in the youth's best interest?

- Yes → A court order is required before the director can consent to treatment that is not routine or emergency in nature (including but not limited to psychiatric, psychological, educational or remedial evaluations or treatment).
- No → Consider whether treatment is needed.

Unless otherwise ordered by the court or prohibited by G.S. 122C-53(d) (injurious to the client's physical or mental well-being as determined by the attending physician), director should promptly provide parents specific notification of all medical treatment, including possible side effects and other pertinent information.

§ 7B-903. Dispositional alternatives for abused, neglected, or dependent juvenile.

(a) The following alternatives for disposition shall be available to any court exercising jurisdiction, and the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile:

(1) The court may dismiss the case or continue the case in order to allow the parent, guardian, custodian, caretaker or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the court may:

a. Require that the juvenile be supervised in the juvenile's own home by the department of social services in the juvenile's county, or by other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, custodian, or caretaker as the court may specify; or

b. Place the juvenile in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place the juvenile in the custody of the department of social services in the county of the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. The director may, unless otherwise ordered by the court, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile, the director may, unless otherwise ordered by the court, arrange for, provide, or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a court or the court's designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent or guardian of the affected juvenile. If the director cannot obtain such consent, the director shall promptly notify the parent or guardian that care or treatment has been provided and shall give the parent frequent status reports on the circumstances of the juvenile. Upon request of a parent or guardian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to such parent or guardian by the director unless prohibited by G.S. 122C-53(d). If a juvenile is removed from the home and placed in custody or placement responsibility of a county department of social services, the director shall not allow unsupervised visitation with, or return physical custody of the juvenile to, the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home.

In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a

safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.

(3) In any case, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile:

a. Upon completion of the examination, the court shall conduct a hearing to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other treatment and who should pay the cost of the treatment. The county manager, or such person who shall be designated by the chairman of the county commissioners, of the juvenile's residence shall be notified of the hearing, and allowed to be heard. If the court finds the juvenile to be in need of medical, surgical, psychiatric, psychological, or other treatment, the court shall permit the parent or other responsible persons to arrange for treatment. If the parent declines or is unable to make necessary arrangements, the court may order the needed treatment, surgery, or care, and the court may order the parent to pay the cost of the care pursuant to G.S. 7B-904. If the court finds the parent is unable to pay the cost of treatment, the court shall order the county to arrange for treatment of the juvenile and to pay for the cost of the treatment. The county department of social services shall recommend the facility that will provide the juvenile with treatment.

b. If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, custodian, or caretaker refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the court may be substituted for that

purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a court and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of treatment, the hospital shall submit to the court a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question.

(b) When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior against people, the court shall consider the opinion of the mental health professional who performed an evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual.

(c) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents, the court shall verify that the person receiving custody of the juvenile understands the legal significance of the placement and will have adequate resources to care appropriately for the juvenile. (1979, c. 815, s. 1; 1981, c. 469, s. 19; 1985, c. 589, s. 5; c. 777, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 2; 1991, c. 636, s. 19(a); 1995 (Reg. Sess., 1996), c. 609, s. 3; 1997-516, s. 1A; 1998-202, s. 6; 1998-229, ss. 6, 23; 1999-318, s. 6; 1999-456, s. 60; 2002-164, s. 4.8; 2003-140, s. 9(b).)

Impact of Revised Rule 17 for GAL's and Parent Attorneys

Guardians Ad Litem for Respondent Parents
A Guide for Parent Attorneys
Updated August, 2014

Wendy C. Sotolongo
Parent Representation Coordinator
Office of Indigent Services
123 West Main Street, Suite 308
Durham, NC 27701
919-354-7230
Wendy.C.Sotolongo@nccourts.org

I. Should you ask for a GAL for your client?

An attorney functions as an advisor, an advocate and a negotiator for his or her client. Implicit in this relationship is the client's ability to adequately make and articulate her goals for the representation. When there is an issue of the client's ability to do this, an attorney must determine:

1. Whether the attorney has a reasonable belief that the client has a diminished capacity, and
2. Whether the client is at risk of substantial physical, financial or other harm unless protective action is taken by the attorney, and
3. Whether the client can adequately act in his or her own interest. Rule 1.14, NC Rules of Professional Conduct.

Start with the presumption that you should avoid asking for a GAL unless your client is an unemancipated minor. Why this presumption? A GAL...

- Diminishes the attorney-client relationship, and
- Sends a negative message to the court and parties about your client's abilities.

II. How to avoid asking for a GAL for your client.

1. Remember that capacity is generally viewed as a continuum. Further, a client's capacity can fluctuate over time. A client with a heroin addiction may only have diminished capacity when high. A client with severe depression may only have diminished capacity when not taking her prescribed medication.

   Take steps to maximize your client's capacity by
   - using an appropriate level of communication,
   - using an interpreter during client appointments,
   - involving your client's family and friends during appointments,

- having your client evaluated by a psychiatrist to determine whether medication will increase your client's capacity,
- having your client evaluated by a psychologist to determine what psychological services may increase your client's capacity.

2. Remember that a client with diminished capacity may still be able to articulate her goals of representation, understand the consequences of her decisions, and act in her own interest. Determine whether your client has been consistent with her goals of representation even with lapses in communication or capacity. Remember that **any** client may make bad decisions about her goals of representation and that is **not** the same as being unable to act in her own interests.

3. Determine whether the risk of harm warrants a GAL or whether some lesser protective action can be utilized.

Resources:

- Chapter 6 of the North Carolina Guardianship Manual, available online at http://www.ncids.org/CivilCommitment/CivilCommitmentHome.htm has a good discussion of the concepts of capacity and competency.
- Rule 1.14, *Client with Diminished Capacity*, North Carolina Rules of Professional Conduct. http://www.ncbar.com/rules/rpcsearch.asp
- Guideline 1.5., *Clients with Diminished Capacity and Guardians ad Litem* North Carolina Indigent Defense Services Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level. IDS Guidelines for Parent Attorneys
- Rule 18, American Bar Association's Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases. ABA Standards of Practice

III. What if the judge or another party wants a hearing on whether your client should be appointed a GAL?

1. Ensure that the hearing is recorded.
2. Through appropriate communication, ascertain your client's position on whether she wants a GAL and if a GAL is appointed, who she wants the GAL to be. Look to family and friends of your client as potential GALs.
3. If you are contesting the appointment, submit an affidavit setting forth the support for your position that a GAL is not warranted.
4. If you are not contesting the appointment, be prepared to state your expectations and intentions regarding the GAL's role in the proceeding.

IV. What do I do if my client is appointed a GAL?

1. Remember that the parent is still your client.
2. Remember that your role as the attorney is different from the role of the GAL. All attorneys are subject to the requirements and limitations in the NC revised Rules of Professional Conduct. However, some of the Rules do not apply if the relationship is not an attorney-client relationship. For example, an ethics opinion under prior statute held that the parent's GAL was not entitled to the duty of confidentiality. Likewise, a GAL may not have the duty of zealous advocacy or loyalty. While the 2005 change in the statute created a duty of confidentiality, there is no reason to think that an attorney-client relationship was created by the change in the statute.
3. File a motion for the GAL to be relieved if any of the conditions leading to the appointment change.

UNC SCHOOL OF GOVERNMENT

JUVENILE LAW BULLETIN NO. 2014/01 | JANUARY 2014

Guardians ad Litem for Respondent Parents in Juvenile Cases

Janet Mason

As first published in March 2013, this bulletin explored the implications of the decision of the North Carolina Court of Appeals in *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012). In that case the court of appeals distinguished between two types of guardian ad litem that could be appointed for adult respondent parents in termination of parental rights proceedings. A guardian ad litem with a role of assistance was appropriate when the appointment was based on a respondent's diminished capacity and inability to adequately act in his or her own interest. A guardian ad litem with a role of substitution was appropriate when the appointment was based on the respondent's incompetence. Effective October 1, 2013, the statute the court was interpreting, Section 7B-1101.1 of the North Carolina General Statutes (hereinafter G.S.), was completely rewritten and the wording on which the court based the distinction it articulated in *P.D.R.* was eliminated.[1]

Janet Mason is an adjunct professor at the School of Government who specializes in juvenile law.

1. *See* S.L. 2013-129, sec. 32. Section 17 of S.L. 2013-129 made comparable changes in Section 7B-602 of the North Carolina General Statutes (hereinafter G.S.) regarding guardians ad litem for adult respondent parents in abuse, neglect, and dependency proceedings.

The answers to the questions addressed in the previous bulletin—"When should the court appoint a guardian ad litem for a respondent parent in a juvenile proceeding, and what is that guardian ad litem's role?"—changed with the enactment of S.L. 2013-129. However, the questions remain relevant and the answers, to some extent, elusive for trial courts and parties trying to implement the law properly.

Background

The first Juvenile Code provision for guardians ad litem for respondent parents was enacted in 1979 and applied only to termination of parental rights actions.[2] The legislation added as a ground for termination of a parent's rights the following: "That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child . . . , and that there is a reasonable probability that such incapability will continue throughout the minority of the child." Any time that ground was alleged, the court was required to appoint an attorney, pursuant to G.S. 1A-1, Rule 17, as guardian ad litem to represent the parent unless the parent retained counsel. The same legislation required the court to appoint a guardian ad litem for any minor parent under the age of fourteen. In 1981 the legislature amended the Juvenile Code to provide for the appointment of counsel for indigent parents in all termination of parental rights actions and to require appointment of a guardian ad litem for any minor parent under the age of eighteen.[3]

In 2001 the legislature first provided for the appointment of guardians ad litem for parents in some other juvenile cases. A trial court was required to appoint a guardian ad litem for a parent in an abuse, neglect, or dependency proceeding if

1. the petition alleged that the child was dependent because the parent was "incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition" of providing proper care and supervision for the child or
2. the parent was under the age of eighteen.[4]

Under these provisions, the Juvenile Code required the court to appoint a guardian ad litem for a respondent parent in some juvenile cases based solely on the allegations in the petition filed in the case. Appellate courts held repeatedly that a court's failure to appoint a guardian ad litem when the statute required one was reversible error.[5] These statutory mandates were expanded by case law to require the appointment of a guardian ad litem for a respondent, even when neither the status of dependency nor the incapability ground for termination of parental rights was alleged in the petition, if the allegations and evidence in the case tended to show that the parent was incapable of providing proper care and supervision for one of the reasons specified in the statutes.[6]

2. 1979 N.C. Sess. Laws ch. 875, sec. 1.
3. 1981 N.C. Sess. Laws ch. 966, sec. 1.
4. S.L. 2001-208, sec. 2.
5. *See, e.g., In re* S.B., 166 N.C. App. 488 (2004); *In re* Estes, 157 N.C. App. 513 (2003).
6. *See, e.g., In re* B.M., 168 N.C. App. 350 (2005).

Many trial courts chose to err on the side of appointing guardians ad litem for parents "just to be safe" whenever dependency was alleged or when there was any suggestion that a parent had a substance abuse or mental health problem. The statutes did not address the role of a respondent's guardian ad litem (often referred to by the acronym GAL) in these cases, and that role often was not clear.[7] Requiring a guardian ad litem for a minor respondent reiterated the requirement in G.S. 1A-1, Rule 17, that a minor party in any civil action appear through a general guardian or guardian ad litem. The relationship between Rule 17 and the requirement that a guardian ad litem be appointed for adult respondents in some juvenile cases was also not clear.

In 2005 the legislature rewrote the statutes providing for guardians ad litem for parent respondents in abuse, neglect, dependency, and termination of parental rights cases.[8] The appellate courts described this legislation as "reveal[ing] the legislature's intent to limit the appointment of a guardian *ad litem*" for respondents.[9] For actions filed on or after October 1, 2005, the requirement to appoint a guardian ad litem for a respondent parent applied only when the parent was an unemancipated minor. Instead, G.S. 7B-602 (for abuse, neglect, and dependency cases) and G.S. 7B-1101.1 (for termination of parental rights cases) authorized a court, in its discretion, to appoint a guardian ad litem for a parent "if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." In addition, both statutes provided that a parent's guardian ad litem could

1. help the parent enter into consent orders, if appropriate;
2. facilitate service of process on the parent;
3. assure that necessary pleadings are filed; and
4. assist the parent and the parent's attorney, if asked by the attorney to do so, in ensuring that the parent's procedural due process requirements are met.

Since October 1, 2009, both G.S. 7B-602 and G.S. 7B-1101.1 have specified that the court's appointment of a guardian ad litem for a respondent parent should be "in accordance with G.S. 1A-1, Rule 17." However, when enacted in 2005, the provisions in the two statutes differed. For abuse, neglect, and dependency cases, G.S. 7B-602 referred to appointment of a guardian ad litem in accordance with Rule 17, while for termination of parental rights actions, G.S. 7B-1101.1 referred to Rule 17 only in relation to the appointment of a guardian ad litem for a minor parent. For termination of parental rights cases, the statute did not refer to Rule 17 in relation to appointments based on the court's finding a reasonable basis to believe the respondent was incompetent or had diminished capacity. The court of appeals found the statutory distinction to be significant with regard to the role of the guardian ad litem in each proceeding. The court interpreted the lack of any reference to Rule 17 in the termination statute as an indication that the guardian ad litem's role in a termination proceeding, while not limited to the four actions specified in the statute and listed above, was one of assistance, not substitution.[10]

---

7. *See In re* Shepard, 162 N.C. App. 215, 227 (2004) (stating that "North Carolina case law offers little guidance as to . . . any specific duties of a GAL assigned to a parent-ward in a termination proceeding").

8. S.L. 2005-398, secs. 2, 15.

9. *In re* J.S.L., 177 N.C. App. 151, 158 (2006). *See also In re* D.H., 177 N.C. App. 700, 705 (2006).

10. *See In re* L.B., 187 N.C. App. 326, 329 (2007) (holding that the signature of a parent's guardian ad litem on a notice of appeal in a termination of parental rights case did not satisfy the requirement that the parent sign the notice), *aff'd per curiam*, 362 N.C. 507 (2008).

In 2009 the legislature amended G.S. 7B-1101.1(c) to insert the words "in accordance with G.S. 1A-1, Rule 17."[11] So, statutory provisions for guardians ad litem for parents who might be incompetent or have diminished capacity were the same regardless of whether the case was for termination of parental rights or for an initial adjudication of abuse, neglect, or dependency.[12]

After a finding that there was a reasonable basis to believe that a parent was incompetent or had diminished capacity, whether to appoint a guardian ad litem for the parent was in the court's discretion. Logically, a court's exercise of that discretion would be informed by an understanding of what a guardian ad litem's role would be and what effect the appointment would have on the respondent's rights. For years trial courts were without sound guidance regarding those critical questions. As a carryover from the pre-2005 version of the statutes that required the appointment of guardians ad litem in some instances, some courts continued to appoint guardians ad litem routinely whenever substance abuse or mental health issues were apparent. Often the guardian ad litem him- or herself was unsure of the proper role of the guardian ad litem.

In December 2012 a decision of the North Carolina Court of Appeals in a termination of parental rights case provided some guidance about the appointment and role of a guardian ad litem for a parent in a juvenile proceeding.[13] The court held that the role of the guardian ad litem and the effect of the appointment on the respondent depended on which of the two possible bases of statutory authority underlay the court's appointment.

- If the appointment was based on the court's determination that there was a reasonable basis to believe the parent was incompetent, the role of the guardian ad litem was one of substitution.
- If the appointment was based on the court's determination that there was a reasonable basis to believe the parent had diminished capacity and could not adequately act in his or her own interest, the role of the guardian ad litem was one of assistance.

The court instructed trial courts that any order appointing a guardian ad litem for a parent who was not an unemancipated minor should specify on which statutory prong the court was relying. The court should make findings to support that determination and, consistent with those findings, state whether the guardian ad litem's role was one of assistance or substitution.[14]

Current Law

A law that became effective October 1, 2013, rewrote G.S. 7B-602 (for abuse, neglect, and dependency proceedings) and G.S. 7B-1101.1 (for termination of parental rights proceedings) to delete the wording on which the court based its decision in *P.D.R.*[15] The statutes no longer provide a basis for distinguishing between guardians ad litem of assistance and guardians ad litem of substitution. They no longer authorize the appointment of a guardian ad litem based on

11. S.L. 2009-311, sec. 9.

12. *See In re* A.Y., ___ N.C. App. ___, 737 S.E.2d 160 (2013) (holding that an appellate court's analysis of the guardian ad litem provisions in G.S. 7B-1101.1(c) applies equally to those in G.S. 7B-602(c)).

13. *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012).

14. *In re P.D.R.,* ___ N.C. App. at ___, 737 S.E.2d at 159.

15. S.L. 2013-129, secs. 17 and 32.

Relevant Statutes (effective October 1, 2013)

§ 7B-602. Parent's right to counsel; guardian ad litem.

[*The right to counsel and waiver of counsel subsections are not reproduced here.*]

(b) In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent who is under the age of 18 years and who is not married or otherwise emancipated. The appointment of a guardian ad litem under this subsection shall not affect the minor parent's entitlement to a guardian ad litem pursuant to G.S. 7B-601 in the event that the minor parent is the subject of a separate juvenile petition.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17.

(d) The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney. Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

(e) Repealed by S.L. 2013-129, sec. 17.

§ 7B-1101.1. Parent's right to counsel; guardian ad litem.

[*The right to counsel and waiver of counsel subsections are not reproduced here.*]

(b) In addition to the right to appointed counsel under subsection (a) of this section, a guardian ad litem shall be appointed in accordance with G.S. 1A-1, Rule 17, to represent any parent who is under the age of 18 years and who is not married or otherwise emancipated.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17.

(d) The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney. Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

(e) Repealed by S.L. 2013-129, sec. 32.

(f) The fees of a guardian ad litem appointed pursuant to this section shall be borne by the Office of Indigent Defense Services when the court finds that the respondent is indigent. In other cases, the fees of the court-appointed guardian ad litem shall be a proper charge against the respondent if the respondent does not secure private legal counsel.

a reasonable basis to believe that a party has diminished capacity and cannot adequately act in his or her own interest. Under current law, the court may appoint a guardian ad litem only for a parent who "is incompetent."

As rewritten, the statutes say the following about the appointment and role of guardians ad litem for parents in juvenile cases.

1. If a parent is an unemancipated minor, the court must appoint a guardian ad litem for the parent pursuant to G.S. 1A-1, Rule 17.
2. On motion of any party or on the court's own motion, the court may appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, for an incompetent parent.
3. The court may not appoint a parent's attorney to serve as the parent's guardian ad litem.
4. The guardian ad litem may not act as the parent's attorney.
5. Communications between a parent's guardian ad litem and the parent and between the guardian ad litem and the parent's attorney are privileged and confidential to the same extent as communications between the parent and his or her attorney.
6. With respect to termination of parental rights proceedings, fees of the parent's guardian ad litem are paid by the Office of Indigent Defense Services when the court finds the respondent is indigent, and in other cases the fees are a proper charge against the respondent if he or she does not secure private legal counsel.[16]

Of these provisions, only the second is a substantive change. In addition to restating the circumstance in which the court may appoint a guardian ad litem for an adult parent, the statutes no longer include the former language about practices in which a parent's guardian ad litem "may engage."

So, under the current law, as before, the court must appoint a guardian ad litem for a parent who is under the age of eighteen and not emancipated. Otherwise, the court is authorized to appoint a guardian ad litem for a parent who "is incompetent." All appointments of guardians ad litem for parents must be made pursuant to G.S. 1A-1, Rule 17. Although the changes to G.S. 7B-602 and G.S. 7B-1101.1 became effective October 1, 2013, they apply to all juvenile actions, including those filed before October 1, 2013.

Rule 17 of the North Carolina Rules of Civil Procedure applies in any civil action in which a party is incompetent (or an unemancipated minor). Nothing in the current wording of the Juvenile Code suggests that the appointment or role of a guardian ad litem for a parent in a juvenile proceeding differs from that of a guardian ad litem appointed pursuant to Rule 17 in any other civil action.[17] However, Rule 17 itself has not been the subject of many appellate court decisions or other forms of interpretation, and many of the questions that existed before the October 1, 2013, statutory changes persist.

16. In practice the same is true for abuse, neglect, and dependency cases, although G.S. 7B-603(b), which addresses payment of counsel appointed for parents in those cases, is silent with respect to parents' guardians ad litem.

17. When a guardian ad litem is appointed pursuant to Rule 17 for indigent parties in other civil actions, the Office of Indigent Defense Services (IDS) frequently lacks the authority to pay the fees of the guardian ad litem. In these cases the court may fix and tax the guardian ad litem's fee as part of the costs. *See* G.S. 1A-1, Rule 17(b)(2). Questions regarding the ability of IDS to pay for a Rule 17 guardian ad litem should be directed to the IDS Assistant Director (919.354.7200).

Relevant Statutes

Rule 17. Parties plaintiff and defendant; capacity.

. . . .

(b) Infants, incompetents, etc. –

. . . .

(2) Infants, etc., Defend by Guardian Ad Litem. – In actions or special proceedings when any of the defendants are . . . incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons. . . . The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said . . . incompetent persons or defendants.

. . .

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. – Notwithstanding the provisions of . . . (b)(2), a guardian ad litem for an . . . incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the . . . insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

. . . .

(c) Guardian ad litem for . . . incompetent persons; appointment procedure. – When a guardian ad litem is appointed to represent an . . . incompetent person, he must be appointed as follows:

. . . .

(3) When an . . . incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon . . . the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an . . . incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

. . . .

(e) Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem. – Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, . . . and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

Discussion

1. What is the status of a guardian ad litem appointed before October 1, 2013, for a respondent parent pursuant to an order indicating he or she is a "guardian ad litem of assistance"?

There is no longer statutory authority for the appointment or payment of guardians ad litem with a role of assistance but not substitution, even in cases filed before October 1, 2013. Diminished capacity that falls short of incompetence is not a basis for appointing a guardian ad litem. In a case decided both before the recent statutory changes and before the decision of the court of appeals in *P.D.R.*, the court of appeals held that once a trial court determined that a respondent was incompetent or had diminished capacity and appointed a guardian ad litem pursuant to G.S. 7B-602, "it was necessary for the [respondent] to be represented by a GAL throughout the neglect and dependency and termination proceedings, as long as the conditions that necessitated the appointment of a GAL still existed."[18] Because a reasonable basis to believe that a respondent has diminished capacity and is unable to adequately act in his or her own interest is no longer a basis for the appointment of a guardian ad litem, that holding would seem to have no bearing on the release or withdrawal of a guardian ad litem appointed on that basis.

An attorney or other person appointed as guardian ad litem with a role of assistance and who has not already done so should make a motion to be relieved or to withdraw. Presumably the need to review the status of the guardian ad litem also could be raised by a party or by the court itself. Notice of the motion should be given to all parties, including the party for whom the guardian ad litem was appointed. A trial court's denial of the guardian ad litem's motion to withdraw should be based on a determination that the respondent parent is incompetent and needs a guardian ad litem. The Office of Indigent Defense Services will not pay for services provided on or after October 1, 2013, by a guardian ad litem appointed with a role of assistance based on a parent's diminished capacity.

2. What is the status of a guardian ad litem appointed before October 1, 2013, for a respondent parent pursuant to an order that does not indicate whether the role of the guardian ad litem is one of assistance or one of substitution?

Guardians ad litem in this position generally were appointed before the court of appeals interpreted the former statutes as distinguishing between guardians ad litem with a role of assistance and those with a role of substitution.[19] Their roles were unclear before October 1, 2013, and their status remains unclear until a court determines in what capacity they were appointed or makes a new determination about whether the respondent is incompetent. A guardian ad litem in this position who has not already done so should make a motion seeking that clarification. Presumably the need to review the status of the guardian ad litem also could be raised by a party or by the court itself. If the guardian ad litem has been acting only in a role of assistance, he or she probably should allege that and seek to withdraw or be relieved. If the guardian ad litem has been acting in a role of substitution or in some hybrid role of substitution and assistance, the motion should ask the court to determine whether there is a substantial question as to the respondent's competency and, if the court finds that there is, whether the respondent is incompetent and needs a guardian ad litem.

18. *In re* A.S.Y., 208 N.C. App. 530, 539 (2010).
19. *See In re* P.D.R., ___ N.C. App. ___, 737 S.E.2d 152 (2012).

In the motion the guardian ad litem should seek to withdraw or be relieved if the court determines that there is not a substantial question as to the respondent's competence or that there is but the respondent is not incompetent for purposes of the juvenile proceeding.[20] The guardian ad litem also could seek to withdraw or be relieved if the court determines that the respondent is incompetent and needs a guardian ad litem, if the guardian ad litem does not want to assume or continue in that role. Notice of the motion should be given to all parties, including the person for whom the guardian ad litem was appointed.

3. When and by whom should the question of whether a respondent needs a guardian ad litem be raised?

Any party or the court itself may move for the appointment of a guardian ad litem for a respondent parent. If the petitioner (or a movant in a termination of parental rights action) knows when the action is initiated that the respondent parent is incompetent, the petitioner should "make written application" for the appointment of a guardian ad litem before or at the time the action is filed.[21] When service by publication is required, the court may appoint a guardian ad litem before the publication is completed. Then the guardian ad litem must be served and, in a termination of parental rights action, notified to respond within the time specified in the published notice.[22] When service by publication is not required, the court may appoint a guardian ad litem before or at the time the action is commenced.[23] Under Rule 17, when the court appoints the guardian ad litem it may enter an order dispensing with service on the incompetent party.[24] However, because the Juvenile Code is so specific about on whom service must be made, the safer approach is to serve both the guardian ad litem and the respondent.[25]

A petitioner often will not know with any certainty when the action is filed whether a respondent is incompetent. Neither G.S. 7B-602(c) nor G.S. 7B-1101.1(c) includes any limitation on when during a proceeding a motion seeking appointment of a guardian ad litem may be made. However, courts have held that when there is a substantial question as to whether a party in a civil action is competent, the court should address that question "as soon as possible in order to avoid prejudicing the party's rights."[26] Pre-trial or pre-adjudication hearings are required in all juvenile cases and provide an appropriate opportunity for the parties and the court to consider whether a competency issue should be addressed.[27]

---

20. The same would be true if the court determined that the respondent was incompetent but did not need a guardian ad litem, a circumstance that would arise rarely but could occur, for example, if the court determined that the respondent had a general guardian appointed pursuant to G.S. Chapter 35A.

21. *See* G.S. 1A-1, Rule 17(c).

22. *Id*. *See also* G.S. 7B-1106(a).

23. G.S. 1A-1, Rule 17(c).

24. *Id*. This provision allows the court to override the requirement in G.S. 1A-1, Rule 4(j)(2), that service be made on both the incompetent party and that party's guardian or guardian ad litem.

25. *See* G.S. 7B-407 and G.S. 7B-1106.

26. *In re* J.A.A., 175 N.C. App. 66, 72 (2005). *See also In re* I.T.P-L., 194 N.C. App. 453, 466–67 (2008) (holding that appointment of a guardian ad litem for a respondent was "timely" when made on motion of the petitioner seventeen days after a termination of parental rights petition was filed and three months before the first hearing).

27. *See* G.S. 7B-800.1, which requires pre-adjudication hearings in abuse, neglect, and dependency cases, and G.S. 7B-1108.1, which requires pre-trial hearings in termination of parental rights cases.

Guardian ad litem issue raised by respondent's attorney. The attorney representing a respondent may be understandably reluctant to raise a question about his or her client's mental capacity, especially if the parent's ability to care for the child is an issue in the case. An attorney reasonably could ask the court to conduct a hearing to determine whether the client needs a guardian ad litem, without affirmatively asserting that the client is incompetent. In addition, the attorney is bound and should be guided by Rule 1.14 of the North Carolina State Bar's Rules of Professional Conduct,[28] which reads as follows:

> **Rule 1.14. Client with Diminished Capacity**
>
> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

In one termination of parental rights case, the respondent appellant argued that she was denied effective assistance of counsel because her attorney told the trial court that she did not need a guardian ad litem.[29] The court of appeals rejected the ineffective assistance of counsel claim, noting that the record showed the attorney had vigorously represented the respondent for an extended period of time, the evidence of grounds for termination was overwhelming, and the respondent had not shown that she was denied a fair trial.[30]

An attorney who has difficulty "maintain[ing] a normal client-lawyer relationship" with a client who has diminished capacity may be more likely to seek to withdraw from the case than to seek the appointment of a guardian ad litem, as permitted by Rule 1.14(b) of the Rules of Professional Conduct. A respondent with mental health issues may ask the court to "fire" appointed counsel and appoint new counsel. Whether to allow an attorney to withdraw and whether to grant a respondent's request for the appointment of a different attorney are in the trial court's discretion.[31] However, if the court allows a respondent's

28. *See* Title 27, Chapter 02, of the N.C. Administrative Code.

29. *In re J.A.A.,* 175 N.C. App. 66.

30. *Id*. at 74.

31. *See, e.g., In re* Faircloth, 153 N.C. App. 565, 580 (2002) (holding that the trial court's refusal to remove respondent's attorney and appoint another one was not an abuse of discretion).

appointed counsel to withdraw, it must either appoint new counsel or obtain a proper waiver of counsel from the respondent. A respondent's request that his or her attorney be removed, by itself, cannot be treated as a waiver of the right to counsel.[32] Before permitting a respondent to proceed pro se, the court must examine the respondent on the record and make findings of fact sufficient to show the waiver is knowing and voluntary.[33]

Guardian ad litem issue raised by another party. Any party may raise the issue of whether a substantial question exists as to a respondent's competence, both to ensure fairness to the respondent and to preclude an issue on appeal as to whether the court should have made an inquiry into the respondent's competence. This may be especially true for a petitioner who alleges that the respondent has serious substance abuse or mental health problems or alleges in fact or in effect that the respondent is incompetent or has diminished capacity.[34]

Guardian ad litem issue raised by the court. The court of appeals has said that "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*."[35] That inquiry, the court of appeals said, should be made "as soon as possible in order to avoid prejudicing the party's rights."[36] Thus, a trial court should be alert for "red flags" indicating the need to make an inquiry regarding a respondent's competence. Under the previous versions of G.S. 7B-602 and G.S. 7B-1101.1, there were no published cases reversing a trial court for abusing its discretion by failing to appoint a guardian ad litem for a respondent. Twice, though, trial courts were reversed for failing to conduct an inquiry to determine whether a guardian ad litem should be appointed, when information before the court raised a substantial question as to the respondent's competence or capacity.[37]

In the first case,[38] the county department of social services (DSS) had alleged that the children involved were dependent and that the respondent mother was unable to provide proper care because of her anger control problems, aggressive tendencies, and lack of understanding about earlier neglect of the children. An assessment indicated that the mother had an IQ significantly below average and that she "was diagnosed as having Personality Disorder NOS and Borderline Intellectual Functioning."[39] The trial court's findings at adjudication included that the respondent's mental health issues affected her ability to provide proper care for the children. The court of appeals held that, based on the DSS

32. *See In re* S.L.L., 167 N.C. App. 362, 364 (2004).

33. G.S. 7B-602(a1) and G.S. 7B-1101.1(a1). These subsections were added by S.L. 2013-129, secs. 17 and 32, effective October 1, 2013.

34. See, for example, *In re I.T.P.-L.,* 194 N.C. App. 453 (2008), a termination of parental rights case in which the petitioner (county department of social services) moved for the appointment of a guardian ad litem for a parent who had been diagnosed with antisocial personality disorder and mild mental retardation.

35. *In re* J.A.A., 175 N.C. App. 66, 72 (2005) (citation omitted).

36. *Id*.

37. *See In re* N.A.L., 193 N.C. App. 114 (2008), and *In re* M.H.B., 192 N.C. App. 258 (2008).

38. *In re N.A.L.*, 193 N.C. App. 114.

39. *Id*. at 118.

allegations and the respondent's diagnosis, the trial court should have discerned a "substantial question" as to the respondent's capacity and conducted an inquiry to determine whether she needed a guardian ad litem. Failure to do that was an abuse of discretion and required reversal.

In the second case,[40] the court of appeals held that the trial court's findings of fact raised "serious questions as to Respondent's competency, capacity, and ability to adequately act in his own interest."[41] Red flags included, among other things, evidence or findings that the respondent

- had suffered from posttraumatic stress disorder, been diagnosed as manic depressive and bipolar, quit taking prescribed lithium, and self-medicated with marijuana;
- was receiving mental health treatment;
- was mentally and emotionally unstable and had threatened suicide after the petition was filed; and
- while testifying, was agitated and weeping and expressed suicidal thoughts.[42]

Although the respondent asserted that the trial court abused its discretion by failing to appoint a guardian ad litem for him, the appeals court held that the trial court abused its discretion by not conducting an inquiry to determine whether a guardian ad litem should be appointed for the respondent.[43]

However, in a third case,[44] the court of appeals held that the trial court's failure to conduct such an inquiry was *not* an abuse of discretion. The respondent in that case mistakenly relied on the pre-2005 wording of the statute to assert that appointment of a guardian ad litem was required because the "incapability" ground for terminating his rights was alleged. Again, the court of appeals held that whether to conduct an inquiry as to a respondent's need for a guardian ad litem was in the trial court's discretion. Considering facts starkly different from those in the two cases described above, the court of appeals held that nothing in the record raised questions as to the respondent's competency or mental capacity. Allegations about the respondent's incapability were based primarily on his repeated incarceration, not on mental health issues affecting his ability to parent.

Indications that a respondent has mental health or substance abuse problems did not necessarily mandate a hearing on the need for a guardian ad litem even when diminished capacity could be the basis for an appointment. The court of appeals rejected a respondent's argument that the trial court erred in failing to appoint a guardian ad litem for her when it had referred to her being emotionally unbalanced and to evidence that her psychiatric evaluation indicated that she was easily excited, prone to emotional outbursts, impulsive, and rebellious; had made findings about her erratic behavior; and had found that she was involuntarily committed after an incident at which the police had to restrain her.[45] The court of appeals found no abuse of discretion, noting that the respondent had testified that she was working in the field of home health care and at a convenience store and was pursuing her EMT license. The court concluded that the record indicated nothing calling into question the respondent's mental competence, her ability to perform mentally or act

40. *In re M.H.B.*, 192 N.C. App. 258.
41. *Id*. at 264.
42. *Id* at 262–63.
43. *Id*. at 266.
44. *In re* C.G.A.M., 193 N.C. App. 386 (2008).
45. *In re A.R.D.*, 204 N.C. App. 500, *aff'd per curiam*, 364 N.C. 596 (2010).

in her own interest, or her ability to handle her own affairs. Comparing the facts to those in the first two cases described above, which were reversed, the court found the absence of a diagnosis of mental illness to be "one critical distinguishing factor."[46]

Similarly, in another case the court of appeals rejected the respondent's argument that the trial court abused its discretion by not appointing a guardian ad litem for her *sua sponte*.[47] The respondent based her argument on her history of substance abuse and mental health and anger control issues. Contrasting this case with those in which it found error, the court of appeals noted that here the dependency ground for termination was not alleged, there was no allegation that the respondent's mental health issues or substance abuse problems rendered her incompetent or incapable of caring for her children, the respondent was sufficiently competent to attend and participate in hearings and enter into a mediated agreement, and nothing in her testimony or in the court proceeding raised a question about her competence.[48]

4. What procedures should the court follow when there is a substantial question as to a respondent's competence?

Failing to conduct an inquiry or appoint a guardian ad litem was asserted as error in a number of cases under former versions of the statutes.[49] Error also may occur, however, when a court appoints a guardian ad litem for a party but does so without (1) making a proper inquiry and (2) protecting the party's due process rights. An Illinois appellate court, reversing a trial court's *sua sponte* appointment of guardians ad litem for two adult plaintiffs who were former foster children, stated that a "trial judge's personal opinion that a guardian *ad litem* is required is not a justification for dispensing with the procedural . . . due process requirements of notice and hearing."[50] The appellate court found the error "particularly troubling" where the plaintiffs, through counsel, had objected to the appointment of guardians ad litem.[51]

The courts have said that "[a]ppointment of a GAL under Rule 17 [of the N.C. Rules of Civil Procedure] for an incompetent person 'will divest the parent of their [sic] fundamental right to conduct his or her litigation according to their [sic] own judgment and inclination.'"[52] Neither the Juvenile Code nor Rule 17 provides guidance for the court with respect to the procedures it should follow in deciding whether to appoint—and in actually appointing—a guardian ad litem for a respondent. The procedure may be as simple as determining that (1) a valid order exists adjudicating the person to be incompetent—either under G.S. Chapter 35A or under comparable statutes of another state, (2) the party lacks a

46. *Id.* at 505. The opinion in *In re A.R.D.* mischaracterizes the holding in *In re N.A.L.*, cited above, stating that the latter case "found error in the trial court's failing to appoint a guardian ad litem for respondent-mother." The court in *N.A.L.* actually held that the trial court abused its discretion by not conducting an inquiry to determine whether the respondent needed a guardian ad litem.

47. *In re* S.R., 207 N.C. App. 102 (2010).

48. *Id*. at 109.

49. *See, e.g., In re S.R.*, 207 N.C. App. 102; *In re* Estes, 157 N.C. App. 513, *disc. review denied*, 357 N.C. 459 (2003).

50. J.H. v. Ada S. McKinley Cmty. Servs., Inc., 369 Ill. App. 3d 803, 820, 861 N.E.2d 320, 334 (2006).

51. *Id*.

52. *In re* P.D.R., ___ N.C. App. ___, ___, 737 S.E.2d 152, 157 (2012) (quoting *In re* J.A.A., 175 N.C. App. 66, 71 (2005)).

general guardian[53] or it is not feasible or appropriate for the general guardian to act for the party in the action,[54] and (3) no party objects to the appointment of a guardian ad litem.

It is clear, however, that an actual adjudication of incompetence pursuant to G.S. Chapter 35A is not a precondition for the appointment of a guardian ad litem in a juvenile case or other civil action. The court of appeals held otherwise in a case that later was both reversed on other grounds and superseded by statutory changes. In 1989 the court held that the trial court in a divorce action lacked jurisdiction to determine a party's incompetence and appoint a guardian ad litem for the party because the incompetency statutes stated that Chapter 35A provided the "exclusive procedures" for adjudicating a person to be incompetent.[55] The state supreme court reversed, holding that the husband was not an aggrieved party and did not have standing to appeal, that the order was interlocutory and not immediately appealable, and that the court of appeals "should have dismissed [the] attempted appeal."[56] Since the court of appeals apparently never should have considered the appeal, it seems evident that the court's holding with respect to how incompetency should be determined for purposes of appointing a guardian ad litem was without effect.[57] For some time thereafter, however, views about the significance of that holding varied, and it sometimes was cited as authority or treated as persuasive.[58] Then, in 2003, the legislature amended G.S. 35A-1102 to state that while Article 1 of G.S. Chapter 35A "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child, . . . nothing in [the] Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure."[59] This legislation clarified that the decision of the court of appeals in *Culton* was not, if it ever had been, a restraint on the trial court's authority to determine incompetence for purposes of appointing a guardian ad litem. It also removed

53. In some cases a person who has been declared incompetent will have only a guardian of the person or only a guardian of the estate, but not a general guardian. Although Rule 17 refers to an incompetent party's defending by "general or testamentary guardian," the term "testamentary guardian" is obsolete. Under former G.S. 33-2 a parent, in his or her will, could appoint a guardian for a minor child, and upon the parent's death the person named in the will became the child's testamentary guardian. (G.S. Chapter 33 was repealed in 1987 when Chapter 35A was enacted by S.L. 1987-550.) Under current law a parent, in his or her will, may make a "testamentary recommendation" that someone be appointed as guardian for a child after the parent's death, but the recommendation does not create a guardianship and is not binding on the court. *See* G.S. 35A-1224, G.S. 35A-1225.

54. Rule 17(b)(2) provides that incompetent defendants must defend "by general or testamentary guardian, if they have any *within this State*." Thus, the court may appoint a guardian ad litem for a party who has a general guardian in another state. In addition, if the court deems it "expedient" it may appoint a guardian ad litem for a party even though the party has a general guardian in the state. A general guardian might have a conflict of interest, for example, that required the appointment of someone else to represent the party's interests in the action.

55. Culton v. Culton, 96 N.C. App. 620, 621–22 (1989), *rev'd on other grounds*, 327 N.C. 624 (1990).

56. Culton v. Culton, 327 N.C. 624, 626 (1990).

57. *See* Thomas L. Fowler, *Holding, Dictum . . . Whatever*, 25 N.C. Cent. L.J., Spring 2003, at 139, 153–62.

58. *Id; see also, e.g., In re* J.A.A., 175 N.C. App. 66, 72 (2005) (treating the holding in *Culton* as having been binding until it was superseded by statute).

59. S.L. 2003-236, sec. 4.

any doubt as to the continued validity of pre-*Culton* appellate court decisions addressing the appointment of guardians ad litem.[60]

Still, the procedures the court should follow before appointing, or deciding not to appoint, a guardian ad litem for a parent (or for any party in a civil action) are less than clear. The court of appeals, in an unpublished opinion, said recently, "We have been unable to find case law establishing the trial court's procedure for making a determination pursuant to N.C.G.S. § 7B-602(c)" about the need to appoint a guardian ad litem.[61] More than forty years ago, the court made a similar observation about Rule 17 of the North Carolina Rules of Civil Procedure, noting that the rule "fail[s] to specify the method or procedure by which a disputed question of competency is to be determined" when a party's competence is called into question in the context of a civil action.[62] Case law, however, does suggest the following steps.

- *Determination of whether a substantial question exists as to the respondent's competence.* As discussed in response to the preceding question, the issue may be raised by any party or by the court itself. The court may make this initial determination based on the pleadings, evidence offered by the parties, the respondent's conduct or appearance in court, the respondent's responses to questions posed by the court, or any circumstances brought to the court's attention. "Whether the circumstances which are brought to the attention of the trial judge are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge."[63] While no particular formal procedure is required, the court of appeals has offered this guidance: (1) If practicable, the respondent whose competency is questioned should be present in court. (2) When possible, the court should conduct a voir dire examination of the respondent. (3) If the court hears conflicting evidence, the judge should make findings of fact to support a determination of whether a substantial question exists.[64]
- *Notice to the respondent.* Once the court determines that a substantial question as to a respondent's competence exists, the court must conduct a hearing to determine whether the respondent is incompetent and needs a guardian ad litem. The respondent must have notice of the hearing. Although the statute is silent with respect to notice, the state supreme court has held that "when a party's lack of mental capacity is asserted and denied—and he has not previously been adjudicated incompetent to manage his affairs—he is entitled to notice and an opportunity to be heard before the judge can appoint . . . a guardian ad litem for him."[65] Unless the court specifies a shorter time, at least five days' notice should be given.[66]
- *Hearing to determine incompetence.* The court's determination that a substantial question exists as to the respondent's competence and the hearing on whether the respondent is incompetent and needs a guardian ad litem may occur together. For example, if the issue is before the court pursuant to a written motion for appointment

60. Two of the most frequently cited cases are *Hagins v. Redevelopment Comm'n of Greensboro*, 275 N.C. 90 (1969), and *Rutledge v. Rutledge*, 10 N.C. App. 427 (1971).

61. *In re* C.M., ___ N.C. App. ___, 725 S.E.2d 474 (2012) (unpublished).

62. *Rutledge*, 10 N.C. App. at 431.

63. *Id.* at 432.

64. *Id*. at 432–33.

65. *Hagins*, 275 N.C. at 101–2 (citations omitted). *See also Rutledge*, 10 N.C. App. at 430–31.

66. *Rutledge*, 10 N.C. App. at 433–34. *See also* G.S. 1A-1, Rule 6(d).

of a guardian ad litem, the respondent may be given notice of a hearing that effectively addresses both questions. Or, as with any notice, the respondent and his or her attorney may waive notice of the hearing and they are likely to do so if the need for a guardian ad litem is not contested.

The court can raise the issue of competence and initiate this hearing on its own motion. Neither the statutes nor case law indicate that a party has a burden of proof, although logically the court may expect a party who seeks the appointment of a guardian ad litem to proceed with evidence that one is needed. No one is in a position comparable to that of a petitioner in an incompetency proceeding under G.S. Chapter 35A. Neither Rule 17 nor the Juvenile Code specifies a standard of proof. [67] It simply is not clear whether the court can determine incompetence by a preponderance of the evidence or whether a higher standard applies.[68] Especially if the court itself initiated the inquiry into competence, it may play a more active role in the hearing than in most proceedings. This may include directing questions to the respondent parent and others as well as seeking additional witnesses or evidence that would aid the court.

In a termination of parental rights case in which the respondent's ability to care for his or her child is at issue, after finding "reasonable cause" the court may order that the respondent be examined by a psychiatrist, psychologist, physician, or other expert.[69] There does not appear to be any reason the results of such an examination could not be considered before adjudication when the court is assessing the respondent's competence for purposes of deciding whether to appoint a guardian ad litem.[70]

The Juvenile Code does not include a comparable pre-adjudication procedure for obtaining an evaluation of a respondent parent in an abuse, neglect, or dependency proceeding. In those cases the court may be able to order an examination of the respondent under either Rule 35 of the North Carolina Rules of Civil Procedure or pursuant to Rule 706 of the North Carolina Rules of Evidence. G.S. 1A-1, Rule 35, authorizes the court to order a party to submit to a physical or mental examination by a physician when the party's physical or mental condition is in controversy in a civil action. The statute says the "order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of

67. For examples of other states' treatment of the question, *see, e.g., In re James F.*, 42 Cal. 4th 901, 174 P.3d 180 (Cal. 2008) (holding that a juvenile court's appointment of a guardian ad litem for a parent without the parent's consent must be based on "substantial evidence" that the parent is incompetent); N. Y. Life Ins. Co. v. V.K., 184 Misc. 2d 727, 734, 711 N.Y.S.2d 90, 96 (N.Y. Civ. Ct. 1999) (holding that "a guardian *ad litem* is justified when, based on a preponderance of the evidence, the court concludes that a party's condition impedes her ability to protect her rights").

68. In a proceeding to adjudicate incompetence under G.S. Chapter 35A, the standard of proof is clear, cogent, and convincing. *See* G.S. 35A-1112(d).

69. G.S. 7B-1109(c).

70. Whether a judge in this circumstance should recuse him- or herself based on hearing this kind of evidence before adjudication is governed by Canon 3 of the Code of Judicial Conduct, available at www.aoc.state.nc.us/www/public/aoc/NCJudicialCode.pdf. For a discussion of recusal, including when a motion for recusal should be heard by a different judge, see *In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994) (holding in a termination of parental rights case that a judge's knowledge of "evidentiary facts" acquired from earlier hearings in the case did not require the judge to disqualify himself). *Also see* Michael Crowell, "Recusal," *Administration of Justice Bulletin* No. 2009/03 (Sept. 2009), http://sogpubs.unc.edu/electronicversions/pdfs/aojb0903.pdf.

the examination and the person or persons by whom it is to be made." This procedure is a form of discovery that one might think could be initiated only by motion of a party.[71] At least in district court child custody cases, however, appellate courts have held that the trial court is authorized to order such examinations even without a motion by a party.[72] There may be some question as to whether Rule 35 applies at all in juvenile proceedings. The courts have held that the Rules of Civil Procedure do not provide procedural rights beyond those provided by the Juvenile Code but that the rules will apply "to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure."[73] In the only juvenile case that mentions Rule 35, the trial court had denied a father's motion pursuant to the rule for a mental examination of his son in a termination of parental rights case. The court of appeals affirmed the denial, without questioning or discussing the applicability of Rule 35 in juvenile cases, holding that the father failed to make the necessary showing of good cause.[74] At least one of the cases upholding a trial court's authority to order parents in a custody action to consult a mental health professional did so without reference to Rule 35, referring instead to the court's "wide discretion to protect the child's best interests and welfare."[75]

Under Rule 706 of the North Carolina Rules of Evidence, the court, acting on its own motion or the motion of a party, may appoint an expert witness and specify that witness's duties. Relevant portions of Rule 706 are set out below.

Rule 706. Court appointed experts.

(a) Appointment. – The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross examination by each party, including a party calling him as a witness.

(b) Compensation. – Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. . . . [T]he compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

. . . .

71. Discovery in juvenile cases is governed by G.S. 7B-700.

72. *See, e.g.*, Jones v. Patience, 121 N.C. App. 434, 442 (1996), *citing* Rawls v. Rawls, 94 N.C. App. 670, 676–77 (1989) ("affirming court-ordered consultation with psychiatrist or psychologist as exercise of inherent judicial authority premised upon court's statutory duty to promote interest and welfare of child"); Williams v. Williams, 29 N.C. App. 509, 510 (1976) (affirming order in which the trial judge ordered both parents in a custody action to submit to psychiatric examinations).

73. *In re* B.L.H., 190 N.C. App. 142, 146, *aff'd per curiam*, 362 N.C. 674 (2008).

74. *In re* Williams, 149 N.C. App. 951 (2002). This case was decided before the current Juvenile Code discovery provisions in G.S. 7B-700 were enacted.

75. *Rawls*, 94 N.C. App. at 676.

> (d) Parties' experts of own selection. – Nothing in this rule limits the parties in calling expert witnesses.

There does not appear to be any appellate court decision in a juvenile case referencing Rule 706.[76]

Several juvenile cases include references to court-ordered pre-adjudication evaluations of respondents, without any references to the statutory authority for such orders.[77] The evaluations in these cases may have been done with the consent of the respondents. There does not appear to be a case in which the court's authority to order the evaluation has been an issue on appeal.

All parties should be allowed to present relevant evidence and cross-examine witnesses at the hearing on the question of competence. The court should make findings of fact and conclusions of law to support any determination that a respondent is incompetent and needs a guardian ad litem. Because neither the statutes nor case law specifies a standard of proof, and because appointment of a guardian ad litem may affect a party's ability to control litigation affecting a fundamental right, the better practice may be for a court's determination of incompetence to be based on clear and convincing evidence. At the same time, the purpose of appointing a guardian ad litem is to protect the parent's rights in that very litigation. A conclusion about the appropriate standard of proof will depend in part on one's understanding of (1) the meaning of "incompetent" and (2) the role of a guardian ad litem. Both of those are discussed below.

Appointing a guardian ad litem without giving the respondent notice or conducting a proper inquiry may be reversible error. It is not altogether clear whether that kind of error automatically requires reversal or whether it is subject to a harmless error analysis.[78] Failing to appoint a guardian ad litem when a statute requires one is reversible error per se.[79] Under North Carolina's current statutes, however, appointment of a guardian ad litem for a parent is required only when the parent is a minor. Otherwise, the issue of whether to appoint a guardian ad litem for a parent respondent in a juvenile case is always in the trial court's discretion.[80]

---

76. The opinion in *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994), includes numerous references to the testimony of a court-appointed psychologist who had interviewed both parents and the child in a termination of parental rights action but does not discuss how the appointment came about. Other cases discuss the appointment of experts pursuant to G.S. 7A-454, which provides for state payment of the fees of experts and other necessary expenses for an indigent respondent or defendant entitled to appointed counsel. *See, e.g., In re* D.R., 172 N.C. App. 300 (2005).

77. *See, e.g., In re* P.D.R., 365 N.C. 533, 534 (2012) (stating that the trial court ordered a mental health evaluation to determine respondent's "capacity to proceed with the neglect and dependency petition"); *In re* A.Y., ___ N.C. App. ___, 737 S.E.2d 160 (2013) (referring to the trial court's order that a respondent, who already had a guardian ad litem, undergo a psychological evaluation to assist the court in ruling on her motion to be allowed to proceed pro se).

78. *See In re* James F., 42 Cal. 4th 901, 174 P.3d 180 (2008) (describing the split among lower California appellate courts on that question and holding that a harmless error analysis was appropriate).

79. *See, e.g., In re* J.L.S., 168 N.C. App. 721 (2005) (reversing for failure to appoint a guardian ad litem for the child in a contested termination of parental rights action, as required by statute); *In re* Fuller, 144 N.C. App. 620 (2001).

80. *See, e.g., In re* A.R.D., 204 N.C. App. 500 (holding that the trial court did not abuse its discretion by not appointing a guardian ad litem for respondent mother), *aff'd per curiam*, 364 N.C. 596 (2010).

5. What is the meaning of "incompetent" for purposes of appointing a guardian ad litem?

The court may appoint a guardian ad litem for a respondent who "is incompetent."[81] In discussing the term "incompetent" in connection with the appointment of guardians ad litem for respondent parents, the courts have adopted the definition of "incompetent adult" found in G.S. 35A-1101(7).[82] That definition reads as follows:

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

The courts use this broad definition despite the fact that a guardian ad litem is appointed by the court only to appear on behalf of an incompetent (or minor) party in a particular lawsuit.[83] By contrast, a guardian appointed in an incompetency proceeding under G.S. Chapter 35A has a broad range of powers and responsibilities with respect to the ward's person, the ward's property, or both.[84]

Appointment of a guardian ad litem based on incompetence "will divest the parent of their [sic] fundamental right to conduct his or her litigation according to their [sic] own judgment and inclination."[85] But appointment of a guardian ad litem does not affect the party's control over any other aspect of his or her life or property. For that reason it seems logical to assess the person's competence in the more narrow terms of his or her understanding of the nature and importance of the litigation and his or her ability to make and communicate important decisions about the litigation. The court of appeals suggested something like that when it said in a 2005 case, "[T]he trial court must determine whether the parents are incompetent within the meaning of N.C. Gen. Stat. § 35A–1101, such that the individual would be unable to aid in their [sic] defense at the termination of parental rights proceeding."[86]

The standard for determining capacity to proceed in a criminal case specifically focuses on a defendant's ability to understand and participate in the court proceeding. For purposes of a criminal prosecution, a defendant lacks the capacity to proceed if "by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner."[87] In discussing the appointment

---

81. G.S. 7B-602, G.S. 7B-1101.1.

82. *See, e.g., In re* P.D.R., ___ N.C. App. ___, 737 S.E.2d 152 (2012); *In re A.R.D.*, 204 N.C. App. 500; *In re* M.H.B., 192 N.C. App. 258 (2008).

83. *See* Roberts v. Adventure Holdings, LLC, 208 N.C. App. 705, 708 (2010) (citing Black's Law Dictionary 774 (9th ed. 2009) to note that the Latin phrase *ad litem* means "for the purposes of the suit").

84. *See* G.S. 35A-1241 (powers and duties of guardian of the person) *and* G.S. 35A-1250 to -1253 (powers and duties of guardian of the estate).

85. *In re* J.A.A., 175 N.C. App. 66, 71 (2005) (citation omitted).

86. *Id. See also* Laura B. Bartell, *Due Process for the Unknown Future Claim in Bankruptcy—Is This Notice Really Necessary?*, 78 Am. Bankr. L.J. 339, 365 (2004) (stating that a federal court, in applying Rule 17 of the Federal Rules of Civil Procedure, should avoid "a mechanical application of state guardianship law" and expressing the view that because the consequences of appointing a guardian and appointing a guardian ad litem are different, "the grounds for the appointment should also be different").

87. G.S. 15A-1001(a).

of guardians ad litem in civil cases, North Carolina appellate courts have not explicitly adopted the standard for determining a defendant's capacity to proceed in a criminal case.[88] However, a California appellate court considering this question (under a statutory scheme similar but not identical to North Carolina's) held that a guardian ad litem should be appointed if a preponderance of the evidence showed either that the party was incompetent for purposes of the appointment of a conservator/guardian or that the party could be found incompetent to proceed in a criminal proceeding.[89]

North Carolina courts have referred only to the broad definition of "incompetent adult" in G.S. 35A-1101(7) and have not considered specifically the criminal standard for capacity to proceed. Nevertheless, it seems appropriate for a court, when determining whether a party is incompetent for purposes of appointing a guardian ad litem, to consider the particular aspects of competence relevant to the party's ability to rationally direct and control his or her civil litigation. That approach could result in the appointment of guardians ad litem for parties who would never be adjudicated incompetent under G.S. Chapter 35A but whose physical or mental condition renders them unable to participate meaningfully in a civil case. This might be someone whose attorney has requested the appointment of a guardian ad litem because the attorney "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[90] In other words, the distinctions the court made in *P.D.R.* between incompetence and diminished capacity, and between substitution and assistance, may not be necessary.

Assessing competence in relation to a person's ability to participate meaningfully in the litigation also leaves open the possibility that someone who could be adjudicated incompetent in a proceeding under G.S. Chapter 35A—based on the inability to manage his or her affairs or to make or communicate important decisions about health care or property, for example—could participate meaningfully and assist the attorney in a juvenile case without the involvement of a guardian ad litem.[91] Even if the court determines that the party is incompetent, whether to appoint a guardian ad litem is in the court's discretion.[92]

Regardless of the meaning one attaches to the term "incompetent," appointing a guardian ad litem for a party on the basis of incompetence carries at least the potential for

88. *But see J.A.A.*, 175 N.C. App. at 71*; In re* P.D.R., 365 N.C. 533, 534 (2012) (in reciting the facts of the case, the supreme court referred to the trial court's having ordered the respondent "to undergo a mental health evaluation to determine her capacity to proceed with the neglect and dependency petition").

89. *In re* Sara D., 104 Cal. Rptr. 2d 909, 914, 87 Cal. App. 4th 661, 667 (2001). This issue and the *Sara D.* case are discussed more fully in Donna S. Harkness, *"Whenever Justice Requires": Examining the Elusive Role of Guardian Ad Litem for Adults with Diminished Capacity*, 8 Marq. Elder's Advisor 1 (2006). Harkness opines that the criminal competency standard, "with its emphasis on navigating the courtroom environment, . . . should be the standard used to inform the court's sound discretion" when it is deciding whether to appoint a guardian ad litem. *Id.* at 13. *See also In re* Christina B., 23 Cal. Rptr. 2d 918, 924, 19 Cal. App. 4th 1441, 1450 (1993) (holding that the proper standard for assessing competency in a dependency proceeding is "whether the person is able to take part meaningfully in the proceedings").

90. *See* Rule 1.14(b) of the North Carolina State Bar's Rules of Professional Conduct. Although this language is similar to wording that has been removed from the Juvenile Code, it remains relevant in the context of an attorney's professional responsibility when representing a client with diminished capacity.

91. *See, e.g.*, Pepper v. Bentley, 59 So. 3d 684 (Ala. Civ. App. 2008) (holding that the trial court did not abuse its discretion by declining to appoint a guardian ad litem or conduct a hearing on competence when the defendant in an ejectment action was represented by counsel).

92. G.S. 7B-602(c), G.S. 7B-1101.1(c).

removing from the party some degree of control over the litigation and placing that control in someone else's hands. The court, therefore, should take extreme care before appointing a guardian ad litem and should make clear findings to support its decision to do so.

The following cautionary statement made by the state supreme court more than forty years ago continues to be apt:

> Many a man has prosecuted a lawsuit to his detriment or ruin, his ordinary caution and good judgment warped by prejudice, spite, or a stubborn purpose to vindicate 'the principle of the thing.' His attorneys and the court may have been entirely convinced that he was blindly and contumaciously refusing to settle his case upon terms which were obviously advantageous to him—and they may have been right. Yet 'no man shall be interfered with in his personal or property rights by the government, under the exercise of its parental authority, until the actual and positive necessity therefor is shown to exist.' Schick v. Stuhr, 120 Iowa 396, 398, 94 N.W. 915, 916 (1903). . . .
>
> We have found no completely satisfactory definition of the phrase 'incompetent from want of understanding to manage his own affairs.' Furthermore, we do not believe it is possible to frame a definition which will include every aberration which might produce the incompetency to which reference is made. The facts in every case will be different and competency or incompetency will depend upon the individual's 'general frame and habit of mind.' . . . [M]ere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs.[93]

6. Who may be appointed as a respondent's guardian ad litem?

There is no requirement that a guardian ad litem appointed for a parent in a juvenile case be an attorney.[94] Nevertheless, the lack of other obvious candidates often has resulted in the appointment of attorneys to serve as guardians ad litem for respondents. The Juvenile Code makes clear that an attorney cannot serve in a dual role as both the attorney and the guardian ad litem for a respondent parent.[95] The only directive in G.S. 1A-1, Rule 17, about who may be appointed as a guardian ad litem refers to the court's appointment of "some discreet person."[96]

The court's selection of a person to serve as guardian ad litem should take into account the nature of the party's incompetence, the extent to which an individual knows and can communicate with the respondent, and the ability of an individual to cooperate with the attorney representing the respondent and act on behalf of the party.

7. What are the duties and authority of a respondent's guardian ad litem?

The recently discarded distinction between a guardian ad litem of assistance and a guardian ad litem of substitution grew out of the former wording of the statutes and case law interpreting that wording.[97] The 2013 amendment of the statutes to delete references to "diminished capacity," which the court of appeals had said was the basis for appointment

93. Hagins v. Redev. Comm'n of Greensboro, 275 N.C. 90, 105 (1969).

94. Questions regarding payment of a guardian ad litem who is not an attorney should be directed to the Assistant Director of the Office of Indigent Defense Services (919.354.7200).

95. *See* G.S. 7B-602(c), G.S. 7B-1101.1(c).

96. G.S. 1A-1, Rule 17(b)(2).

97. See *In re* P.D.R., ___ N.C. App. ___, 737 S.E.2d 152 (2012).

of a guardian ad litem of assistance, suggests that now there are only "guardians ad litem of substitution." That conclusion and the former distinction itself are troubling, because a guardian ad litem's role is fundamentally one of assistance even though it may involve substitution of the guardian ad litem's judgment for that of the party the guardian ad litem represents. "The duty of a guardian ad litem, and in fact the object of his appointment, is to protect the interest of his wards."[98]

Under G.S. 1A-1, Rule 17(b), a party to a civil action who is incompetent must appear by general guardian if he or she has one or, if the party has no general guardian, by a guardian ad litem. It would seem, then, that a guardian ad litem appointed for an incompetent party would participate in the litigation in the same role and with the same authority that a court-appointed general guardian would have in relation to the litigation if the party were appearing through that guardian. As noted earlier, a guardian appointed for an adult under G.S. Chapter 35A following an adjudication of incompetence has very broad authority.[99] However, a general guardian's broad authority to act in the place of a ward is not absolute. A clerk's order appointing a guardian must specify the guardian's powers and duties, and the clerk may create additional duties or limit those set out in the statutes. The statutory duties of a guardian of the person are effective only to the extent that they are "not inconsistent with the terms of any order of the clerk or any other court of competent jurisdiction."[100] The powers and duties of a guardian in relation to a ward's estate are subject to any "express terms or limitations set forth in any court order creating or limiting [those] powers and duties."[101] When appointing a guardian under G.S. Chapter 35A, the court may consider the "nature and extent of the needed guardianship" and order a "limited guardianship," specifying legal rights and privileges the ward retains despite an adjudication of incompetence.[102]

Thus, even after a determination in a juvenile case that a respondent is incompetent, the proper role of a guardian ad litem may not be the same in every case. A court might address any limitations or expectations in the order appointing the guardian ad litem. The Mississippi Supreme Court, after discussing the "diverse duties and responsibilities" a court might assign to a guardian ad litem, encouraged judges to "set forth clearly the reasons an appointment has been made and the role the guardian ad litem is expected to play in the proceedings."[103] When a court does not do that, the guardian ad litem, the party for whom he or she is appointed, and the party's attorney will be left to figure that out during the course of the proceeding.

The following statements from the purpose section of the guardianship statutes seem as relevant for a guardian ad litem as for a general guardian:

- "The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions."[104]

98. Narron v. Musgrave, 236 N.C. 388, 394 (1952), *quoting* Spence v. Goodwin, 128 N.C. 273, 274 (1901).

99. For powers and duties of guardians, see Articles 8 and 9 of G.S. Chapter 35A.

100. G.S. 35A-1241(a).

101. G.S. 35A-1250(b).

102. G.S. 35A-1212(a), G.S. 35A-1215(b).

103. S.G. v. D.C., 13 So. 3d 269, 281 (Miss. 2009).

104. G.S. 35A-1201(a)(3).

- "Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent."[105]
- "To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him."[106]
- "Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights."[107]

"Substitution," if that term is used at all, should not mean depriving the party of the right to participate in and make decisions about the case to the extent he or she is able. In a personal injury action, a guardian ad litem for a seventeen-year-old party would act differently from a guardian ad litem for a six-month-old child. Teenagers have some ability to articulate their own interests and to participate in decision making. Similarly, a guardian ad litem for a parent who is in a coma should act differently from a guardian ad litem for a parent whose developmental disability prevents the managing of most of his or her own affairs but who can articulate opinions about at least some of the litigation. The guardian ad litem's role includes assisting the parent in understanding the case and in participating to the extent he or she is able while exercising judgment about and making decisions the parent is unable to make in order to protect that parent's interests.

8. When can a guardian ad litem withdraw or be relieved of duties by the court?

The court of appeals has said "once a parent has been appointed a GAL according to Rule 17, the presence and participation of the GAL is necessary in order for the trial court to 'proceed to final judgment, order or decree against any party so represented. . . .'"[108] In the case quoted here, the trial court had appointed a guardian ad litem for the respondent mother early in a neglect and dependency proceeding, and that person assisted the respondent throughout the proceeding. Subsequently, social services filed a motion to terminate the respondent's parental rights, alleging, among other things, the respondent's apparent mental illness and bizarre behavior. However, when the respondent failed to appear at the termination hearing, the court allowed the guardian ad litem to withdraw.[109] The court of appeals held that permitting the guardian ad litem to withdraw was error because the conditions that led the court to appoint the guardian ad litem initially continued to exist. The appellate court said, "[E]ven in the absence of respondent-mother, the GAL was still required to remain and represent respondent-mother to the fullest extent feasible during the termination hearing."[110]

Because the respondent's attorney cannot also serve as his or her guardian ad litem, the fact that the respondent was represented by counsel did not affect the necessity of the

105. G.S. 35A-1201(a)(5).
106. *Id*.
107. G.S. 35A-1201(a)(4).
108. *In re* A.S.Y., 208 N.C. App. 530, 540 (2010). *See also In re* P.D.R., ___ N.C. App. ___, 737 S.E.2d 152 (2012).
109. *In re A.S.Y.*, 208 N.C. App. at 534.
110. *Id*. at 539.

guardian ad litem's continued participation in the case.[111] Unless the court, after a hearing, makes findings to support a determination that the reasons for appointing a guardian ad litem no longer exist, the court should not dismiss the guardian ad litem or permit him or her to withdraw without appointing a replacement.

Conclusion

After a long period of evolving statutes and case law relating to guardians ad litem for respondent parents in juvenile proceedings, the law appears to have arrived at a simple conclusion: Rule 17 of the North Carolina Rules of Civil Procedure applies in juvenile proceedings just as it does in any other civil action. With that conclusion, however, come a dearth of guidance about precisely how Rule 17 should be applied and a lack of clarity about the role of a guardian ad litem appointed pursuant to the rule. The courts have adopted the definition of "incompetent" in the incompetence and guardianship statutes, G.S. Chapter 35A, for purposes of interpreting the same term in Rule 17 and the Juvenile Code. Chapter 35A acknowledges that a respondent's disability may not be complete, a ward may not be completely unable to make and communicate decisions, and a guardian's role may not be one of total substitution. In juvenile proceedings courts should follow that lead when determining incompetence and appointing guardians ad litem for respondents. Persons appointed as guardians ad litem for parents should heed the purposes set out in Chapter 35A by making decisions for the respondent only when the respondent lacks the capacity to do so, protecting the respondent's opportunity to exercise rights within his or her comprehension and judgment, permitting the respondent to participate as fully as possible in decisions that affect him or her, and acting in a way that gives the respondent a fuller capacity for exercising and protecting his or her rights.

111. *Id.* at 540.

Guardians ad Litem for Respondent Parents in Abuse, Neglect and Dependency Cases

WENDY C. SOTOLONGO
PARENT REPRESENTATION COORDINATOR
INDIGENT DEFENSE SERVICES OF NORTH CAROLINA

ROBIN STRICKLAND
ATTORNEY AT LAW
RALEIGH, NC

Guardians ad Litem for Respondents

- *In re P.D.R.*, ___ N.C. App. ___, 737 S.E.2d 152 (2012)
- Session Law 2013-129 amended both G.S.§7B-602 and §7B-1101.1

§ 7B-602 and § 7B-1101.1. Parent's right to counsel; guardian ad litem.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17.

Raising the Issue of a Respondent's Competence

- If the Petitioner/Movant knows the parent is incompetent, they should make 'written application' for the appointment of a GAL upon filing of the action. N.C. Gen. Stat. § 1A-1, Rule 17(c)
- Any party may raise the issue of competence. N.C. Gen. Stat. § 1A-1, Rule 17(c)
- Even if no party has raised the issue, the Court has a duty to determine whether a GAL should be appointed if information available to the court raises a substantial question as to the respondent's competence. *In re N.A.L.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008) and *In re M.H.B.*, 192 N.C. App. 258, 664 S.E.2d 583 (2008)

Raising the Issue of a Respondent's Competence

- The issue should be addressed as soon as possible in order to avoid prejudicing the party's rights. *In re J.A.A.* 175 N.C. App. 66, 623 S.E. 2d 45 (2005). However, the failure to appoint a GAL prior to or at commencement of the action pursuant to Rule 17 does not require reversal unless that appointment is so untimely that it results in prejudice to the incompetent's case. *In re H.W.*, 163 N.C. App. 438, 594 S.E. 2d 211 (2004)

Defending the Client's Competence

What is the Definition of Incompetence?

§ 35A-1101. Definitions.
(7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

Defending the Client's Competence

What is the Definition of Incompetence?

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.
(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

Defending the Client's Competence

Client with Diminished Capacity RPC Rule 1.14

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Defending the Client's Competence

Performance Guidelines for Attorneys Representing Indigent Parent Respondents in A/N/D AND TPR Proceedings at the Trial Level

Adopted December 14, 2007

Guideline 1.5 Clients with Diminished Capacity and Guardians ad Litem

(c) If another party seeks appointment of a GAL for the respondent parent, counsel should consider all relevant factors in determining whether to oppose or consent to the appointment, including the services a GAL would provide and any inferences about the client's capacity or parenting ability that may be drawn from counsel's position or the appointment of a GAL.

Raising the Issue of Competence as the Respondent's Attorney

Rule 18, American Bar Association's Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases ABA Standards for Parent Attorneys

Be aware of the client's mental health status and be prepared to assess whether the parent can assist with the case.

Raising the Issue of Competence as the Respondent's Attorney

Rule 18…

Action: Attorneys representing parents must be able to determine whether a client's mental status (including mental illness and mental retardation) interferes with the client's ability to make decisions about the case. … If the client's situation seems severe, the attorney should also explain that the attorney may seek the assistance of a clinical social worker or some other mental health expert to evaluate the client's ability to assist the attorney because if the client does not have that capacity, the attorney may have to ask that a guardian ad litem be appointed to the client. **Since this action may have an adverse effect on the client's legal claims, the attorney should ask for a GAL only when absolutely necessary.**

Raising the Issue of Competence as the Respondent's Attorney

Rule 18…

Commentary: Many parents charged with abuse and neglect have serious or long-standing mental health challenges. However, not all of those conditions or diagnoses preclude the client from participating in the defense. … If the client seems unable to assist the attorney in case preparation, the attorney should seek an assessment of the client's capacity from a mental health expert. If the expert and attorney conclude that the client is not capable of assisting in the case, the attorney should inform the client that the attorney will seek appointment of a guardian ad litem from the court. …

Raising the Issue of Competence as the Respondent's Attorney

Client with Diminished Capacity RPC Rule 1.14, cont.....

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

12

Raising the Issue of Competence as the Respondent's Attorney

Client with Diminished Capacity RPC Rule 1.14, cont.....

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment #7: If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests.

13

Raising the Issue of Competence as the Respondent's Attorney

When the trial court failed to address the issue of a mother's competency despite her attorney's request for a GAL and despite findings that the mother was incapable of parenting her minor children based upon her mental illness, the TPR order was reversed due to the trial court's failure to appoint a GAL for the mother. *In re T.W.*, 173 N.C. App. 153, 617 S.E.2d 702 (2005). (Note that the TPR statute that applied to this case required the appointment of a GAL when the TPR petition alleged the parent's 'incapacity'.)

When a mother's attorney indicated he did not want a GAL appointed for his client, the trial court still held a hearing on the issue of whether respondent needed a GAL appointed after questions concerning her mental condition were brought to the court's attention. The court's decision that no GAL was warranted was not an abuse of discretion and was upheld by the appellate court. *In re J.A.A.*, 175 N.C. App. 66, 623 S.E.2d 45 (2005).

Raising the Issue of Competence as the Respondent's Attorney

When a mother's attorney did not ask for a GAL but there were clear findings that the mother's mental health issues warranted an inquiry into her competency, the trial court abused its discretion by failing to conduct an inquiry as to whether respondent-mother should be appointed a GAL. *In re N.A.L.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008)

Raising the Issue of Competence as the Respondent's Attorney

Is failure to ask for a GAL ineffective assistance of counsel?

A parent has a right to counsel in termination of parental rights proceedings. N.C. Gen. Stat. § 7B-1101 (2005); *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing. *Id*.

Raising the Issue of Competence as the Respondent's Attorney

Is failure to ask for a GAL ineffective assistance of counsel?

Careful review of the record indicates respondent's attorney vigorously and zealously represented her client. Respondent's attorney had represented her for many months and was familiar with respondent's ability to aid in her own defense, as well the idiosyncrasies of her personality. Further, the record contains overwhelming evidence supporting termination of respondent's parental rights. Therefore, respondent has failed to demonstrate that her trial counsel's failure to request the appointment of a guardian *ad litem* denied her a fair trial, the outcome of which is reliable. This argument is without merit. *In re J.A.A.,* 175 N.C. App. 66, 73-74 (2005)

Determining the Issue of Competence

Threshold: Is there a substantial question as to whether the Respondent is competent?

In answering this question, it is preferable for the respondent to be present and for the court to conduct an examination of the respondent. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E. 2d 163 (1971)

If yes, the court must hold a hearing and the Respondent is entitled to notice and an opportunity to be heard. *Hagins v Redev. Comm'n of Greensboro*, 275 N.C. 90, 165 S.E.2d 490 (1969)

Determining the Issue of Competence

Neither Rule 17 or the juvenile code indicate the standard of proof or the burden of proof

No independent examination required but may be ordered; issue of payment

No Chapter 35A action required per N.C. Gen. Stat. § 35A-1102

Review is abuse of discretion; sufficient findings and conclusions are required