



Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina

2015 Edition

Kella W. Hatcher
Sara DePasquale
John Rubin



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Production of this manual made possible with funding provided by the U.S. Department of Health and Human Services—Administration for Children and Families, and the Court Improvement Program of the North Carolina Administrative Office of the Courts

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Printed in the United States of America

19 18 17 16 15 1 2 3 4 5

ISBN 978-1-56011-840-4

∞ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

♻️ Printed on recycled paper

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Preface

We are pleased to provide the June 2015 edition of this manual for legal professionals involved in abuse, neglect, dependency, and termination of parental rights proceedings in North Carolina. This edition, which is intended primarily as an online resource, updates the 2014 edition, which replaced the online and hard copy manual that was published in 2011.

The primary purpose of the manual is to provide easily accessible information about the law and procedures applicable to these proceedings. The manual serves the additional goal of making this information uniformly available to a variety of professionals. We hope the manual will be a useful and reliable tool for judges, social services attorneys, parents' attorneys, guardian ad litem attorney advocates, and others involved in this important and challenging work.

We specially thank our former colleague Janet Mason, who recently retired from the School of Government. Janet dedicated her career to serving the children of North Carolina by assisting professionals who work in juvenile proceedings in the North Carolina court system. She shared her dedication to and knowledge of this substantive area of the law with the authors of this manual. The extensive analysis and availability of this manual for all professionals working in child welfare is due to Janet's hard work, commitment, and input.

This manual would not have been possible without the financial support of the Juvenile Court Improvement Program (CIP) of the North Carolina Administrative Office of the Courts as well as the logistical and moral support of its managers, Lana Dial (first edition) and Kiesha Crawford (2014 edition). CIP is a federally funded project to improve court practice in child abuse, neglect, and dependency cases. The program's mission is "to improve the performance of North Carolina's Juvenile Courts in abuse and neglect cases so that safety, permanence and well being for each child are achieved in a fair and timely manner." CIP's support for this manual is one example of its many efforts in that regard.

The first edition of this manual benefited immeasurably from the time and expertise of the members of the advisory committee, who provided invaluable feedback and insight throughout the drafting process. The 2014 edition reflects the original committee's dedication and hard work, and we express again our appreciation for their many contributions. Members of the committee were Sydney Batch, Frederick R. Benson, Susan K. Button, Rick Croutharmel, Lana Dial, Alice Anne Espenshade, Whitney Fairbanks, Deana K. Fleming, Alisa Huffman, Judge Debra A. Sasser, Wendy Sotolongo, and Jane R. Thompson.

We welcome any corrections, suggestions, or comments. They may be sent to Assistant Professor Sara DePasquale at the School of Government, CB #3330, Knapp Building, The University of North Carolina at Chapel Hill, Chapel Hill, North Carolina, 27599-3330. You also may reach her by email at sara@sog.unc.edu or by telephone at (919) 966-4289.

*Sara DePasquale
John Rubin
June 2015*

How to Use This Manual

This manual describes and explains the laws, procedures, concepts, and people related to abuse, neglect, dependency, and termination of parental rights proceedings in North Carolina. It is designed to be useful as both a reference manual and a training tool, with an intended primary audience of district court judges, social services attorneys, parents' attorneys, and guardian ad litem attorney advocates.

The text of the chapters combines applicable statutes, relevant case citations, additional resources, and practical explanations for particular topics. "Practice Notes" are set apart to offer insight into practical aspects of a given topic. "Resources" and "Tools" are set apart to alert the reader to resources and tools beyond the manual. The manual uses cross-references liberally to alert the reader to other parts of the manual that are relevant to a particular topic.

The table of contents at the beginning of the manual identifies the location of general topics, while each chapter contains a more detailed table of contents. In the online version of the manual, the links to the chapters on the left side of the web page are "live," providing readers with an easy way to move to specific chapters. In addition, readers may search for specific words after opening an individual chapter or the entire manual. Web links are present throughout the manual, typically embedded in the relevant text. Where a specific web address is not visible for hard copy readers or if a link does not work, the reader usually can find the resource by running an internet search using the title of the resource.

Appendix materials supplement topics covered in the manual. Also included are Hearing Checklists that highlight the basic requirements for each type of hearing.

Because of the broad intended audience for the manual, advocacy materials and perspectives are not included; however, individuals and organizations with a particular advocacy perspective may choose to supplement the manual with materials helpful to their work.

About the Authors

Kella Hatcher is the lead author of the manual. She became the Executive Director of the North Carolina Child Fatality Task Force in June 2015. Previously, she worked as Associate Counsel for the North Carolina Guardian ad Litem Program where she authored the North Carolina Guardian ad Litem Attorney Practice Manual and served as chair and co-chair of the Juvenile Code Revision Committee for the North Carolina Court Improvement Project. She also has worked as an Assistant District Attorney in Orange County, North Carolina. She has a degree in professional writing from Purdue University and a law degree from the University of North Carolina.

Sara DePasquale is an Assistant Professor of Public Law and Government at the School of Government at the University of North Carolina at Chapel Hill. She joined the faculty in 2013 after spending seventeen years practicing law as a civil legal services attorney in Maine, representing low-income individuals and families in family law, education, housing, and public benefits matters. She specializes in juvenile law, with a focus on abuse, neglect, dependency, termination of parental rights, adoption, and judicial waiver of parental consent. She teaches, writes for, and consults with district court judges and attorneys who are involved in these types of proceedings.

John Rubin is Albert Coates Professor of Public Law and Government at the School of Government at the University of North Carolina at Chapel Hill. He joined the faculty in 1991 and specializes in criminal law and procedure and indigent defense education. Prior to this appointment, he practiced law for nine years in Washington, D.C., and Los Angeles. He teaches, writes for, and consults with indigent defenders, judges, magistrates, and others who work in the court system.

Chapter 1

Background for Proceedings¹

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1. Some content for this chapter was drawn or adapted from: KELLA HATCHER, [NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL](#) (2007).

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1.1 History and Demographics; Evolution of Law²

A. History of Societal Responses and Laws Related to Child Maltreatment

Cultures have evolved and changed with respect to acceptable societal standards related to how children should and must be treated. The concept of juvenile court is relatively new (beginning around 1900), yet the modern juvenile court is very different from early juvenile courts that focused more on removing vagrant children from the streets than protecting children from maltreatment. It is helpful, in understanding current laws related to abuse, neglect, and dependency, to have a sense of the history and progression of laws in American society related to the treatment of children.

1. Early court actions. Criminal prosecution has always been used to address egregious child abuse, but laws specifically protecting children from abuse and neglect did not exist in most states through most of the nineteenth century. Intervention to protect children during that time was therefore sporadic, although there are examples of cases in which the courts recognized the need to interfere with parental authority in order to protect a child. Then the pivotal case of Mary Ellen arose in New York in 1874. Mary Ellen, a 10-year-old girl, was being abused and neglected by her guardians and when a missionary sought police assistance, they declined to help. The missionary finally received assistance from the founder of the American Society for

2. Content for this section was sourced, drawn, or adapted from: Summaries of federal laws available from the [“Major Federal Legislation Index and Search”](#) page on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services; JANET MASON, [REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA](#) (UNC School of Government, 3d ed. 2013); MARY GRATCH, N.C. ADMIN. OFFICE OF THE COURTS AND NAT’L COURT APPOINTED SPECIAL ADVOCATE ASS’N, N.C. GUARDIAN AD LITEM VOLUNTEER TRAINING CURRICULUM, WORKBOOK FOR VOLUNTEER TRAINING (2001); John E.B. Myers, [A Short History of Child Protection in America](#), 42 FAMILY LAW QUARTERLY NO. 3 (Fall 2008); [“Child Maltreatment”](#) on the National Association of Counsel for Children website. See also Robert E. Shephard, Jr., [The Juvenile Court at 100 Years: A Look Back](#), JUVENILE JUSTICE VOLUME VI, NO. 2 (Dec. 1999).

the Prevention of Cruelty to Animals, and Mary Ellen was removed from her home by the court system. The Mary Ellen case was a catalyst in the creation of The New York Society for the Prevention of Cruelty to Children, and it inspired the formation of similar societies in other locations, resulting in 161 cruelty societies in the United States by 1900, and 300 nongovernmental child protection societies by 1922. In the 1944 case of *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944), the U.S. Supreme Court confirmed “that the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare[.]”

Resource: For additional information on the history of the New York Society for the Prevention of Cruelty to Children and the origin of child protection laws, see “[History](#)” on the New York Society for the Prevention of Cruelty to Children website.

2. Governmental responsibility for protecting children. Government social services in existence prior to the twentieth century were mostly at the local level, but during the early part of the twentieth century, states began to create or strengthen state departments of welfare and social services. Until the creation of the Children’s Bureau in 1912, the federal government had an insignificant role in child welfare policy and funding.

The North Carolina Constitution of 1868 recognized that the “[b]eneficent provision for the poor, the unfortunate and orphan” was a primary duty of a civilized state. N.C. CONST. of 1868, art. XI, § 7. However, it was not until the early part of the twentieth century that legislation provided for state and local superintendents of public welfare and charged local public agencies with responding to children who were neglected, dependent, truant, delinquent, wayward, misdirected, or otherwise in need of attention from the state.

More significant federal involvement with the protection of children began with the Social Security Act of 1935, which included funding to states for services “. . . for the protection and care of homeless, dependent, and neglected children.” Federal funding and the conditions attached to states receiving it have continued to influence states’ child welfare systems. However, North Carolina law, beginning with the first Juvenile Code in 1919, has defined responsibilities for providing child welfare services in the state and assigned those responsibilities primarily to the counties.

3. Medical attention to abuse and neglect. In the medical community, increased awareness of and attention to the problem of abused and neglected children occurred in the middle of the twentieth century. In 1946, Dr. John Caffey published the results of his research showing that subdural hematomas and fractures of the long bones in infants were inconsistent with accidental trauma. Other physicians also began to draw attention to abuse as the cause of some child injuries. In 1962, the term “battered child syndrome” received public attention when Dr. C. Henry Kempe and several other physicians published the landmark article, *The Battered Child Syndrome*, in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, at 181 JAMA 17 (July 17, 1962). The article was a significant factor leading to awareness of the magnitude of problems of child abuse and neglect.

4. Enactment of reporting laws. Even when medical professionals suspected or knew that a child had been abused or neglected, the constraints of confidentiality often kept them from informing anyone of the concern. After the Kempe article, states began adopting laws to enable or require doctors, and sometimes others, to report cases of child abuse or neglect. By 1967, 44 states had adopted mandatory reporting laws and the remaining six had adopted voluntary reporting laws. All states now have mandatory reporting laws, although they vary with respect to what must be reported, who must report, and whether there is a penalty for failing to report.

5. North Carolina abuse and neglect reporting laws. North Carolina's first reporting law, enacted in 1965, did not mandate reporting, but required county departments of public welfare to investigate reports of abuse and neglect and guaranteed physicians and certain other professionals immunity from civil or criminal liability for reporting abuse and neglect. The next generation of reporting law came about in 1971. It did mandate reporting to the county department of social services by specified professionals who *had reasonable cause to suspect* that a child was abused or neglected, but required others to report only if they had *actual knowledge* of abuse. Since 1979 North Carolina law has required reporting by any person or organization with "cause to suspect" that a child is abused or neglected. A 1993 amendment expanded the obligation to report to include circumstances in which a person or institution has cause to suspect that a child is dependent (as defined in the Juvenile Code) or has died as the result of maltreatment. Beginning December 1, 2013, willfully failing to report or preventing someone else from reporting when a report to the county department of social services is required is a misdemeanor. G.S. 7B-301(b).

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

6. Juvenile courts and North Carolina's Juvenile Code. In the late 19th century, states began to create special courts to separate young offenders from adult criminals. The laws enacted to do this, beginning with the Illinois Juvenile Court Act of 1899, provided for these courts to address the needs of neglected and dependent children as well as delinquent children. North Carolina enacted its first Juvenile Code in 1919. Major rewrites took effect in 1970, 1980, and, most recently, in 1999 when the current Code, Chapter 7B of the North Carolina General Statutes, became effective. The 1919 Code dealt with juveniles who were neglected, dependent, abandoned, destitute or homeless, delinquent, truant, unruly, wayward, misdirected, disobedient to or beyond the control of their parents, or in danger of becoming any of these things. Over the years these evolved into the current categories of abused, neglected, dependent, delinquent, and undisciplined juveniles. The 1999 Code was the first to separate within the Code provisions relating to juveniles who need protection (abused, neglected, and dependent juveniles) and those whose conduct brings them before the court (delinquent and undisciplined juveniles). The legislature amends the Code in some respect almost every session—to ensure compliance with federal funding conditions, in response to appellate court decisions, to conform to changes in other laws, or for other reasons.

Resources: For a brief summary of the birth and evolution of juvenile court in the United States, see [*The Juvenile Court at 100 Years: A Look Back*](#), JUVENILE JUSTICE VOLUME VI, NO. 2 (Dec. 1999).

For a summary of North Carolina legislation from 1997 through 2005 and its impact on the N.C. Juvenile Code, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL § 1404\(II\)](#) (Jan. 2007).

For annual summaries of North Carolina legislation, beginning with the 1998 session, see “[NC Legislation](#)” on the University of North Carolina School of Government website.

For a timeline of historical events (legislative, judicial, societal) giving rise to the American juvenile court system, see “[Child Maltreatment](#)” on the National Association of Counsel for Children website.

B. Influence of Federal Law

Various federal laws provide states with funding for programs related to child maltreatment or child protective services and tie the receipt of that funding to a state’s compliance with conditions set out in federal laws and regulations. The North Carolina Juvenile Code has been amended numerous times to ensure its conformity with federal child welfare funding criteria. The following are just some of the federal laws that affect child welfare proceedings and that have helped shape the North Carolina Juvenile Code. (For additional and more detailed discussion of federal laws that are relevant to juvenile proceedings, see *infra*, Chapter 13.)

1. The Child Abuse Prevention and Treatment Act. The *Child Abuse Prevention and Treatment Act* (“CAPTA”), Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101 *et seq.*), was enacted in 1974 and has since had a number of amendments and additions. CAPTA provides for funds to states to establish programs to prevent and treat child abuse and neglect. It was the federal law that linked federal funding to such requirements as mandatory child abuse and neglect reporting laws, aspects of the definitions of child abuse and neglect, immunity and confidentiality for people who report, representation for children whose cases result in judicial proceedings, and confidentiality of records. The Act also authorized government research into child abuse prevention and treatment, created the National Center on Child Abuse and Neglect (NCCAN) (now replaced by the Office on Child Abuse and Neglect) and the National Clearinghouse on Child Abuse and Neglect Information, and addressed state programs for child death reviews. CAPTA funds training programs, recruitment of volunteers, and the establishment of resource centers in fields related to abuse and neglect. Also see *infra* §13.2.A.

2. The Indian Child Welfare Act. In 1978, the *Indian Child Welfare Act* (“ICWA”), Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901 *et seq.*), was enacted as a result of recognition by the federal government that American Indian children of federally recognized tribes were being inappropriately removed from their homes. ICWA was designed to establish standards for the placement of Indian children in foster or adoptive homes and to

prevent the breakup of Indian families. The Act gives Indian tribes jurisdiction over or the right to intervene in child welfare cases involving Indian children, and it imposes specific requirements on state courts that exercise jurisdiction in cases involving Indian children. For more information about ICWA, see *infra* § 13.6.

3. Adoption Assistance and Child Welfare Act. In 1980, Congress enacted the *Adoption Assistance and Child Welfare Act*, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.), to address problems in the foster care system and the unnecessary separation of children and families. This Act was the genesis of the requirements that states provide “reasonable efforts” to prevent or eliminate the need for removal of a child from his or her home, that cases of children in foster care be reviewed every six months, and that a permanent plan be made for every child placed away from home within 18 months after the child’s initial placement. The Act establishes standards for foster family homes and for reviewing those standards periodically, and requires maintenance of a data collection and reporting system about children in care.

4. Multiethnic Placement Act. In 1994, the *Multiethnic Placement Act* (“MEPA”), Pub. L. No. 103-382, 108 Stat. 4056 (codified in scattered sections of 42 U.S.C.), was enacted as Title V, part E, subpart 1 of the Improving America’s Schools Act, amending Title IV-E of the Social Security Act. Significant amendments to MEPA were made by The Small Business Job Protection Act of 1996, Pub. L. No. 104-188. MEPA prohibits delay or denial of a child’s foster care or adoptive placement based on the race, color, or national origin of the parent or child, and facilitates the development of a diverse pool of foster and adoptive families. For more information about MEPA, see *infra* § 13.7.

5. Adoption and Safe Families Act. In 1997, Congress passed the Adoption and Safe Families Act (“ASFA”), Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.). Highlights of the act (relating to its effect on state law) include the clarification of the “reasonable efforts” requirement, an emphasis on the safety of children as the paramount concern, the requirement that permanency planning begin as soon as a child enters foster care, and a number of time requirements designed to keep children from remaining in foster care longer than necessary. For more information about ASFA, see *infra* § 13.2.D.

6. Fostering Connections to Success and Increasing Adoptions Act. In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 42 U.S.C.). This Act emphasized relative and kinship care and support for relative and kinship guardians, provided for tribal foster care and adoption access, and improved incentives for adoption. It also expanded Title IV-E assistance to older youth in foster care and provided various programs and funding incentives to promote better outcomes for children in foster care and those transitioning out of foster care. For more information about this Act, see *infra* § 13.2.K.

7. Preventing Sex Trafficking and Strengthening Families Act³

On September 29, 2014 the Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, was signed into law. It has a significant impact on child welfare proceedings. Relevant highlights of the law include: identifying, preventing, and providing services to at-risk foster children who may become victims of sex trafficking; implementing a “reasonable and prudent parenting standard” for decisions made by foster parents that allow foster children to engage in “age or developmentally appropriate” activities; including older foster care children in the development of their case plans and transition out of foster care; and contacting parents of siblings for possible placement of the child. *See infra* § 13.2.L for additional details.

Note: At the time of the most recent updates to this manual (June 2015), there is proposed legislation in the state of North Carolina intended to implement provisions of this federal act. *See* 2015-2016 Legislative Session, H 407, S 423, and H 669, sections 4, 8, 9, 11, 13, 14, 16.

Resource: For a timeline of major legislation, see CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., [MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION](#) (2012).

C. Demographics

1. National data.⁴ The U.S. Department of Health and Human Services, via the Children’s Bureau, collects and reports data relating to child maltreatment in the United States. For fiscal year 2012, child protective services agencies received an estimated 3.4 million referrals (an allegation of maltreatment) involving approximately 6.3 million children. Of those reports, 2.1 million were screened in (received further agency attention) and had a child protective services response. The Children’s Bureau also compiles statistics and information relating to the reporters, the type of maltreatment, demographics of children and alleged perpetrators, and child deaths.

2. North Carolina data.⁵ Statistics on North Carolina reports of abuse, neglect, and dependency as well as child placement data are maintained through a joint project of the Jordan Institute for Families at the School of Social Work at The University of North Carolina at Chapel Hill and the Division of Social Services in the North Carolina Department of Health and Human Services. The data show that in state fiscal year 2012-2013, 127,798 children in

3. Source for some content in this section: [Fact sheet for Preventing Sex Trafficking and Strengthening Families Act from the Children’s Defense Fund](#), October, 2014.

4. Information for this section was obtained from CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [Child Maltreatment 2013](#) (2013) (based on information gathered from the National Child Abuse and Neglect Data System (NCANDS)).

5. Information for this section was obtained from D. F. Duncan, H. C. Kum, K. A. Flair, C. J. Stewart, J. Vaughn, R. Bauer, and J. Reese, Jordan Institute for Families, University of North Carolina at Chapel Hill, School of Social Work, [North Carolina: Investigated Reports of Abuse and Neglect Type of Finding/Decision \(Not Exclusive\) Number of Children \(Point in Time\)](#), in Management Assistance for Child Welfare, Work First, and Food & Nutrition Services in North Carolina (2014).

the state were the subject of investigated abuse, neglect, and dependency reports. Findings resulting from investigations or assessments are characterized in nine ways, and one report may result in multiple characterizations. For 2012-2013 the data show the following findings:

Finding	Total Number SFY 2013-2014
• abuse and neglect	1,167
• abuse	930
• neglect	8,464
• dependency	276
• services needed	13,614
• services provided, no longer needed	7,481
• services recommended	38,155
• unsubstantiated	24,774
• services not recommended	47,587

Data on these and other factors (e.g., referral source, race, age, ethnicity) are available for individual counties as well as for the state. (See footnote 4, *supra*, for link to the data.)

D. Resources and Organizations

The University of North Carolina School of Government maintains a [juvenile law page](#) on its website with this manual and multiple other resources for professionals working in the field of abuse, neglect, dependency, and termination of parental rights. In addition to the juvenile law page, the [School of Government](#) has numerous other web pages with resources in various fields of law, some of which have relevance to juvenile proceedings.

A number of organizations operating on the national level provide information, resources, training, and even technical assistance related to child abuse, neglect, dependency, and TPR proceedings. Those that cover a variety of topics related to juvenile proceedings include (but are not limited to) the following, and organizations focused on a more specific topic are highlighted in relevant sections of this manual.

The [Child Welfare Information Gateway](#) website is a service of the Children's Bureau, part of the Administration for Children and Families, U.S. Department of Health and Human Services. The Child Welfare Information Gateway provides access to print and electronic publications, websites, and online databases covering a wide range of topics, including preventing and responding to abuse and neglect, permanency, foster care, adoption, and more. This website is very comprehensive, and readers are encouraged to start here when researching most topics related to abuse, neglect, dependency, and juvenile court proceedings.

The [National Council of Juvenile and Family Court Judges](#) (NCJFCJ) has a website with access to publications, training opportunities, and technical assistance, as well as membership opportunities, and covers a broad range of topics.

The [American Bar Association Center on Children and the Law](#) addresses laws, policies, and judicial procedures affecting children. The Center has multiple projects focused on specific topics, generating publications with technical advice and reports on research. The Center offers memberships and training, subscriptions, and listservs for attorneys and judges focused on specific topics and specific practice areas.

1.2 Purpose of Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings⁶

There is a presumption in the law that the government will not interfere with the parent-child relationship: “[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” *In re Stumbo*, 357 N.C. 279, 286 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000)). North Carolina’s Juvenile Code provides the procedures and parameters for governmental intervention into the parent-child relationship when children are harmed, are at risk of harm, or do not receive minimally adequate care.

In North Carolina, the initial focus of the court in abuse, neglect, and dependency proceedings is on whether the status or condition of the child warrants governmental intervention. This focus contrasts with that of a criminal case in which someone who harms a child may be prosecuted and punished. It also contrasts with termination of parental rights proceedings, where the focus is determining whether a ground for termination exists based on a parent’s conduct or capability. An adjudication—a determination that a child is an abused, neglected, or dependent juvenile, or that a ground for termination of parental rights exists—establishes the court’s jurisdiction to proceed to a disposition, where the focus is the child’s best interest. The conduct of parents or others is relevant in juvenile court, but not for the purpose of imposing punitive measures. Rather, the court’s focus is on determining the child’s condition, the court’s jurisdiction, and what if any actions are necessary in response to the child’s condition. Nevertheless, an adjudication that a child is abused, neglected, or dependent may lead to serious consequences for a parent, including temporary removal of the child from the home or permanent termination of parental rights.

The stated purposes of the Juvenile Code and the proceedings it prescribes provide a “big picture” perspective that can be helpful any time, but particularly when resolution of a case is difficult. Attorneys and judges may find support for arguments or decisions in the statutory language related to purposes or the case law interpreting that language.

G.S. 7B-100 states that the provisions of the Juvenile Code relating to abuse, neglect, dependency, and termination of parental rights must be interpreted and construed so as to implement the following purposes and policies:

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

1. To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]
2. To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.
3. To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence[.]
4. To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.
5. To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

Additional purposes with respect to termination of parental rights are set out in G.S. 7B-1100:

1. [T]o provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.
2. . . . [T]o recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.
3. Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.
4. This Article shall not be used to circumvent . . . the Uniform Child Custody Jurisdiction and Enforcement Act.

North Carolina appellate cases have helped shape these purposes and have cited them as support for some decisions. For example, in concluding that an anonymous report of a naked two-year-old child in a family's driveway was not sufficient to invoke DSS's authority to conduct an investigation, the state supreme court cited the Code's purpose of providing protective services "by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence." *In re Stumbo*, 357 N.C. 279, 287 (2003). *See also In re A.R.G.*, 361 N.C. 392 (2007). The courts have considered the Code's stated purposes when determining whether a particular Rule of Civil Procedure furthered those purposes and should apply in juvenile proceedings. *See, e.g., In re B.L.H.*, 190 N.C.

App. 142, *aff'd per curiam*, 362 N.C. 674 (2008); *In re S.D.W.*, 187 N.C. App. 416 (2007); *In re L.O.K.*, 174 N.C. App. 426 (2005). In the case *In re Eckard*, 148 N.C. App. 541, 548 (2002), the court of appeals held explicitly that an order ceasing reunification efforts was “not consistent with the purposes and policies of the statute.” Numerous cases have pointed to the Code’s characterization of the child’s best interest as a paramount consideration in juvenile proceedings. *See, e.g., In re T.R.P.*, 360 N.C. 588 (2006); *In re S.C.H.*, 199 N.C. App. 658 (2009); *In re M.D.*, 200 N.C. App. 35 (2009); *In re L.O.K.*, 174 N.C. App. 426 (2005).

1.3 Overview of the Proceedings: The Way a Case Flows Through the System

A. Narrative Overview of Case Flow

The following narrative provides an overview of the primary stages and hearings in abuse, neglect, and dependency cases to give a big picture perspective of how these cases flow through the system. Note that there are other hearings associated with these proceedings that are not touched on in this overview but are explained in the relevant sections of this manual. *See also infra* appendix 1 for a chart that explains hearings and other events in abuse, neglect, dependency, and termination of parental rights proceedings.

After receiving a report and conducting an assessment, if DSS finds evidence of abuse, neglect, or dependency, DSS must determine whether to provide protective services to the family, whether to file a petition so that the court can become involved in the case, and whether removal of the child from the home is necessary in order to protect the child. If removal is necessary immediately and there is not time to obtain a court order, DSS (or a law enforcement officer) may take a child into temporary custody without a court order. An order authorizing custody beyond an initial 12-hour (24-hour on weekends or holidays) period and before a hearing on the merits of the case is called a nonsecure custody order. It may be issued only after DSS has filed a petition and only in narrow circumstances described in the statute. Most initial nonsecure custody orders are issued *ex parte*. When a child is in nonsecure custody, either a hearing on the merits of the petition (adjudication) or a hearing to determine the need for continued nonsecure custody must be held within 7 calendar days unless the parties consent for the court to continue the hearing for up to 10 business days. If the child remains in nonsecure custody, periodic hearings, unless waived, must be held at intervals of no more than 30 days on the need for continued custody and, if custody continues, to evaluate the child’s placement pending adjudication.

Juvenile cases are heard in the district court by a judge, with no jury. The Juvenile Code sets out most procedural requirements, but when the Code is silent as to procedure, the Rules of Civil Procedure typically apply. *See infra* § 4.1 for further explanation of when the Rules apply. In some districts, chief district court judges have adopted local court rules governing the procedures to be followed in juvenile cases.

Juvenile petitions are handled by the court in two primary stages: (1) *adjudication*, during which the court hears evidence, makes findings, and determines whether allegations in the

petition have been proved; and (2) if the court adjudicates the child to be abused, neglected, or dependent, *disposition*, which is devoted to identifying the needs of the child and the parents, considering ways to address those needs, and developing a plan that is in the best interests of the child. These two stages of the proceedings have different purposes, standards, and rules, making it important that the court delineate clearly the end of one stage and the beginning of the other, even if they are handled in the same court session.

At adjudication, the formal rules of evidence apply and the burden is on the petitioner, DSS, to prove the allegations in the petition by clear and convincing evidence. The court either adjudicates the child to be abused, neglected, or dependent, or dismisses the petition.

At disposition, the rules of evidence are relaxed and the hearing may be informal. The parties may submit written reports or other evidence concerning their perspectives on the family's needs, how those needs can be met, and what steps should be taken for the child's care and protection. After making findings and conclusions, the court may leave the child in the home, place custody with DSS or a relative or other person, and make other orders concerning the child or parents. The guiding principle for the court's decisions in this dispositional phase is the child's best interests.

If a disposition includes placing or continuing the placement of the child outside the home, the court must conduct review hearings at specified intervals. At each review the court considers and makes findings about a variety of statutory criteria, including what services have been or should be offered, whether the child's placement is appropriate, and whether the child's return home is likely. A special review hearing, a permanency planning hearing, must be held within a year after the child was first removed from the home, to ensure that a plan for reunification or another permanent plan is in place and that timely and appropriate steps are being taken to accomplish the plan. Each hearing reviewing the case after the initial permanency planning hearing is also designated a permanency planning hearing. The presumptive goal in every case is for the child to remain at home safely or, if placed outside the home, to return as soon as possible to a home that is safe. If the court finds at any point in the case that reunification efforts are futile or inconsistent with the child's health, safety, and need for a safe permanent home, the court may order that reunification efforts cease and develop another permanent plan for the child.

If the permanent plan for the child is adoption, a termination of parental rights (TPR) petition or motion may be filed if necessary to implement that plan. A TPR proceeding is also divided into two stages, adjudication and disposition. At adjudication, the court determines whether a statutory ground for termination of parental rights has been proved by clear, cogent, and convincing evidence. If not, the case is dismissed. If one or more grounds exist, the court moves on to disposition where it determines whether termination of parental rights is in the child's best interest. The court will terminate parental rights only if it finds that it is in the child's best interest to do so. If parental rights are terminated and the child is in the custody of DSS or a licensed child-placing agency, post-termination review hearings must be held at least every six months to examine progress toward achieving the permanent plan.

The court retains jurisdiction and can continue to hold hearings and enter orders until the court enters an order that terminates jurisdiction, a final order of adoption is entered, or the juvenile turns eighteen or is emancipated, whichever occurs first.

B. Juvenile Court Logistics, Systems, and Special Courts⁷

1. Juvenile court sessions. All juvenile cases are civil actions in district court, although they are scheduled and heard separately from other civil cases. The court may have special juvenile sessions for cases that are expected to involve lengthy hearings or for other reasons.

2. Family court districts. In 1998, the legislature authorized the establishment of family courts on a pilot basis. The legislature has funded 13 family court districts serving 45 percent of the state's population. In these districts, family court case coordinators assist with the assignment and management of cases so that, to the extent possible, all of one family's legal matters are scheduled and heard before the same judge. Family court matters include abuse, neglect, and dependency; termination of parental rights; domestic violence; child custody and visitation; child support; divorce, alimony, and equitable distribution; and delinquent and undisciplined juveniles. Some districts that are not designated family court districts model some practices of family courts, such as "one family-one judge" or child planning conferences. For more detailed information about Family Court, see "[Family Court](#)" on the North Carolina Administrative Office of the Courts website.

3. Court Improvement Program. The Court Improvement Program (CIP), based in the state Administrative Office of the Courts (AOC), is a federally funded program to improve court practice in child abuse, neglect, and dependency cases. Since the initial grant award in 1995, CIP funds have been distributed to twenty-three of North Carolina's judicial districts to provide staff who perform case management activities and/or training. These districts focused on implementing best practices in juvenile court, including one judge-one family case assignment, child planning conferences, and shared decision-making. Court Improvement funds have also been used in the past to implement Family Drug Treatment Courts in four districts. In more recent years, CIP funds have been used to continue the enhancement of the information system used to store data on cases of abuse, neglect, and dependency in North Carolina, and CIP staff has broadened the program's reach to a more statewide audience for court improvement activities. For more information about the Court Improvement Program in North Carolina, see "[Court Improvement for Children and Families](#)" on the North Carolina Administrative Office of the Courts website.

4. Family Drug Treatment Court. In some districts, Family Drug/Dependency Treatment Court (FDTC) works with parents and guardians who are in danger of losing or have lost custody of their children due to abuse or neglect and who have substance abuse issues. Participants receive support in their efforts to overcome substance abuse and to make other changes that will facilitate reunification with their children. For more information about the

7. Some of the content for this section was drawn or adapted from 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL CH. X](#) (2008).

program, see “[Family Dependency/Drug Treatment Courts](#)” on the North Carolina Administrative Office of the Courts website.

5. Local rules. In some districts, chief district court judges have adopted local court rules governing the procedures to be followed in juvenile cases. To access local rules, see “[Local Rules and Forms](#)” on the North Carolina Administrative Office of the Courts website.

6. Child Fatality Task Force. The North Carolina Child Fatality Task Force is part of the N.C. Child Fatality Prevention System established by Article 14 of the Juvenile Code. Within the prevention system is a state Child Fatality Prevention Team that reviews records of deaths and periodically assesses the operations of the child fatality prevention system, making recommendations to the Task Force as needed. Purposes of the system include development of community-wide approaches to the problem of child abuse and neglect; understanding the causes of childhood deaths; identifying any gaps or deficiencies in the delivery of services to children and families to prevent child abuse, neglect, or death; and making and implementing recommendations for changes to laws, rules, and policies to support safe and healthy child development and prevent child abuse, neglect, and death. See G.S. 7B-1400 through 7B-1414.

7. Community Child Protection Teams. Community Child Protection Teams (CCPTs), part of the N.C. Child Fatality Prevention System discussed above, were established to serve as local partnerships to strengthen child protection. Every county is required to have one. The duties and membership requirements of the CCPTs are contained in G.S. 7B-1406 and 7B-1407. *See also* 10A N.C.A.C. 70A .0201, .0202, and .0203. Each CCPT reviews selected protective services cases, fatalities, and other cases brought to the team for review. CCPTs must report annually to the board of county commissioners, and the teams are directed by G.S. 7B-1406(a)(2) to “advocate for system improvements and needed resources where gaps and deficiencies may exist.” For more information about CCPTs, see 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL § 1434](#) (2007).

8. Child Planning Conferences and Pre-adjudication Hearings. Some districts have “child planning” or “day-one” conferences in cases in which a child is placed outside the home pending an adjudication hearing. These conferences are held soon after a petition is filed and a nonsecure custody order is issued. The parties and their attorneys, as well as others with an interest in the case, are notified and encouraged to attend. To varying degrees, participants share information, identify issues, explore options, discuss resources, resolve problems, and hear recommendations about or agree on such things as child placement, visitation, health and education services, paternity determination, and child support. Child planning conferences do not take the place of the required hearings on the need for continued nonsecure custody. However, they may expedite those hearings, and sometimes they provide a less adversarial method of resolving issues that otherwise would be addressed at those hearings. Since 2013, G.S. 7B-800.1 has required pre-adjudication hearings to address many of the same issues addressed in child planning conferences. For more detailed information about pre-adjudication hearings and child planning conferences, see *infra* § 5.7.

9. J Wise System. J Wise is an automated computer information system operated by the N.C. Administrative Office of the Courts. J Wise is used by multiple juvenile court officials and

employees to record and access juvenile court information, manage cases, and link case outcomes from different courts. For more detailed information about J Wise and other aspects of court administration, see *infra* appendix 3.

10. Juvenile Rules of Recordkeeping. Chapter 12 of the Rules of Recordkeeping issued by the Administrative Office of the Courts addresses the filing system and related topics in juvenile cases. For information on the Rules of Recordkeeping, see *infra* appendix 4.

11. Permanency Mediation. G.S. 7B-202, in the Juvenile Code, directs the Administrative Office of the Courts to establish, in stages, a statewide Permanency Mediation Program. Only a few districts have implemented permanency mediation. The purpose of the program is to provide mediation services to resolve issues in cases in which a juvenile is alleged to be abused, neglected, or dependent or in which a petition or motion to terminate parental rights has been filed. The goals of permanency mediation include improving the parties' understanding of juvenile proceedings, clarifying the issues for all participants, enhancing the quality of case plans, and reducing the number of court hearings and the amount of relitigation. While each of the programs operates somewhat differently, the primary goal of all permanency mediation is to facilitate the permanent placement of children in a timely manner. G.S. 7B-202 specifies the participants in mediation, confidentiality and privileges with respect to mediation, and the manner in which agreements reached in mediation should be used by the court. Additional information regarding permanency mediation is available in the [Permanency Mediation Program's annual report](#) on the website for the Administrative Office of the Courts.

12. Judicial assignments and recusal. The assignment of judges to cases is pursuant to local rules and at the direction of the chief district court judge. *See* N.C. R. CIV. P. 40. In family court districts as well as other districts, local rules may require or encourage the assignment of one judge to one family. That is, for any matters involving one family, including but not limited to abuse, neglect, dependency, TPR, domestic violence, or civil custody, one judge is assigned to all cases. For more information about duties of the chief district court judge, see *infra* appendix 2.

Recusal of a judge is not addressed in the Juvenile Code, but it is an issue that arises occasionally in juvenile proceedings. Even though the one judge-one family approach to judicial assignments for juvenile court has become more common, the issue of recusal is most likely to come up in the context of a judge who hears different proceedings involving the same family. The Code of Judicial Conduct addresses recusal (disqualification) in Canon 3. When a party requests recusal by the trial judge, the party must demonstrate that grounds for disqualification exist. *See In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994). Canon 3 of the Code of Judicial Conduct states in part that a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including a proceeding in which the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings. *See* N.C. CODE OF JUDICIAL CONDUCT Canon 3(C)(1)(a).

In applying this standard from Canon 3, appellate cases have not found that a judge should be recused simply because he or she presided over another case involving the same children. *See*

In re M.A.I.B.K., 184 N.C. App. 218 (2007) (holding that the trial judge who presided over the mother’s termination of parental rights proceeding was not barred from presiding over the father’s termination of parental rights proceeding without any showing by the father of “extraordinary circumstances,” which, according to local rules, would have been the only basis for recusal of the judge); *In re Faircloth*, 153 N.C. App. 565 (2002) (holding that recusal from a TPR proceeding was not necessary for the sole reason that the judge presided over an abuse, neglect, or dependency proceeding involving the same children); *In re LaRue*, 113 N.C. App. 807 (1994) (holding that the judge did not have to recuse himself from a TPR action because he presided over an earlier review hearing).

Where the issue of recusal is not raised at trial, it is not preserved for appellate review. *See In re D.R.F.*, 204 N.C. App. 138 (2010) (holding that trial judge did not err in failing to recuse himself where the judge had no duty to recuse himself sua sponte; there was no indication of the reason for the judge’s earlier recusal in another hearing; and the issue was not preserved for appeal because no motion for recusal was made in the trial court).

1.4 Overlapping Proceedings

It is not unusual for children, parents, or other caregivers involved in abuse, neglect, or dependency proceedings to have some involvement in other court actions as well. When proceedings overlap in time, circumstances, or both, the parties may face challenges with respect to advocacy strategies, and the parties and the court may face procedural issues. Proceedings that may overlap with abuse, neglect, dependency, or TPR proceedings include (but are not limited to) juvenile delinquency cases, private custody actions, adult criminal court actions, and domestic violence proceedings. Statutes and case law provide limited guidance for navigating overlapping proceedings, so they must generally be analyzed on a case-by-case basis. Note, however, that the court may not grant a continuance in an abuse, neglect, or dependency case based solely on resolution of a pending criminal charge arising from the same occurrence as the juvenile petition. G.S. 7B-803.

A. Juvenile Delinquency and Undisciplined Proceedings

Overlap between the child welfare system and the juvenile justice system is not uncommon. A child who is the subject of an abuse, neglect, or dependency petition may also be the subject of a delinquency or undisciplined petition. Any juvenile who is adjudicated delinquent or undisciplined may be placed in DSS custody at disposition. See G.S. 7B-2503(1)c. and 7B-2506(1)c. While that disposition does not create or require the initiation of an abuse, neglect, or dependency case, it inserts DSS into the delinquency or undisciplined case and triggers requirements, discussed further below, related to findings and hearings that apply in abuse, neglect, and dependency cases. The Juvenile Code’s Subchapter I (abuse, neglect, dependency, termination of parental rights) and Subchapter II (delinquency and undisciplined) have different goals and procedures. The juvenile’s entitlement to representation and the nature of the representation differ, and an indigent parent is entitled to appointed counsel in one but not the other.

Resource: See “[Juvenile Justice Division](#)” on the Child Welfare League of America website for resources related to the relationship between child welfare and juvenile justice cases.

1. Simultaneous proceedings. When a child is the subject of petitions in both delinquency court and abuse, neglect, and dependency court, both the court and key people involved with the juvenile need to be aware of both proceedings. If the juvenile is in DSS custody, then DSS as well as the juvenile’s parent should be served with pleadings and notices in the delinquency case. A juvenile court counselor preparing recommendations for the court in a delinquency case or supervising a juvenile on probation should be in close communication with DSS when the counselor knows that agency is involved with the juvenile’s family. A DSS report to the court at a review hearing in an abuse, neglect, or dependency case would not be complete without addressing the juvenile’s involvement in a delinquency matter and the parents’ participation in that case. The legislature recognized the need for inter-agency sharing of information when it enacted G.S. 7B-3100, requiring designated agencies to share information. For more detailed information on access to and sharing of information, see *infra* § 2.7. For dispositional and review hearing purposes, a court counselor’s presence in an abuse, neglect, or dependency case and a social worker’s presence in a delinquency case may be critical to the court’s ability to obtain complete information and to the coordination of services to the child and family.

2. DSS placement from delinquency proceeding. In the dispositional phase of a delinquency (or undisciplined) case, the court may place a juvenile in DSS custody if the DSS director has been given notice and an opportunity to be heard. See G.S. 7B-2506(1)c. and 7B-2503(1)c. The court’s placement of a delinquent (or undisciplined) juvenile in the custody of DSS does not constitute an adjudication of abuse, neglect, or dependency, and the court in the delinquency case does not have jurisdiction to adjudicate the juvenile abused, neglected, or dependent. That can occur only in an action initiated by the filing of a petition by DSS alleging one of those conditions. Placement of the juvenile in DSS custody is simply a dispositional alternative in the delinquency case.

Even though DSS is not required to file a petition, there is a requirement that the juvenile’s placement be reviewed according to G.S. 7B-906.1 (relating to review and permanency planning hearings in abuse, neglect, or dependency cases). See G.S. 7B-2503(1)c. and 7B-2506(1)c. Also see *infra* Chapter 8 (related to review and permanency planning hearings). Because the only case in which the court is exercising jurisdiction is the delinquency case, the required review hearings pursuant to G.S. 7B-906.1 are hearings in the delinquency case, even if local practice is to schedule the hearings for days on which abuse, neglect, and dependency cases are heard. The juvenile is represented by the attorney appointed for the juvenile in the delinquency case and does not have a guardian ad litem or attorney advocate. The parent, even if indigent, has no statutory right to appointed counsel. The court’s authority over the parents under Article 27 of the Juvenile Code (G.S. 7B-2700 through 7B-2706) in delinquency cases is somewhat different from the court’s authority over parents under G.S. 7B-904 in abuse, neglect, or dependency cases.

Sometimes a complication arises when the disposition in a delinquency case both places the juvenile in DSS custody and places the juvenile on probation. When the juvenile’s probation

ends, the court might normally terminate its jurisdiction. However, if the court's intention is that the juvenile remain in DSS custody, the court must retain jurisdiction in the delinquency action in order for the custody order to remain in effect.

There may be times when DSS determines that the best course of action is to file an abuse, neglect, or dependency petition, even though the order in the delinquency case is legally sufficient to give DSS custody. However, DSS should file a petition only if the facts establish that the juvenile is abused, neglected, or dependent. If the juvenile's placement was unrelated to the adequacy of the care the parents provided but arose instead from a need for DSS assistance with a specific or specialized placement, review hearings in the delinquency (or undisciplined) case should be sufficient.

3. Representation of the juvenile. It is important to recognize the different roles of attorneys for juveniles in delinquency proceedings and in abuse, neglect, and dependency proceedings. Attorneys representing children in delinquency proceedings are representing the child's rights and wishes—that is, the child's expressed interests—whereas, GAL attorney advocates in abuse, neglect, and dependency cases (along with the GAL program) are representing the best interest of the child, which takes into account (but is not centered on) the child's expressed interests. Also, GAL attorney advocates are given broad access to confidential information that may not be available to the juvenile's attorney in a delinquency case. See G.S. 7B-601.

Representation by an appointed attorney is limited to the type of proceeding for which the attorney is appointed. See G.S. 7B-601 and 7B-2000(a). The appointment and role of attorneys in delinquency proceedings and in abuse, neglect, and dependency proceedings are separate. The Juvenile Code does not address whether an attorney could or should represent the same child in both types of proceedings. From an ethical perspective, it would be difficult for an attorney to switch back and forth between expressed interest representation and best interest representation, without encountering conflicts of interest. However, GAL attorney advocates and delinquency attorneys can and should communicate and exchange information with one another to the extent that such interaction supports and does not interfere with their representation goals, privileges, and responsibilities. Similarly, a child's attorney in delinquent or undisciplined proceedings should communicate and coordinate with a parent's attorney in an abuse, neglect, or dependency proceeding to the extent that it is prudent.

B. Civil Custody Proceedings

A civil custody matter may be pending when an abuse, neglect, or dependency proceeding begins, or a civil custody case may be initiated during or as a result of a juvenile case. The relationship between Chapter 50 civil custody proceedings and juvenile abuse, neglect, and dependency proceedings is addressed in both the Juvenile Code and in Chapter 50.

1. Jurisdiction, consolidation, and stays. As soon as the court obtains jurisdiction over a juvenile as the result of a petition alleging abuse, neglect, or dependency, any other civil action in the state in which custody is an issue is automatically stayed as to that issue. See G.S. 7B-200(c) and 50-13.1(i). However, the court in the juvenile case has options with respect to consolidation, transfer, and stay of proceedings:

- The court may order that any civil action or claim for custody filed in the same district be consolidated with the juvenile proceeding. See G.S. 7B-200(c)(1) and (d). Court orders resulting from consolidated hearings should sufficiently separate the matters considered in the different proceedings. *See In re N.T.S.*, 209 N.C. App. 731 (2011) (holding that an order entered after a hearing in consolidated custody and juvenile cases was a temporary civil custody order, not a juvenile disposition order, and therefore was not immediately appealable). *See also In re R.B.B.*, 187 N.C. App. 639 (2007) (discussing consolidation of abuse, neglect, and termination of parental rights proceedings).
- If the civil custody case is filed in another district, for good cause and after consulting with the court in the other district, the court in the juvenile proceeding may order a transfer of either the civil custody case or the juvenile case to allow the proceedings to take place in the same district. See G.S. 7B-200(d).
- The court also has the option to proceed in the juvenile case while the civil case remains stayed, or to dissolve the stay of the civil case and stay the juvenile proceeding pending a resolution of the civil case. See G.S. 7B-200(d).

Note that the initiation of a termination of parental rights proceeding has no effect on a pending Chapter 50 custody action. The stay provision in G.S. 7B-200 applies only when a petition alleges that the juvenile is abused, neglected, or dependent.

2. Civil custody as a permanent plan. Under G.S. 7B-903(a)(2)(b), at or subsequent to disposition in a juvenile case, the court may place the child in the custody of a parent, relative, agency offering placement services, or another appropriate person. If the need for intervention through a juvenile court action ends, but an order placing custody with a parent or other person needs to remain in effect, the court may create a civil custody action under G.S. Chapter 50, enter a custody order in that action, and terminate jurisdiction in the juvenile proceeding. If a civil custody order already exists, the court would modify that order rather than initiate a new action. This procedure, under G.S. 7B-911, is available only if there has been an adjudication of abuse, neglect, or dependency. For details of the requirements for initiating or modifying a civil custody order in juvenile court, see *infra* § 7.7. Custody pursuant to Chapter 50 allows the court to terminate jurisdiction in the juvenile case without dissolving legal or custodial status. Otherwise, under G.S. 7B-201(b), termination of jurisdiction in an abuse, neglect, or dependency case results in the vacating of all orders entered in that action and the reversion to pre-petition legal status of the juvenile and custodial rights of the parties except to the extent those are changed by a valid order in another action.

C. Criminal Proceedings

Events leading to a petition alleging abuse or neglect also may result in criminal charges against an adult. In cases involving abuse, it is not uncommon for a criminal case to be going on simultaneously with a juvenile case. While there is a lack of statutory and case law guidance addressing issues that may arise when criminal and juvenile proceedings overlap, persons involved in both cases need to be able to recognize these issues in order to prepare for and resolve them in the best possible way.

1. Evidentiary issues. If a witness is called to testify in both cases, issues may arise as to how the witness's testimony in one case might affect the other case. If a child witness is involved in both cases, efforts may be made to avoid unnecessarily repetitive or traumatic interviews and/or testimony of the child. (Note that the Juvenile Code specifically states in G.S. 7B-601(b) that the court may authorize a child's GAL to accompany the child to court in any criminal action in which the child is called on to testify in a matter relating to abuse.) Some types of evidence may be needed for analysis and/or introduction in both cases, and there may be issues concerning logistics (where, when, and with whom the evidence will be) as well as how the introduction of evidence in one case affects the other case. For an analysis of selected evidence issues, see *infra* Chapter 11.

2. Defendant's participation in juvenile proceeding. An attorney for a parent (or other respondent) in a juvenile case, with the client's consent, should consult any attorney representing the client in a related criminal matter. Among other things, the two attorneys should confer and advise the client about the nature and extent of the client's participation in the abuse, neglect, or dependency case; witnesses and evidence that might be relevant to both cases; and the theory of and strategy for each case. In the juvenile case, any party could call the parent/defendant as a witness. A witness in a juvenile or other civil case may assert his or her Fifth Amendment privilege against self-incrimination and refuse to testify. Doing so, however, will support an inference that truthful testimony by the witness would have been unfavorable to him or her. See, e.g., *In re Estate of Trogdon*, 330 N.C. 143 (1991); *McKillop v. Onslow County*, 139 N.C. App. 53 (2000). See also *Lovendahl v. Wicker*, 208 N.C. App. 193 (2010) (discussing the relationship between the timing of overlapping civil and criminal proceedings, specifically involving sanctions against defendant for his refusal to answer deposition questions based on the privilege against self-incrimination). For further discussion of the application of the right against self-incrimination, see *infra* § 11.12.

3. Access to information and people. In criminal cases, access to information is governed by the statutes and cases governing criminal procedure and discovery. In juvenile cases, access to information is governed in part by the discovery provisions in G.S. 7B-700, but is also impacted by the requirement in G.S. 7B-3100 that designated agencies share information, as well as the ability of both DSS and the GAL to access confidential information. For a discussion of confidentiality and sharing of information, see *infra* § 2.7. With different standards and procedures for accessing information in criminal court and juvenile court, issues may arise as to what information can be accessed by whom, and for what purpose. Access to people can be an issue as well due to attorney representation. For example, the prosecutor or a defendant's attorney may wish to speak with a child concerning the criminal case, but if the child is represented by a GAL attorney advocate, the attorney advocate's permission is required in order for another attorney to speak with the child. See [North Carolina State Bar](#), RPC 249 (1997) and RPC 61 (1990). Even if a child is not represented (for example, if the child is a witness) an attorney who wants to interview the child should consider whether the consent of a parent or guardian, or a court order, is required and what disclosures must be made to the child. See [North Carolina State Bar](#), 2009 Formal Ethics Opinion 7 (Jan. 27, 2012) (ruling that if the prosecuting witness in a criminal physical or sexual abuse case is younger than 14, the prosecutor or defense lawyer may interview the child only with consent of a parent or guardian or pursuant to a court order).

4. Timing of the two proceedings. The criminal process and the juvenile process move independently of one another and often at very different paces. The Juvenile Code permits continuances in juvenile cases only under limited circumstances, and specifically prohibits a continuation for the sole reason of awaiting resolution of a pending criminal charge against a respondent arising out of the same occurrence as the juvenile petition. *See* G.S. 7B-803 and *infra* § 4.5. In juvenile court, statutory timelines dictate when hearings must be held, regardless of what is happening in the criminal case.

D. Domestic Violence Proceedings

A parent or child involved in a juvenile proceeding may also be involved in a domestic violence proceeding that arises before or during the juvenile proceeding. Domestic violence proceedings are pursuant to Chapter 50B of the General Statutes.

As defined in G.S. 50B-1(a), “domestic violence” means the commission of one or more of the following acts (but not acts that are in self-defense) upon an aggrieved party or upon a child who resides with or is in the custody of the aggrieved party, by a person with whom the aggrieved party has or has had a personal relationship:

- attempting to cause bodily injury, or intentionally causing bodily injury; or
- placing the aggrieved party or a member of the aggrieved party’s family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
- committing any act defined in G.S. 14-27.2 through 14-27.7 (rape and other sex offenses).

A domestic violence action may be initiated in an existing Chapter 50 action or as a new civil action, and the initiating party may file the action pro se. The district court has jurisdiction over domestic violence actions. Chapter 50B contains an extensive list of remedies the court can order as it deems necessary to protect the aggrieved party or child, including provisions addressing temporary custody and visitation and provisions restricting the defendant’s contact with the aggrieved party or child. Any part of a domestic violence action that constitutes a claim for custody is automatically stayed by the filing or pendency of an abuse, neglect, or dependency petition and the court’s acquisition of jurisdiction in the juvenile case. *See* G.S. 7B-200(c), described *supra* § 1.4.B.1.

Resources: The “[Domestic Violence](#)” section of the website for the national Council of Juvenile and Family Court Judges has multiple resources. At the bottom of this page is a link to publications on domestic violence.

[VAWnet.org](#) is the National Online Resource Center on Violence Against Women, with multiple resources on domestic violence.

The [National Center for Children Exposed to Violence](#) provides access to statistics, reports, articles, and other relevant websites related to children exposed to violence.

Chapter 2

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

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

A. Introduction

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

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

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

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

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

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

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

B. The People: Explanation of Roles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2 The Role of Social Services³

A. DSS-DHHS Structure and Relationship

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

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

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

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

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

Resources: For additional information regarding the Division of Social Services, see “[General Information](#)” on the Division of Social Services, N.C. Department of Health and Human Services website.

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

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

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

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

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

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

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

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

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

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

For information about consolidated human services agencies, see “[Types of Local Public Health Agencies: Consolidated Human Services Agencies](#)” on the UNC School of Government website.

B. DSS Policies and Procedures

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

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

C. DSS Role and Responsibilities

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

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

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

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

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

G.S. 7B-300.

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

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

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

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

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

D. DSS Funding

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

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

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

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

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

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

For information about Medicaid, see the [Medicaid section](#) of the website for the N.C. Division of Medical Assistance.

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

2.3 The Role of the Child's Guardian ad Litem

A. Introduction

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

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

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

For more information about the GAL Program in general, see also the “[Guardian ad Litem](#)” homepage on the website for the North Carolina Administrative Office of the Courts.

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

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

B. North Carolina GAL Program Establishment and Structure

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

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

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

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

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

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

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

D. Role and Responsibilities of the GAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4 Rights of the Child

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

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

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

A. Best Interest and Legal Rights Representation

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

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

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

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

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

B. Right to Be Heard

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

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

C. Foster Care Children’s Bill of Rights

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

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

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

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

G.S. 131D-10.1.

2.5 Rights of the Parent

A. Protection of Parent-Child Relationship

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

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

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

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

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

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

B. Notice and Opportunity to Be Heard

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

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

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

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

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

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

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

106 N.C. App. at 582.

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

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

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

§ 50A-111. Taking testimony in another state.

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

a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this State may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this State shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this State by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

C. DSS Perspective

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

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

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

D. Representation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Funds for Experts and Other Expenses⁵

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

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

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

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

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

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

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

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

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

F. Guardian ad Litem for Parent⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.6 Important Definitions and Concepts⁷

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

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

A. Abused Juvenile

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Neglected Juvenile

A neglected juvenile is one who:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Dependent Juvenile

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

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

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

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

D. Permanence and Timeliness

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

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

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

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

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

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

[“Concept and History of Permanency in U.S. Child Welfare”](#) on the website for the Child Welfare Information Gateway, U.S. Department of Health and Human Services.

Resource: For additional resources related to permanency, see [“Achieving & Maintaining Permanency”](#) on the website for the Child Welfare Information Gateway, U.S. Department of Health and Human Services.

E. Reasonable Efforts and Related Requirements

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

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

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

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

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

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

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

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

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

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

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

- (a) Reasonable efforts to prevent the need for placement.** The court must make specific findings as to whether DSS has made reasonable efforts to either prevent or eliminate the need for placement. G.S. 7B-507(a)(2). If efforts to prevent the juvenile's placement were precluded by an immediate threat of harm to the child, the court may find that the child's placement without such efforts was reasonable. G.S. 7B-507(a).
- (b) Reasonable efforts to reunify.** When the child has been removed from the home, the court must make specific findings as to whether DSS has made reasonable efforts to reunify the family (unless the court has already determined that those efforts are not required). *See* G.S. 7B-507(a)(2). Reunification refers to the child's placement with either parent or with a guardian or custodian from whose home the child was removed. Reasonable efforts and reasonable efforts findings must be made with respect to both parents and, if custody was removed from a custodian or guardian, that person as well.
- (c) Reasonable efforts to achieve permanent plan.** Where the child has been removed from the home and the court is conducting permanency planning hearings (required by G.S. 7B-906.1), the court is required to make findings regarding whether DSS has, since the previous permanency planning hearing, made reasonable efforts to implement the permanent plan for the child. G.S. 7B-906.1(e)(5).
- (d) Concurrent efforts.** The court may order that reasonable efforts to reunify be made concurrently with another permanent plan for the child. G.S. 7B-507(d). *See In re J.J.L.*, 170 N.C. App. 368 (2005) (holding that a permanency planning order adopting concurrent plans of reunification and adoption did not make the respective responsibilities of parents and DSS unclear or place the children in "limbo"; the order set out specifically what each party was to do to establish permanent placement for the children and outlined the children's placement during continued reunification efforts).
- (e) Whether to continue efforts.** The court must make findings as to whether DSS should continue to make efforts to reunify (unless the court has already determined those efforts are not required). G.S. 7B-507(a)(3). For requirements for ceasing efforts, see 6., below. *See also In re H.D.F.*, 197 N.C. App. 480 (2009) (holding that the trial court's orders for DSS to supervise the mother's visitation and to aid in her substance abuse assessment were the "functional equivalent" of ordering DSS to "make reasonable efforts" for reunification, and the trial court was therefore in compliance with G.S. 7B-507(a)(3)).

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

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

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

- (b) DSS responsibility.** The order must specify that the juvenile's placement and care are the responsibility of DSS and that DSS is to provide or arrange for foster care or another placement of the juvenile. Nevertheless, after considering DSS recommendations, the court may order a specific placement that it finds to be in the child's best interest. G.S. 7B-507(a)(4).
- (c) Services or other efforts.** The court's order may provide for services or other efforts aimed at returning the child to a safe home or at achieving another permanent plan for the child. G.S. 7B-507(a)(5).
- (d) Health and safety.** The child's health and safety must be the paramount concern in determining reasonable efforts to be made. G.S. 7B-507(d).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- highly relevant. *In re Eckard*, 148 N.C. App. 541 (2002).
- An order ceasing reunification efforts was upheld where mother did not have stable housing, had tested positive for drugs, failed to attend several substance abuse assessments, and was not making progress on her psychological problems. In addition, an order to cease reunification efforts with the mother had been entered regarding another child. *In re M.J.G.*, 168 N.C. App. 638 (2005).
 - In determining whether to continue reunification efforts or change the permanent plan, it was permissible for the court to consider the cost of providing services deemed necessary for reunification. Here, the court concluded that because the mother would need help twenty-four hours a day to cope with and care for her children, “reunification is possible but not financially practical.” *In re J.J.*, 180 N.C. App. 344, 350–51 (2006).
 - Findings in an order to cease reunification efforts were sufficient where evidence showed that there were risks associated with the child’s returning home, that earlier attempts at home placement had failed, and that mother had failed even to contact the social worker since the last review. *In re R.A.H.*, 182 N.C. App. 52 (2007).

2.7 Confidentiality and Access to Information

A. Confidentiality of Records and Hearings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Disclosure of and Access to Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 3

Jurisdiction and Venue¹

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1. Some content in this chapter is based on: JANET MASON, [TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA](#) (UNC School of Government, 2012).

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3.1 Summary and Scope of Jurisdiction Issues

A. Introduction

Orders entered by a court that does not have subject matter jurisdiction are void. A court's action with respect to a person over whom the court does not have personal jurisdiction, when personal jurisdiction is required, is not binding on that person. Therefore, an early inquiry in every case should be whether the court has the requisite jurisdiction to proceed in the matter.

In abuse, neglect, dependency, and termination of parental rights cases:

- Subject matter jurisdiction generally depends on the proper initiation of proceedings, including the filing of a proper pleading, and compliance with the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).
- Personal jurisdiction generally depends on a statutory basis for exercising jurisdiction and proper issuance and service of process, unless an individual's actions constitute consent to personal jurisdiction. G.S. 1-75.3, 1-75.7.
- Venue in juvenile cases depends generally on where the child resides or is found. Improper venue does not affect the court's jurisdiction, and in some circumstances the court has broad discretion to order a change of venue.

B. Juvenile Court Jurisdiction

The juvenile court has exclusive, original jurisdiction over the following proceedings that are discussed in this manual:

- any case involving a juvenile who is alleged to be abused, neglected, or dependent;
- proceedings to deal with petitions alleging obstruction of or interference with a DSS assessment required by G.S. 7B-302;
- proceedings on petitions for judicial review of DSS determinations that someone is a "responsible individual";
- proceedings under the Interstate Compact on the Placement of Children, Article 38 of the Juvenile Code;
- termination of parental rights proceedings and proceedings for reinstatement of parental rights; and
- proceedings to review voluntary foster care placements.

The juvenile court also has exclusive, original jurisdiction over the following, not discussed in this manual:

- proceedings involving judicial consent for emergency treatment for a juvenile when the juvenile's parent (or other responsible person) refuses to consent for treatment;
- proceedings involving waiver of the parental consent requirement for an unemancipated minor's abortion;
- proceedings involving authorization for an underage party to marry;
- emancipation proceedings; and
- any proceeding in which a juvenile is alleged to be undisciplined or delinquent.

G.S. 7B-200(a), 7B-1600, 7B-1601.

In addition, adoption proceedings that are transferred by the clerk of superior court or appealed to district court generally are handled in juvenile court, although they technically are special proceedings, not juvenile cases.

C. Continuing and Ending Jurisdiction

Once a court obtains jurisdiction in a juvenile case in which abuse, neglect, or dependency is alleged, any other civil action in which custody is an issue, whether filed before or after the juvenile petition, is automatically stayed as to that issue. If a juvenile order conflicts with an order in a civil custody action, the juvenile order controls as long as the court continues to exercise jurisdiction in the juvenile case, unless the court specifically orders otherwise. G.S. 7B-200(c)(2). For a discussion of the relationship between juvenile and private custody matters, including conversion of a juvenile custody order to a civil custody order, see *supra* § 1.4.B.

The Code provides that once jurisdiction is obtained in a juvenile case, it continues until whichever of the following occurs first:

- jurisdiction is terminated by the court;
- the juvenile reaches age 18;
- the juvenile is emancipated.

G.S. 7B-201(a). Because juvenile cases are subject to the UCCJEA, jurisdiction also would end if the court did not have jurisdiction under G.S. 50A-202(b) to modify its custody determination. *See* § 3.3.C.2 below. Although the Code does not say so explicitly, the court's jurisdiction probably ends when the child becomes the subject of a final order of adoption. *See* G.S. 7B-908(b) (providing for cancellation of post-termination of parental rights review hearing when notice is given of entry of a final order of adoption).

When the court's jurisdiction terminates, whether automatically or by court order, the legal status of the juvenile and the custodial rights of the parties revert to the status they were before the petition was filed, unless an applicable law or a court order in another action provides otherwise. After jurisdiction terminates, the court may not modify or enforce any order entered in the case, including any juvenile court order relating to custody, placement, or guardianship. However, termination of jurisdiction in an abuse, neglect, or dependency proceeding does not affect:

- a civil custody order entered pursuant to G.S. 7B-911;
- an order terminating parental rights;
- a pending action to terminate parental rights, unless the court orders otherwise;
- any delinquency or undisciplined proceeding; or
- any proceeding related to a new petition alleging abuse, neglect, or dependency.

G.S. 7B-201(b).

Because jurisdiction continues until an order stating otherwise or until the juvenile's 18th birthday or emancipation, parties and judges should avoid using the term "closed" in reference to the jurisdictional status of a case. It is not a statutory term and is subject to varying interpretations.

The court of appeals has said, “Closing a case file is not the equivalent of the trial court terminating its jurisdiction.” *In re S.T.P.*, 202 N.C. App. 468 (2010) (holding that trial court had jurisdiction to consider DSS’s motion to reassume custody years after court entered order that “vested” custody with grandparents and ordered, “Case closed”). Earlier cases seem to say the opposite. *See In re D.D.J.*, 177 N.C. App. 441 (2006) (“DSS [did not] include in its brief any citation of statutory or case law authority that would allow the court to act after it had closed the case”); *In re P.L.P.*, 173 N.C. App. 1 (2005), *aff’d per curiam*, 360 N.C. 360 (2006) (concluding that trial court’s jurisdiction in earlier action was terminated by the trial court’s order to “close” the case); *see also In re A.P.*, 179 N.C. App. 425 (2006) (Levinson, J., dissenting), *rev’d per curiam for reasons stated in dissenting opinion*, 361 N.C. 344 (2007).

In *Rodriguez v Rodriguez*, 211 N.C. App. 267 (2011), the court of appeals (distinguishing the case from *S.T.P.*, cited above) held that despite the absence of a specific order terminating jurisdiction in a juvenile case, the contents of the order amounted to a termination of jurisdiction as contemplated by G.S. 7B-201(a). The order placed the children in the physical and legal custody of the defendant, ended involvement of DSS and the GAL program, and included no provisions requiring ongoing supervision or court involvement. Even so, the court of appeals in *Rodriguez* stressed the need for including sufficient documentation in the record relating to jurisdiction and termination of jurisdiction. A court order should state explicitly whether the court retains or terminates jurisdiction, so that the court's intentions will not be subject to misinterpretation.

Reference to "closing" a case may be appropriate when referring to administrative action by DSS to end its involvement in a child protective services case. *See, e.g., In re H.D.F.*, 197 N.C. App. 480 (2009) (noting that DSS completed a family assessment and “closed the case”); *In re H.T.*, 180 N.C. App. 611 (2006) (stating that respondents complied with their treatment plan and “their case was closed”). However, even if DSS administratively closes its case because judicial reviews have been waived, DSS remains a party in the action until the court's jurisdiction is terminated, so that if a motion for review is filed, DSS must reactive its case. G.S. 7B-401.1(a).

3.2 Subject Matter Jurisdiction

A. Introduction

The district court has exclusive, original jurisdiction over any case involving a juvenile alleged to be abused, neglected, or dependent. G.S. 7B-200. The district court also has exclusive original jurisdiction over termination of parental rights cases. G.S. 7B-200(a)(4); G.S. 7B-1101. In a particular case, however, the court may lack subject matter jurisdiction if steps necessary to invoke the court’s jurisdiction have not been taken. Subject matter jurisdiction cannot be conferred by consent, waiver, stipulation, estoppel, or failure to object. *In re T.R.P.*, 360 N.C. 588 (2006). A lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal. *See In re K.J.L.*, 363 N.C. 343 (2009); *In re T.R.P.*, 360 N.C. 588. Any order entered by a court that lacked subject matter jurisdiction is

void. *See In re T.R.P.*, 360 N.C. 588 (concluding that because trial court lacked subject matter jurisdiction, review hearing order was “void ab initio”). *See also* N.C. R. CIV. P. 12(h)(3). The better practice is for the court to make findings of fact to support a stated conclusion of law that the court has subject matter jurisdiction. However, a lack of specific findings in the order will not prevent the court from having jurisdiction where evidence in the record supports the court’s conclusion that it has jurisdiction. *See In re E.X.J.*, 191 N.C. App. 34 (2008), *aff’d per curiam*, 363 N.C. 9 (2009).

B. Key Issues in Determining Subject Matter Jurisdiction

1. Proper petitioner (standing). The court does not have subject matter jurisdiction if the petition (or TPR motion) is filed by someone who does not have standing.

(a) Abuse, neglect, dependency. The DSS director, or the director’s authorized representative, is the only proper petitioner in an abuse, neglect, or dependency proceeding. G.S. 7B-401.1(a). Even when someone who made a report appeals a DSS decision not to file a petition, after reviewing the case the prosecutor may direct DSS to file a petition but may not initiate a juvenile proceeding himself or herself. DSS has standing, though, only after an assessment results in a finding of abuse, neglect, or dependency. *See* G.S. 7B-403(a); *In re S.D.A.*, 170 N.C. App. 354 (2005) (holding that the trial court lacked subject matter jurisdiction where one county DSS, after investigating reports referred to it by a second county DSS, determined there was no abuse, neglect, or dependency, but the second county DSS, which did not conduct an investigation, filed a petition based on the allegations it referred to the first county for investigation, failing to follow procedures required by G.S. 7B-302).

(b) Termination of parental rights. Persons who have standing to file a petition or motion to terminate parental rights include:

- either parent seeking termination of the other parent’s rights (except for a father convicted under G.S. 14-27.2 or 14-27.3 of a rape occurring on or after December 1, 2004, or under G.S. 14-27.2A of a rape occurring on or after December 1, 2008, if the rape resulted in the birth of the child who is the subject of the TPR proceeding);
- any judicially appointed guardian of the person of the child;
- any county DSS or licensed child-placing agency to which (i) a court has given custody of the child or (ii) a parent or guardian of the person of the child has surrendered the child for adoption pursuant to G.S. Chapter 48;
- any person with whom the child has lived for a continuous period of two years or more immediately preceding the filing of the petition or motion;
- any guardian ad litem appointed to represent the child pursuant to G.S. 7B-601 who has not been relieved of his or her duties;
- any person who has filed a petition to adopt the child.

G.S. 7B-1103.

A DSS or child-placing agency that does not have (or fails to establish that it has) custody of the child when it files a termination of parental rights petition or motion does not have standing to initiate the action and the court therefore lacks subject matter jurisdiction. *See In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009); *In re T.B.*, 177 N.C. App. 790 (2006); *In re Miller*, 162 N.C. App. 355 (2004). However, when custody is clear from the record, failure to attach a copy of the custody order to the petition or motion to terminate parental rights does not deprive the trial court of subject matter jurisdiction. *See In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008); *In re W.L.M.*, 181 N.C. App. 518 (2007); *In re D.J.G.*, 183 N.C. App. 137 (2007).

If the trial court lacked subject matter jurisdiction in the underlying action in which custody was awarded to DSS, the order giving DSS custody is void and DSS does not have standing to file a termination action. *See In re S.E.P.*, 184 N.C. App. 481 (2007). *See also In re A.J.H.-R.*, 184 N.C. App. 177 (2007) (holding custody order void for lack of proper verification of petition).

In the case *In re A.D.N.*, __ N.C. App. __, 752 S.E.2d 201 (2013), the court of appeals held that a grandmother had standing to petition for TPR, where evidence in the record showed that the child stayed with her 85% of the time. Although the trial court did not make detailed findings as to standing, it did make the ultimate finding that the child resided with the grandmother continuously for two years before the action was initiated, and the court of appeals found competent evidence in the record to support the finding.

2. Proper initiation of proceedings. The court does not have subject matter jurisdiction in the absence of a valid pleading. *See, e.g., In re S.D.W.*, 187 N.C. App. 416 (2007) (holding that a parent could not initiate a termination action by filing a counterclaim for termination in the other parent's civil action for visitation); *In re McKinney*, 158 N.C. App. 441 (2003) (rejecting a motion in the cause as insufficient to initiate a termination action where it contained no prayer for relief).

3. Verification of petition. The petition must be properly signed and verified or the petition is fatally defective and the court will be deprived of subject matter jurisdiction. *See* G.S. 7B-403(a); *In re T.R.P.*, 360 N.C. 588 (2006); *In re T.R.M.*, 208 N.C. App. 160 (2010). For a discussion of what constitutes proper verification, see *infra* § 4.2.B.

Note that effective October 1, 2014, the court is required at every pre-adjudication hearing to consider “[w]hether the petition has been properly verified and invokes jurisdiction.” S.L. 2014-16 (amending G.S. 7B-800.1, effective Oct. 1, 2014).

4. Indian Child Welfare Act. In a case involving the custody of a child who is, or is eligible to be, a member of a federally recognized Indian tribe, the tribe must be given notice pursuant to the Indian Child Welfare Act (ICWA). If the Indian child resides or is domiciled on Indian land, the Indian tribe has exclusive jurisdiction. *See* 25 U.S.C. 1911(a). However, the tribe may enter into an agreement with the state for the transfer of jurisdiction on a case by case basis or for concurrent jurisdiction. *See* 25 U.S.C. 1925. For Indian children who are not

residing or domiciled on Indian land, the case may be commenced in state court; however, the case is subject to transfer to a tribal court, or the tribe may intervene in the state court proceeding. *See* 25 U.S.C. 1911(b), (c).

The means by which a North Carolina court may exercise jurisdiction over a child subject to ICWA include: 1) emergency jurisdiction over an Indian child temporarily located off the reservation, in order to prevent imminent harm; and 2) pursuant to an agreement between the state and a specific tribe, such as one in which the tribe defers to the state to handle child protective proceedings. *See* 25 U.S.C. 1922 (addressing emergency situations); *In re E.G.M.*, ___ N.C. App. ___, 750 S.E.2d 857 (2013) (acknowledging that an agreement pursuant to 25 U.S.C. 1919 between the state and tribe would allow for state jurisdiction, but remanding because nothing in the trial court record referred to the agreement, and the copy attached to the appellee's brief was not certified and could not be validated).

Failure to comply with ICWA can deprive the court of subject matter jurisdiction. *See, e.g., In re E.G.M., Id.; In re Bluebird*, 105 N.C. App. 42 (1992) (explaining that where the putative father was a registered member of the Cherokee Nation of Oklahoma and the child was eligible for tribal membership, ICWA applied and the trial court properly proceeded only after the Cherokee Nation declined to assume jurisdiction or intervene). A parent who seeks to invoke ICWA has the burden of showing that the Act applies. *In re Williams*, 149 N.C. App. 951 (2002) (affirming the trial court's decision to deny a motion to dismiss for lack of subject matter jurisdiction where the respondent merely mentioned his Indian heritage and provided no supporting evidence). *See also In re A.D.L.*, 169 N.C. App. 701 (2005). For details about ICWA, including additional case law related to its applicability, see *infra* § 13.6.

5. Appeal in underlying action. The trial court does not have subject matter jurisdiction in a TPR proceeding if there is a pending appeal in an underlying abuse, neglect, or dependency case. *See* G.S. 7B-1003(b)(1); *In re C.N.C.B.*, 197 N.C. App. 553 (2009); *In re P.P.*, 183 N.C. App. 423 (2007). Note that the pending appeal does not deprive the trial court of jurisdiction to continue holding hearings in the abuse, neglect, or dependency case itself. *See* G.S. 7B-1003. For a more detailed discussion of permissible actions by a court pending appeal, see *infra* § 12.10.

6. Uniform Child-Custody Jurisdiction and Enforcement Act. Abuse, neglect, dependency, and termination of parental rights proceedings are child-custody actions for purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in G.S. Chapter 50A. Thus, the court should make findings to support a conclusion in every case that it has subject matter jurisdiction under the Act. For a detailed discussion of the UCCJEA, see *infra* § 3.3.

7. Location of child. In a TPR case, the court has jurisdiction only if, when the petition or motion is filed,

- the child resides in or is found in the district in which the action is filed, or is in the legal or actual custody of a DSS or licensed child-placing agency in that district (G.S. 7B-1101); or

- the court has exclusive continuing jurisdiction under the UCCJEA. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

C. Issues that Do Not Affect Subject Matter Jurisdiction

1. Defects in or lack of summons. Lack of a proper summons or problems with issuance of a summons implicate personal jurisdiction, not subject matter jurisdiction. Failure to follow the required procedures with respect to issuance of the summons, defects or irregularities in the contents of the summons, problems with service of the summons, or expiration of the summons will not deprive a court of subject matter jurisdiction. *See In re K.J.L.*, 363 N.C. 343 (2009) (holding that defects in the summons *and* failure to issue a summons do not deprive a court of subject matter jurisdiction and relate only to personal jurisdiction); *In re J.T.*, 363 N.C. 1 (2009) (preceding *In re K.J.L.* and holding that problems with the summons or service of the summons related to personal, not subject matter, jurisdiction—a holding that did not explicitly disconnect *issuance* of the summons from subject matter jurisdiction, but abrogated a number of appellate decisions that had found a lack of subject matter jurisdiction due to problems with summonses); *In re J.D.L.*, 199 N.C. App. 182 (2009) (holding that failure to serve a summons within the time allowed affects only personal jurisdiction and can be waived).

Issuance and service of a proper summons are required, however, in order for the court to have *personal* jurisdiction over a party, unless that party waives any defect in the summons or service. *See infra* § 3.4 (related to personal jurisdiction); § 4.3 (related to proper summons and issuance of summons). Note that although the child is a party, issuance of a summons to the child or the child's guardian ad litem in an abuse, neglect, dependency, or TPR proceeding is not required. G.S. 7B-406(a), 7B-1106.

2. Failure to include certain information in petition. While the Juvenile Code sets out requirements for the contents of a petition alleging abuse, neglect, or dependency and a petition or motion for TPR, failure to adhere exactly to the requirements concerning contents may not be a jurisdictional defect where the court can get the necessary information from the record or from the face of the petition and no prejudice is shown. [Note that the requirements concerning contents should be distinguished from the requirement of verification, which is a jurisdictional necessity and is discussed *supra* § 3.2.B.3, *infra* § 4.2.B.]

(a) Child's address and "clerical information." Failure to list the child's address in a dependency petition did not deprive the court of subject matter jurisdiction because it was "routine clerical information" and the court could determine from information provided in the petition whether it had subject matter jurisdiction. *In re A.R.G.*, 361 N.C. 392 (2007).

(b) Language regarding UCCJEA. Failure to include in a TPR petition or motion the statutorily required statement that the pleading was not filed to circumvent provisions of Uniform Child Custody Jurisdiction and Enforcement Act does not deprive the trial court of subject matter jurisdiction absent a showing of prejudice. *In re J.D.S.*, 170 N.C. App. 244 (2005). *See also In re Humphrey*, 156 N.C. App. 533 (2003).

- (c) Affidavit as to child's status.** Failure to attach the affidavit as to the child's status required by G.S. 50A-209 to an abuse, neglect, dependency, or TPR petition (or motion) does not, by itself, deprive the court of subject matter jurisdiction where the court can get necessary information from the record or direct that the information be provided within a reasonable time and there is no prejudice. *See In re D.S.A.*, 181 N.C. App. 715 (2007) (neglect petition); *In re J.D.S.*, 170 N.C. App. 244 (2005) (TPR petition).
- (d) Custody order.** Failure to attach a custody order, if one exists, to a TPR petition or motion as required by G.S. 7B-1104(5) does not deprive the court of subject matter jurisdiction where the court can get the necessary information concerning custody from the petition itself or from the record, and no party is prejudiced by the omission. *See, e.g., In re T.M.H.*, 186 N.C. App. 451 (2007); *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re W.L.M.*, 181 N.C. App. 518 (2007); *In re B.D.*, 174 N.C. App. 234 (2005). However, failure to attach the custody order has been found to be reversible error when the court is unable to get the needed information concerning custody from the petition or record. *See In re T.B.*, 177 N.C. App. 790 (2006); *Z.T.B.*, 170 N.C. App. 564 (2005) (holding that failure to include the custody order or the name and address of the appointed guardian rendered the petition facially defective).

3. Statutory timelines. The timeline for initiating a termination proceeding is not jurisdictional. *In re B.M.*, 168 N.C. App. 350 (2005) (rejecting the argument that DSS's failure to initiate the termination proceeding within 60 days after the permanent plan was changed to adoption was a jurisdictional defect). *See infra* § 4.5.D.5 (explaining delays beyond statutory timelines and remedy of mandamus for delays).

4. GAL representation in underlying action. In a termination of parental rights case, the trial court's jurisdiction was not affected by the earlier failure to appoint guardians ad litem for the children when the initial neglect and dependency petitions were filed or to ensure consistent representation of the children by guardians ad litem in those proceedings, when the children were represented by a guardian ad litem and attorney advocate throughout the termination proceeding. *In re J.E.*, 362 N.C. 168 (2008), *rev'g per curiam for the reasons stated in the dissent*, 183 N.C. App. 217 (2007).

3.3 Uniform Child-Custody Jurisdiction and Enforcement Act²

A. Introduction

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A, addresses the need for uniformity in custody cases involving multiple states, for rules requiring courts to honor orders of other states, and for ways to prevent forum shopping by

2. Some content for this section is based on: 1 CHERYL DANIELS HOWELL & JANICE S. SIMMONS, NORTH CAROLINA TRIAL JUDGES' BENCH BOOK ch. 4 (UNC School of Government, 2009) (the [2014 version](#) of this publication is available for purchase online) and JANET MASON, [TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA](#) (UNC School of Government, 2012).

parties in private custody matters. The UCCJEA sought to harmonize the former UCCJA with the federal Parental Kidnapping Prevention Act (PKPA) and Violence Against Women Act (VAWA). The UCCJEA ensures that in any type of custody case the appropriate state is exercising jurisdiction. Parties cannot confer jurisdiction by consent on a court that does not have jurisdiction pursuant to the UCCJEA. *See* Official Comment, G.S. 50A-201; *In re K.U.-S.G.*, 208 N.C. App. 128 (2010); *Foley v. Foley*, 156 N.C. App. 409 (2003).

An initial question in every case is whether the court can properly exercise jurisdiction under the UCCJEA. The court must conclude that it has:

- temporary emergency jurisdiction, or
- jurisdiction to enter an initial child-custody order, or
- exclusive continuing jurisdiction, or
- jurisdiction to modify an order from this state, or
- jurisdiction to modify an order of another state.

Evidence in the record must support the trial court's conclusion of law that it has subject matter jurisdiction under the UCCJEA. Some appellate cases have indicated that findings of fact to support that conclusion are desirable, but not legally required. *See In re J.C.*, ___ N.C. App. ___, 760 S.E.2d 778 (2014), *rev'd on other grounds*, ___ N.C. ___ (June 11, 2015); *In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009); *In re T.J.D.W.*, 182 N.C. App. 394, *aff'd per curiam*, 362 N.C. 84 (2007). Other cases appear to require specific findings on subject matter jurisdiction under the UCCJEA. *See In re E.J.*, ___ N.C. App. ___, 738 S.E.2d 204 (2013) (stating that to exercise emergency or exclusive jurisdiction, the trial court must make specific findings of fact to support its action); *Foley v. Foley*, 156 N.C. App. 409 (2003) (vacating and remanding because order contained no findings as to jurisdiction, but also stating that there was no evidence in the record to support such findings).

B. Applicability of the UCCJEA

1. Abuse, neglect, dependency, and TPR. The UCCJEA applies to any case in which the court is making determinations related to child custody, and G.S. 50A-102 includes within the definition of child custody proceedings abuse, neglect, dependency, and TPR.

2. Initial actions and modifications. Initial and modification custody determinations are covered by the UCCJEA, but different rules govern initial jurisdiction and jurisdiction to modify an existing order. *See infra* § 3.3.C.1 (initial orders) and § 3.3.C.2 (modification of orders).

3. Not applicable to adoption, emergency medical care, or juvenile delinquency. The UCCJEA does not govern an adoption proceeding, a proceeding pertaining to the authorization of emergency medical care for a child, or a proceeding in which a juvenile is alleged to be delinquent or undisciplined. G.S. 50A-102(4), 50A-103.

Note, however, that in an adoption proceeding in North Carolina:

- the petition must include any information required by the UCCJEA that is known to the petitioner (G.S. 48-2-304(b)(4)), and
- the court may not exercise jurisdiction if, when the adoption petition is filed, a court in another state is exercising jurisdiction substantially in conformity with the UCCJEA, unless that state's court dismisses its proceeding or releases its exclusive, continuing jurisdiction within 60 days after the adoption petition is filed.

G.S. 48-2-100(c).

4. Indian Child Welfare Act controls. Custody proceedings pertaining to Indian children are not subject to the UCCJEA to the extent that they are governed by the Indian Child Welfare Act. State courts, however, must treat tribes as if they were states for most purposes under the UCCJEA. G.S. 50A-104. *See infra* § 13.6 (explaining the Indian Child Welfare Act).

5. Foreign countries. Foreign countries are treated as states for most purposes of the act. The UCCJEA is not applicable if the child-custody law of a foreign country violates human rights. G.S. 50A-105. For an example of a court dealing with a foreign country, see *Tataragasi v. Tataragasi*, 124 N.C. App. 255 (1996) (holding that the trial court had emergency jurisdiction despite the father's pending custody action in Turkey).

C. Jurisdictional Basis for Making Custody Determination

Jurisdictional criteria under the UCCJEA differ depending on whether the court is making an initial custody determination, modifying an existing custody order, or dealing with a temporary emergency custody situation.

1. Initial child custody jurisdiction. [G.S. 50A-201] When a court makes an initial child custody determination one of the following four criteria must be met:

(a) Home state. A North Carolina court has jurisdiction if (i) North Carolina is the child's home state on the date of commencement of the proceeding; or (ii) North Carolina was the child's home state within six months before the commencement of the proceeding, the child is absent from North Carolina, and a parent or person acting as a parent continues to live in North Carolina. G.S. 50A-201(a)(1).

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with a parent or person acting as a parent. G.S. 50A-102(7). *See also In re M.G.*, 187 N.C. App. 536 (2007) (holding that where children had lived in North Carolina less than six months, it could not be considered their home state), *rev'd in part on other grounds*, 363 N.C. 570 (2009). In cases where children have moved more frequently than six months, the court may determine that there is no "home state" and make a determination as to whether N.C. has significant connection jurisdiction. G.S. 50A-201(1)(2); *see, e.g., Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014).

A period of temporary absence of any of the mentioned persons is part of the six-month period. G.S. 50A-102(7). *See also Ellison v. Ramos*, 130 N.C. App. 389 (1998); *Brewington v. Serrato*, 77 N.C. App. 726 (1985). The court of appeals has adopted a “totality of the circumstances” approach to determining whether an absence from a state is a temporary absence or a change of residence sufficient to change home state status.

- Nearly six months that children spent in Japan prior to the commencement of the child custody action was a temporary absence from North Carolina. *Hammond v. Hammond*, 209 N.C. App. 616 (2011).
- Where children spent a six-week period of time in North Carolina it was considered to be a temporary absence from Vermont. *Chick v. Chick*, 164 N.C. App. 444 (2004).
- Ten months spent by children in Georgia pursuant to a temporary custody order was considered to be a “temporary absence” from North Carolina. *See Pheasant v. McKibben*, 100 N.C. App. 379 (1990).
- Military deployment is one of the circumstances considered in determining whether absence from a state is temporary, and a court may look to actions taken by a parent after the commencement of the custody proceeding when determining if the relocation was a temporary absence. *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014).

(b) Significant connection and available evidence. A North Carolina court has jurisdiction if there is no home state or the home state has declined to exercise jurisdiction and:

- the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with North Carolina other than mere physical presence; and
- substantial evidence is available in North Carolina concerning the child’s care, protection, training, and personal relationships.

G.S. 50A-201(a)(2). *See Holland v. Holland*, 56 N.C. App. 96 (1982) (explaining that to the evidence required to invoke significant connection jurisdiction is “more than a scintilla” and the court must address each aspect of the child’s interest, care, protection, training, and personal relationships).

When there is no home state, the parties cannot consent to subject matter jurisdiction. In a private custody case where there was no home state jurisdiction, the court must consider whether there was jurisdiction due to significant connection or available evidence. *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014). In that case, although the original custody order in 2003 was in North Carolina and subsequent motions and orders were filed in N.C. through 2013, neither the parent nor the children had lived in North Carolina since 2009. North Carolina could not be said to have significant connection simply because past custody proceedings had taken place there. *Id.*

(c) Convenience and unjustifiable conduct. A North Carolina court has jurisdiction if all courts that would have jurisdiction under the above criteria (home state or significant connection) have declined to exercise it because a North Carolina court is the more

appropriate forum under G.S. 50A-207 (convenience) or G.S. 50A-208 (unjustifiable conduct by the person seeking jurisdiction). While the UCCJEA does not specifically define “unjustifiable conduct,” the official comments to G.S. 50A-208 give the example of one parent abducting a child and establishing a new home state prior to a custody decree (but excludes a parent who is a domestic violence victim fleeing for protection).

G.S. 50A-207 sets out specific factors for the court to consider in determining whether it is an inconvenient forum. Findings about these factors are necessary when the court determines that the current forum is inconvenient, but not when the court determines that it is a convenient forum. *See In re M.M.*, __ N.C. App. __, 750 S.E.2d 50 (2013); *Velasquez v. Ralls*, 192 N.C. App. 505 (2008). The trial court has discretion at any point to determine that another state is a more appropriate forum. *See In re M.E.*, 181 N.C. App. 322 (2007) (affirming the trial court’s determination that Ohio was the more convenient forum pursuant to G.S. 50A-207, where evidence showed that the child had been placed with the father in Ohio for three years, the family had been receiving counseling in Ohio during that time, and the child’s therapist and school were in Ohio, among other factors).

A court cannot determine that another state is a more convenient forum and dismiss its case in deference to the other state's jurisdiction unless a custody action is pending in that other state. Where it is determined that another jurisdiction is a more convenient forum, the trial court must stay the proceedings on the condition that a proceeding be promptly commenced in the other designated state. G.S. 50A-207; *In re M.M.*, 181 N.C. App. 322 (2007) (reversing trial court order that purported to transfer jurisdiction to another state without properly establishing that it was an inconvenient forum and without staying the North Carolina case, effectively dismissing the case and leaving the child in legal limbo).

(d) No other court would have jurisdiction. A North Carolina court has jurisdiction if no court of any other state would have jurisdiction under any of the above criteria. G.S. 50A-201(a)(4).

The UCCJEA addresses simultaneous proceedings stating that a court may not exercise jurisdiction “if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Article, unless the proceeding has been terminated or is stayed by the court.” G.S. 50A-206. This language was interpreted by the North Carolina Supreme Court to mean that the court must determine whether the other state has substantially the same type of jurisdiction as its own state, and not whether the other state complied with the statute, as the court of appeals improperly interpreted the language to mean. *Jones v. Whimper*, 366 N.C. 367 (2013).

In the case *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014), the court of appeals determined that two states besides North Carolina could exercise significant connection jurisdiction under the UCCJEA, but the N.C. court need not determine which state had the most significant connection.

2. Jurisdiction to modify custody determination and continuing jurisdiction. A North Carolina court may modify a child-custody determination made by a court of another state only if North Carolina would have jurisdiction to make an initial custody determination under G.S. 50A-201(a)(1) (home state criteria) or G.S. 50A-201(a)(2) (significant connection and available evidence criteria) and:

- the court of the other state has determined that it no longer has exclusive, continuing jurisdiction or that North Carolina would be a more convenient forum; or
- either the court of the other state or a North Carolina court determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state. *See* G.S. 50A-203 and its Official Comment. "Presently reside" has been interpreted to mean where someone actually lives and does not refer to a technical domicile. *See In re B.L.H.*, __ N.C. App. __, 767 S.E.2d 905 (2015) (affirming subject matter jurisdiction based on G.S. 50A-203 and holding that father who had been residing in Virginia when convicted and sent to prison in Texas could not be considered to be "presently residing" in Virginia).

Once a North Carolina court has made a child-custody determination in compliance with G.S. 50A-201 (initial determination) or 50A-203 (modification), this state has exclusive, continuing jurisdiction over the determination until:

- a North Carolina court determines that neither the child, the child's parents, nor any person acting as a parent has a significant connection with North Carolina and that substantial evidence is no longer available in North Carolina concerning the child's care, protection, training, and personal relationships; or
- a North Carolina court or a court of another state determines that the child, the child's parent, and any person acting as a parent do not presently reside in North Carolina.

A North Carolina court that has made a child-custody determination and does not have exclusive continuing jurisdiction may modify its own determination only if it would have jurisdiction to make an initial custody determination under G.S. 50A-201, 50A-202.

Although initial custody orders and modifications to those orders took place in North Carolina, the court of appeals determined that N.C. did not have jurisdiction to modify orders where neither the parties nor the children had lived in N.C. for several years and N.C. had no home state jurisdiction nor significant connection jurisdiction. *Gerhauser v. Van Bourgondien*, __ N.C. App. __, 767 S.E.2d 378 (2014).

Where initial custody orders were entered in New York but the New York court specifically ordered that it was "relinquishing jurisdiction to the State of North Carolina," the court of appeals held that this was a sufficient relinquishment of jurisdiction. In doing so, the court rejected the mother's argument that the New York order was insufficient due to its lack of findings indicating the basis for relinquishment under New York law. The court of appeals reasoned that the UCCJEA did not require North Carolina to undertake collateral review of a facially valid order from another state before exercising jurisdiction. *In re N.B. and L.B.*, __ N.C. App. __, 771 S.E.2d 562 (2015).

In the case of *In re J.W.S.*, 194 N.C. App. 439 (2008), the trial court's order was reversed for lack of subject matter jurisdiction because, although the court had properly exercised temporary emergency jurisdiction, the court had not made a proper determination that it had jurisdiction to modify another state's order. The record did not show that the New York court making the initial custody determination had made a subsequent determination that it no longer had exclusive, continuing jurisdiction; nor did the record show that there was a relinquishment of jurisdiction to North Carolina or a determination that no party still resided in New York.

Where an initial custody order was entered in Arkansas, the North Carolina trial court did not have jurisdiction because there was no order from the Arkansas court stating that Arkansas no longer had jurisdiction, Arkansas had not determined that North Carolina would be a more convenient forum, and the children's father continued to reside in Arkansas. *In re N.R.M.*, 165 N.C. App. 294 (2004).

For purposes of the UCCJEA, an action for termination of parental rights is considered an action to modify any existing custody order. *See, e.g., In re K.U.-S.G.*, 208 N.C. App. 128 (2010). In *K.U.-S.G.*, even though the record reflected that the judge in North Carolina had contacted the court in Pennsylvania and determined that it did not wish to retain jurisdiction, because there was no order from Pennsylvania in the North Carolina action reflecting that the Pennsylvania court determined that it no longer had exclusive continuing jurisdiction or intended to relinquish jurisdiction to North Carolina as a more convenient forum, the TPR order was vacated.

Where an initial child custody determination was made by a New Jersey court, the North Carolina trial court did not make findings required to establish jurisdiction. Nothing in the record indicated that New Jersey had determined that it no longer had jurisdiction, that North Carolina was determined to be a more convenient forum, or that the father no longer lived in New Jersey (per the requirements of G.S. 50A-203). The court of appeals also rejected the mother's argument that there was no New Jersey custody order in the record, since she was the petitioner and therefore the one required to attach the order pursuant to G.S. 50A-209 and her petition stated that custody was established through mediation in New Jersey. *In re J.A.P.*, ___ N.C. App. ___, 721 S.E.2d 253 (2012).

Where an initial custody order was entered in Indiana, the N.C. court erred in determining that the Indiana court had relinquished jurisdiction, and the trial court's order terminating respondent's parental rights was vacated for lack of subject matter jurisdiction. *In re J.D.*, ___ N.C. App. ___, 759 S.E.2d 375 (2014). Where the father respondent continued to reside in Indiana, continuing exclusive jurisdiction remained with Indiana. The denial of the grandparents' motion to intervene in the Indiana custody proceeding was not a relinquishment of jurisdiction, and nothing in the record showed a determination by the Indiana court that it no longer had jurisdiction.

3. Temporary emergency jurisdiction. A North Carolina court has temporary emergency jurisdiction to make a child custody determination if the child is present in North Carolina and the child has been abandoned or it is necessary to protect the child because the child, or a

sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. G.S. 50A-204. Orders made pursuant to this section of the UCCJEA are meant to allow a court to protect a child in an emergency situation even if the court cannot claim home state or significant connection jurisdiction and does not have jurisdiction to modify an existing custody order. The temporary order can protect the child until a state that has jurisdiction to make an initial custody determination or to modify a determination enters an order. *See In re Brode*, 151 N.C. App. 690 (2002) (discussing the temporary nature of an order entered pursuant to G.S. 50A-204). An order based on temporary emergency jurisdiction must be for a specific period of time. *In re E.J.*, ___ N.C. App. ___, 738 S.E.2d 204 (2013) (holding that the trial court had temporary emergency jurisdiction to enter a nonsecure custody order, but not an adjudication order, and that the nonsecure custody order should have been limited in time).

The temporary emergency jurisdiction provisions of G.S. 50A-204 require that certain circumstances exist in order to exercise emergency jurisdiction, but the court is not required to make specific findings of fact as to the circumstances. *See In re N.T.U.*, ___ N.C. App. ___, 760 S.E.2d 49 (2014) (child was found with mother in North Carolina hotel room where mother was arrested and incarcerated on charges of robbery and murder, and there was no alternative placement); *In re E.X.J.*, 191 N.C. App. 34 (2008).

A temporary emergency custody order entered in North Carolina may become a final order if there is no existing custody determination, no custody proceeding is filed in a state with jurisdiction, and North Carolina becomes the child's home state. G.S. 50A-204 and Official Comment. For example, appellate cases have held that custody pursuant to a nonsecure custody order issued on the basis of temporary emergency jurisdiction is sufficient to give DSS standing to petition for termination of parental rights, when no custody action had been filed in another state and North Carolina had become the child's home state). *See, e.g., In re N.T.U.*, ___ N.C. App. ___, 760 S.E.2d 49 (2014); *In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009). *See also In re M.B.*, 179 N.C. App. 572 (2006) (holding that temporary emergency jurisdiction was exercised properly and that North Carolina became the home state for purposes of making an initial custody determination).

D. Hearing and Communication Requirements

1. Communication and records. When custody actions are pending in more than one state, courts of different states may communicate with one another concerning the proceedings. G.S. 50A-110. The courts may allow parties to participate in the communication. If the parties are not allowed or are unable to participate, the court must give them an opportunity to present facts and legal arguments before a decision about jurisdiction is made. A record must be made of all communications except those concerning scheduling, court records, calendars, or similar matters. Except for communications about such administrative matter, the parties must be informed about communications between courts and given access to the record. The requirement to make a record of communications between courts is applicable not only to discretionary communications under G.S. 50A-110, but to *all* communications addressed in the UCCJEA, such as those required under G.S. 50A-206 when there are simultaneous proceedings in different states. *Jones v. Wimper*, 366 N.C. 367 (2013). "Record" is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other

medium and is retrievable in perceivable form.” G.S. 50A-110(e). See the official comment to G.S. 50A-110 for an expanded explanation of this provision.

2. Judicial cooperation and appearance of parties. Courts may request assistance from and assist courts of other states. Specifically, a court of one state may request the court of another state to hold an evidentiary hearing, order a person to produce evidence, or order an evaluation related to child custody, and may request a certified copy of the record of any such hearing, evidence, or evaluation. A court also may request the court of another state to order a party to a child-custody proceeding or any person with physical custody of the child to appear in the proceeding with or without the child. A court may assess travel costs and other expenses incurred through these procedures against the parties. G.S. 50A-112.

3. Notice and opportunity to be heard. Before a child-custody determination is made, notice and an opportunity to be heard must be given to anyone who would typically be entitled to notice in child-custody proceedings in this state, including any parent whose rights have not been terminated and anyone having physical custody of the child. G.S. 50A-205. The court may order that the notice given to a party outside the state direct the party to appear in person with or without the child and inform the party that failure to appear may result in a decision adverse to that party. G.S. 50A-210.

4. Testimony in another state. A party to a child custody proceeding in another state may offer his or her own testimony or other witnesses’ testimony by deposition or other means allowable in North Carolina for testimony taken in another state, in a manner determined by the court. The court may allow a person in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means, and must cooperate with courts of the other state in designating an appropriate location for the deposition or testimony. G.S. 50A-111.

5. Information concerning child’s circumstances (affidavit). Because jurisdiction under the UCCJEA is determined primarily by the past and present location of the child and any prior custody actions, information related to the child’s living arrangements, location, and possible involvement in custody or other proceedings must be submitted in the initial pleading of every custody proceeding or by attached affidavit. *See* G.S. 50A-209. *See also In re Bhatti*, 98 N.C. App. 493 (1990). Appellate cases have stated that the better practice is to attach the affidavit as to the child’s status, but failure to file it does not itself divest the court of subject matter jurisdiction. *See In re D.S.A.*, 181 N.C. App. 715 (2007); *In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Clark*, 159 N.C. App. 75 (2003).

Tool: AOC Form AOC-CV-609, “[Affidavit as to Status of Minor Child](#)” (July 2011).

6. Declining jurisdiction. A court that has jurisdiction can decline to exercise it if the court can define itself as an inconvenient forum under G.S. 50A-207 or if a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct under G.S. 50A-208.

7. Deployed parents. In 2013 the North Carolina legislature adopted the “Uniform Deployed Parents Custody and Visitation Act,” creating a new Article 3 in the UCCJEA to address

custody and visitation issues when one or both parents are or may be deployed. This Act mostly impacts private custody cases, but could be relevant in a juvenile case if the court uses G.S. 7B-911 to create a civil custody order. *See* An Act to Adopt the Uniform Deployed Parents Custody and Visitation Act, [S.L. 2013-27](#) (2013) (codified in various sections of G.S. 50 and 50A). A summary of the act can be found in [2013 Legislation of Interest to Court Officials](#), UNC School of Government, p. 68. Additional information about the act is available on the website of the Uniform Law Commission, at “[Deployed Parents Custody and Visitation Act](#).”

E. Enforcement of Custody Orders under the UCCJEA

1. Enforcement generally. A North Carolina court must enforce a custody determination made by a court of any other state if the other state exercised jurisdiction in substantial conformity with the UCCJEA or if the order was entered under factual circumstances meeting the jurisdictional standards of the UCCJEA. G.S. 50A-303(a). *See also Tataragasi v. Tataragasi*, 124 N.C. App. 255 (1996); *Schrock v. Schrock*, 89 N.C. App. 308 (1988). A custody order from one state may be registered and confirmed in another state, with or without a simultaneous request for enforcement, allowing for a predetermination of the enforceability of the order. *See* G.S. 50A-305 and Official Comment. A court may grant any relief normally available under its law to enforce a registered child-custody determination made by a court of another state. Expedited enforcement of a child-custody determination can be sought by filing a petition for enforcement, even if the order has not been registered and confirmed. *See* G.S. 50A-308. A North Carolina court does not acquire jurisdiction to modify another state’s custody order merely because the order is registered and confirmed here or because a proceeding to enforce the order is filed here. The court may modify another state’s custody determination only pursuant to the UCCJEA’s requirements for modification. *See* G.S. 50A-306.

Tools: AOC Forms Related to UCCJEA Enforcement of Custody Orders

- Form AOC-CV-660, “[Instructions For Registration Of Foreign Child Custody Order \(Side 1\)/Instructions For Expedited Enforcement Of Foreign Child Custody Order \(Side Two\)](#)” (Mar. 2014).
- Form AOC-CV-660, “[Petition For Registration Of Foreign Child Custody Order](#)” (Oct. 2006).
- Form AOC-CV-661, “[Notice Of Registration Of Foreign Child Custody Order](#)” (July 2013).
- Form AOC-CV-663, “[Motion To Contest Validity Of A Registered Foreign Child Custody Order And Notice Of Hearing](#)” (Dec. 2006).
- Form AOC-CV-664, “[Order Confirming Registration Or Denying Confirmation Or Registration Of Foreign Child Custody Order](#)” (Dec. 2006).
- Form AOC-CV-665, “[Petition For Expedited Enforcement Of Foreign Child Custody Order](#)” (Dec. 2006).
- Form AOC-CV-666, “[Order For Hearing On Motion For Expedited Enforcement Of Foreign Child Custody Order](#)” (Feb. 2014).
- Form AOC-CV-667, “[Warrant Directing Law Enforcement To Take Immediate Physical](#)

[Custody Of Child\(ren\) Subject To Foreign Child Custody Order](#)” (June 2014).

- Form AOC-CV-668, “[Order Allowing Or Denying Expedited Enforcement Of Foreign Child Custody Order](#)” (Dec. 2006).
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2. Temporary visitation. Even if North Carolina does not have jurisdiction to modify an order, a court in this state can either (1) enforce a visitation schedule made by a court in another state, or (2) enter a temporary order setting out a visitation schedule where the order from the other state awarded visitation rights but did not set out a specific visitation schedule. G.S. 50A-304(a). A temporary visitation order entered by a North Carolina court must specify a date the order will expire, based on what the court deems a reasonable time for parties to return to the appropriate state for a new order concerning a visitation schedule. G.S. 50A-304(b).

3. Registration and confirmation of orders from other states. A custody order from another state may be registered and confirmed with or without a petition for enforcement. G.S. 50A-305(a); *see also* Official Comment, G.S. 50A-305 (explaining that registration and confirmation allows parties to “predetermine” the enforceability of a custody order before allowing the child to come to the state). A person may register an order by sending a certified copy of the order to the appropriate court with a letter or other document requesting registration. The letter or document must contain the information set out in G.S. 50A-305(a). Upon receipt of the request, the court must register the order and send instructions to the petitioner informing the petitioner of the notice requirements for confirmation. G.S. 50A-305(b).

A party seeking to object to registration must request a hearing within 20 days of service of the required notice. If no request for a hearing is made, the order is confirmed as a matter of law and the court must notify all parties of the confirmation. G.S. 50A-305(d), (e). If a hearing is requested and held, the court must confirm the order unless the party objecting to registration can show:

- the court that issued the order did not have appropriate jurisdiction; or
- the order has been vacated, stayed, or modified by a court having appropriate jurisdiction; or
- the person contesting registration was entitled to notice in the proceeding in the other state but was not given notice in accordance with the statute.

G.S. 50A-305(d).

Confirmation, either as a matter of law or as the result of a hearing, precludes further attack on the validity of the order for any of the reasons that could have been raised in objection to registration. G.S. 50A-305(f). A North Carolina court can enforce a registered order, but may modify the order only if North Carolina has modification jurisdiction. G.S. 50A-306.

4. Expedited enforcement procedure. (G.S. 50A-308 through 50A-317)

(a) Petition, timing, and notice. A petition seeking enforcement of a custody order from

another state must be verified. Certified copies of the custody order and of any order confirming the registration of the order must be attached to the petition. G.S. 50A-308(a). The petition must contain all information set out in G.S. 50A-308(b). Upon the filing of the petition, the court must issue an order to the respondent to appear with or without the child at a hearing. The hearing must be scheduled for the next judicial day following service of process, unless that date is impossible, in which case the hearing must be held on the first day possible. The hearing date can be continued only upon the request of the petitioner. G.S. 50A-308(c). The required content of the notice that must be sent by the court to the respondent upon the filing of a petition for enforcement is set out in G.S. 50A-308(d).

(b) Hearing. At a hearing for enforcement, the court must enforce the order by allowing the petitioner immediate possession of the child unless the respondent can show that the order has not been confirmed (or that the order has been appropriately stayed, modified, or vacated since confirmation) and that:

- the issuing court did not have appropriate jurisdiction at the time the order was entered; or
- the order has been stayed, vacated, or modified by a court with appropriate jurisdiction; or
- the respondent was entitled to notice in the proceeding in the other state but notice was not given in accordance with the UCCJEA.

G.S. 50A-310(a). If the order has been confirmed, respondent cannot contest enforcement based on any of the grounds that could have been raised in objection to the confirmation. G.S. 50A-305(f).

5. Law enforcement involvement. A party who files a petition to enforce a custody order may also file a verified application for issuance of a warrant to take physical custody of the child. If the court finds from testimony of the petitioner or other witness “that the child is imminently likely to suffer serious physical harm or be removed from this State,” the court may issue a warrant that:

- recites the facts on which the court’s conclusion of imminent serious physical harm or removal from the state is based,
- directs law enforcement to take physical custody of the child immediately, and
- provides for the child’s placement pending final relief.

G.S. 50A-311.

If the court does not issue a warrant for custody, the court should not invoke the assistance of law enforcement. *See Chick v. Chick*, 164 N.C. App. 444 (2004) (holding that the trial court erred in ordering law enforcement to assist with enforcement of a Vermont custody order when there was no statutory basis for their participation); *In re Bhatti*, 98 N.C. App. 493 (1990) (holding that the trial court lacked statutory authority to order law enforcement to pick up children in an effort to assist in the enforcement of a Georgia custody order).

Practice Note: If a child is “imminently likely to suffer serious physical harm,” a report to DSS will be required if there is cause to suspect that the child is abused, neglected, or dependent as defined in G.S. 7B-101. *See* G.S. 7B-301. If DSS finds a risk of immediate harm, the agency may take temporary custody of the child, file a petition, and seek an order for nonsecure custody. When DSS involvement is appropriate, the court should make a report to DSS rather than directly ordering DSS to assume custody of the child.

6. Prosecutor’s role. Note also that G.S. 50A-315 allows a prosecutor or other appropriate public official to bring an enforcement action on behalf of the court under the circumstances described in that statute, and while this has not been a practice in North Carolina, there are circumstances in which prosecutors from other states have become involved.

3.4 Personal Jurisdiction

A. Service of Process

The court has jurisdiction over a parent, guardian, custodian, or caretaker of a juvenile who has been adjudicated abused, neglected, or dependent if that person has been properly served with a summons (under G.S. 7B-406 for abuse, neglect, dependency, or under G.S. 7B-1106 for TPR) or waived service of process. G.S. 7B-200(b). Note, however, that personal jurisdiction for out-of-state parents in TPR cases is more complicated and is addressed *infra* § 3.4.C.

1. Who must be served.

(a) Abuse, neglect, dependency. For an abuse, neglect, or dependency petition, the summons must be issued to and served on each party named in the petition, except the juvenile. G.S. 7B-406, 7B-407. Although the statute does not require service of a summons on the child, the clerk is required to provide a copy of the petition and any notices of hearings to the local GAL office immediately after a petition is filed. G.S. 7B-408.

Every petition and summons should name both parents, even if one or both can be identified only as “unknown.” Efforts should be made to serve both parents as expeditiously as possible. However, the court’s ability to address the child’s circumstances is not dependent on the whether the parents have been served. The court acquires subject matter jurisdiction and can act to protect the child as soon as a proper petition is filed. *See In re Poole*, 357 N.C. 151 (2003), *rev’g per curiam for the reasons stated in the dissent*, 151 N.C. App. 472 (2002). Nevertheless, both of the child’s parents have a constitutional interest in the proceeding and should be served whenever possible and as soon as possible. At every hearing on the need for continued nonsecure custody and dispositional hearing the court is required to inquire and make findings about efforts that have been made to locate and serve a missing parent. G.S. 7B-506(h)(1); G.S. 7B-901.

(b) Termination of parental rights. For a termination of parental rights proceeding initiated by the filing of a *petition*, service of the summons is required for:

- the parents of the juvenile (except a parent whose rights have already been terminated, who has surrendered the child for adoption to DSS or a licensed child placing agency, or who has consented to adoption by the person petitioning for TPR);
- a judicially appointed guardian of the person of the child;
- a judicially appointed custodian of the child;
- any county DSS or licensed child placing agency to which a parent has relinquished the child for adoption; and
- any county DSS to which a court has given placement responsibility for the child.

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

No summons is required to be issued to or served on the child or the child's guardian ad litem if there is one. However, if the child has a guardian ad litem, either the guardian ad litem or attorney advocate must be served, pursuant to Rule 5 of the Rules of Civil Procedure, with a copy of all pleadings and other papers required to be served. G.S. 7B-1106(a1). If an attorney has been appointed for a respondent parent in an underlying abuse, neglect, or dependency case and has not been relieved of responsibility, a copy of all pleadings and other papers required to be served on the respondent must also be served on the respondent's attorney pursuant to Rule 5 of the Rules of Civil Procedure. G.S. 7B-1106(a2).

2. Proper service. Proper service of a summons for abuse, neglect, and dependency cases is addressed in G.S. 7B-407; for termination of parental rights, service is addressed in G.S. 7B-1106. Both statutes require service pursuant to Rule 4 of the Rules of Civil Procedure, so the means of accomplishing proper service are the same as in other civil actions. For details relating to proper service, see *infra* § 4.4.

B. Consent and Waiver Establishing Personal Jurisdiction

Where service is not completed on a party or there is a defect in service or process, a party's own actions may subject the party to the court's jurisdiction. Unlike subject matter jurisdiction, challenges to personal jurisdiction must be raised by the parties themselves and can be waived. *See In re J.T.*, 363 N.C. 1 (2009); *In re K.J.L.*, 363 N.C. 343 (2009).

1. Making an appearance. In the case of *In re A.J.M.*, 177 N.C. App. 745 (2006), service was not completed on the mother, but because she was present in court and did not raise an objection regarding insufficient service of process or personal jurisdiction, her actions amounted to a waiver of her right to challenge personal jurisdiction. *See also In re K.J.L.*, 363 N.C. 343 (2009); *In re H.T.*, 180 N.C. App. 611 (2006). However, the court did not view parents as having consented to jurisdiction by appearing at the hearing when the purpose of their appearance was the timely challenge to the sufficiency of process. *In re Mitchell*, 126 N.C. App. 432 (1997).

2. Failing to raise the defense. A parent may waive the defenses of lack of personal jurisdiction or insufficiency of service of process by filing an answer, response, or motion without raising the defense. *See* N.C. R. Civ. P. 12; *In re H.T.*, 180 N.C. App. 611 (2006); *In re J.W.J.*, 165 N.C. App. 696 (2004) (holding that the respondent waived the defense of lack of personal jurisdiction by mailing a handwritten response to the clerk of court and later filing a formal answer without raising the defense); *In re Howell*, 161 N.C. App. 650 (2003).

C. Out-of-State Parents in TPR Cases

A court's exercise of personal jurisdiction over a nonresident generally requires both notice and that the individual either have minimum contacts with the state or submit to the court's jurisdiction. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). North Carolina has never required that a parent have minimum contacts with the state in order for a court in the state to act in a custody action involving that parent's child. *See Harris v. Harris*, 104 N.C. App. 574 (1991). The UCCJEA states that personal jurisdiction is not necessary or sufficient to enable a court to make a child custody determination (G.S. 50A-201(c)), and the Juvenile Code requires only that the parent be served properly. Under North Carolina case law, however, in some termination of parental rights cases the court may act only if the nonresident respondent has minimum contacts with the state or submits to the court's jurisdiction. The appellate courts have not addressed this conflicting intersection of statutory and case law.

1. Juvenile Code requires only service. G.S. 7B-1101 was amended in 2007 to provide that the court has jurisdiction to terminate a parent's rights, without regard to the parent's state of residence, if

- the court finds that it would have jurisdiction to make an initial custody determination or to modify a custody order under the UCCJEA, and
- the nonresident parent was served with process pursuant to G.S. 7B-1106, which requires the issuance and service of a summons upon the filing of a petition to terminate parental rights.

2. Appellate cases require minimum contacts in some situations. In contrast to the statutory criteria for jurisdiction, above, the court of appeals has held that a court in this state may terminate the rights of an out-of-state parent of a legitimate child (or of an illegitimate child if that parent is involved with the child) only if the parent (i) has minimum contacts with North Carolina, (ii) submits to the court's jurisdiction (*see supra* § 3.4.B), or (iii) is served while physically present in the state (*see infra* § 3.4.C.3).

Although termination proceedings are *in rem*, to satisfy due process a nonresident parent must have minimum contacts with the state before a court here may terminate the parent's rights. *In re Finnican*, 104 N.C. App. 157 (1991), *overruled in part on other grounds by Bryson v. Sullivan*, 330 N.C. 644 (1992); *In re Trueman*, 99 N.C. App. 579 (1990). Where the nonresident parent had no contacts with North Carolina and made no appearance in the action, the termination order was void and could be set aside at any time under Rule 60(b)(4) of the Rules of Civil Procedure. *In re Finnican*, 104 N.C. App. 157. However, minimum contacts

are not required in the case of a nonresident father of a child born out of wedlock if the father has failed to establish paternity, legitimate the child, or provide substantial financial support or care to the child and mother. *In re Williams*, 149 N.C. App. 951 (2002); *In re Dixon*, 112 N.C. App. 248 (1993).

Because these holdings are based on the Due Process Clause of the Fourteenth Amendment, it is unlikely that the 2007 statutory amendment described above or the UCCJEA provision described below, both of which came after these cases were decided, effected any change in the rule established by case law.

The nonresident parent may raise the defense of lack of personal jurisdiction in an answer, response, or motion as provided in Rule 12(b)(2) of the Rules of Civil Procedure.

3. Service on respondent temporarily in state. Personal service of process on an out-of-state respondent who is temporarily in the state will confer personal jurisdiction without regard to any other contacts with the state. *See Burnham v. Superior Court*, 495 U.S. 604 (1990) (holding that due process does not bar the exercise of personal jurisdiction over a nonresident defendant based on personal service while temporarily in the state).

4. Other states. Courts in some states have held that minimum contacts are never required in termination of parental rights proceedings, on the basis that these cases fall within the “status” exception recognized by the U.S. Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See, e.g., In re R.W. and N.W.*, 39 A.3d 682 (Vermont 2011); *In re Termination of Parental Rights to Thomas J.R.*, 663 N.W.2d 734 (Wis. 2003); *S.B. v. State*, 61 P.3d 6 (Alaska 2002).

5. UCCJEA does not require personal jurisdiction. The UCCJEA specifically states that “[p]hysical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.” G.S. 50A-201(c). However, this statement in the UCCJEA addresses subject matter jurisdiction and does not mean that parties to a custody action do not have to be served.

D. Permanent Custodians and Guardians

The court has personal jurisdiction over a guardian or custodian who was not named in the petition (and therefore was not served with a summons) but gains party status pursuant to G.S. 401.1(c) or (d) by being named guardian or custodian of the child, if that custody or guardianship arrangement is the juvenile’s permanent plan. G.S. 7B-200(b).

3.5 Venue

A. Introduction

It is not unusual for more than one county to have some degree of involvement in a child protective services case. A need for an immediate petition may arise when the child is somewhere other than the child’s county of residence. Families may relocate at some point

during the case. Placement with a relative or in a facility in another county may occur, or one DSS may be asked to handle another county's case due to a conflict of interest.

In almost all cases a petition alleging abuse, neglect, or dependency will be adjudicated in the county in which the petition is filed. However, there may be a need to transfer venue, and the circumstances under which the Juvenile Code permits transfer of venue depends on whether the transfer is pre- or post-adjudication.

Issues of venue should not be confused with jurisdiction. Where a petitioner in a private termination action filed the petition in the county where respondent was incarcerated, not the county in which she and the child resided, the issue was one of venue, not jurisdiction. *In re J.L.K.*, 165 N.C. App. 311 (2004). Challenges to venue, unlike challenges to subject matter jurisdiction, must be raised by the parties and can be waived. N.C. R. Civ. P. 12(h).

B. Proper Venue

1. Where to initiate action. A petition for abuse, neglect, or dependency must be filed in the district where the child resides or is present. When a conflict of interest causes DSS to have an assessment conducted by another county's DSS, the DSS conducting the assessment may file a petition in either county. G.S. 7B-400. In termination cases, the child must reside or be found in the district or be in the legal or actual custody of DSS or a licensed child-placing agency in the district when the petition or motion is filed. G.S. 7B-1101. That requirement does not apply, however, if the court already has exclusive continuing jurisdiction under the UCCJEA. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

2. Defining "residence." The Juvenile Code does not specifically define residence, but G.S. 153A-257(a), the statute determining legal residence for social service purposes, provides as follows:

- A minor has the legal residence of the parent or other relative with whom he or she resides. If the minor does not reside with a parent or relative and is not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility, he or she has the legal residence of the person with whom he or she resides. Any other minor has the legal residence of his or her mother or, if the mother's residence is not known, then the legal residence of his or her father, or, if the residence of neither parent is known, of the county in which he or she is found.
- A person has only one legal residence at a time, and a legal residence continues until the person acquires a new residence.
- The director of the Division of Social Services in the state DHHS is authorized to resolve disputes between counties regarding a child's legal residence in an abuse, neglect, or dependency case, for purposes of the provision of services. G.S. 153A-257(d).

Notwithstanding these provisions, the fact that a child is absent from home due to a protection plan or case management services will not affect proper venue if it becomes necessary to file a juvenile petition. G.S. 7B-400. Thus, if parents in County A agree to place their child with a

relative in County B as part of a protection plan, DSS in County A can file a petition in County A even though the child is residing with a relative in another county.

C. Transfer of Venue in Abuse, Neglect, and Dependency Cases

1. When transfer may occur. Before adjudication, the court may grant a motion for change of venue for good cause; however, a change of venue does not affect the identity of the petitioner. G.S. 7B-400(c). The statute does not provide guidance regarding what might constitute good cause for a pre-adjudication change of venue, but it might exist when a petition is filed somewhere other than the county of the child's residence. When that occurs, the petitioner must provide a copy of the petition and any notices of hearing to the DSS director in the county of the juvenile's residence. G.S. 7B-402.

Any time after adjudication, a court may transfer venue to another county (even if the petition could not have been filed there), but only after making numerous findings (see below) and communicating with the court in the other district. The court may transfer venue on its own motion or the motion of a party. G.S. 7B-900.1.

2. Post-adjudication change of venue.

(a) Factors to be considered. Before ordering that a case be transferred to another county in the post-adjudication phase of the case, the court must consider the following factors and any other relevant factors:

- the current residences of the juvenile and the parent, guardian, or custodian and the extent to which those residences have been and are likely to be stable;
- the reunification plan or other permanent plan for the juvenile and the likely effect of a change in venue on efforts to achieve permanence for the juvenile expeditiously;
- the nature and location of services and service providers necessary to achieve the reunification plan or other permanent plan for the juvenile;
- the impact upon the juvenile of the potential disruption of an existing therapeutic relationship;
- the nature and location of witnesses and evidence likely to be required in future hearings;
- the degree to which the transfer would cause inconvenience to one or more parties;
- any agreement of the parties as to which forum is most convenient; and
- the familiarity of the departments of social services, the courts, and the local offices of the guardian ad litem with the juvenile and the juvenile's family.

G.S. 7B-900.1(e).

(b) Required findings. After considering the factors above, the court may order transfer only if it finds that:

- the present forum is inconvenient,
- transfer is in the juvenile's best interest,

- the parties' rights will not be prejudiced by a change in venue, and
- the DSS directors in the two counties have communicated about the case and either:
 - (i) the directors are in agreement with respect to each county's responsibility for providing financial support and services in the case, or
 - (ii) the director of the Division of Social Services or his or her designee has made that determination pursuant to G.S. 153A-257(d).

G.S. 7B-900.1(b).

- (c) Communication between judges.** Before transferring a case to another district, the court is required to communicate with the chief district court judge or a judge presiding in juvenile court in that district and explain the reasons for the proposed transfer. G.S. 7B-900.1(d).
- (d) Objection by judge to transfer.** If the judge who is contacted about a proposed transfer makes a timely objection, either verbally or in writing, the court proposing the transfer may order the transfer only after making detailed findings of fact that support a conclusion that the juvenile's best interests require that the case be transferred. G.S. 7B-900.1(d).
- (e) Joinder or substitution and transfer of custody.** Any time the court transfers a case to a different county, the court is required to join or substitute as a party the DSS director in the county to which the case is being transferred and, if the juvenile is in the custody of DSS in the county where the action is pending, transfer custody to the DSS in the county to which the case is being transferred. These orders may be entered, however, only if the DSS director in the receiving county has been given notice and an opportunity to be heard or has waived the right to notice and a hearing. G.S. 7B-900.1(c).
- (f) Order and clerical procedure.** An order transferring a case must be entered within 30 days after the hearing on the question of transfer. The clerk is required to transmit to the other county a copy of the complete record of the case within three business days after entry of the transfer order. The clerk receiving the transferred case is required to promptly assign a file number, ensure that any necessary appointments of new attorneys or guardians ad litem are made, and calendar and give notice of the next court action required in the case. G.S. 7B-900.1(f), (g).

3. Practice tips.

- An order transferring venue should address whether and when any appointed counsel and guardian(s) ad litem are released.
- A phone call from the clerk in the first county to the clerk in the county to which the case is being transferred serves as both a courtesy and a way to ensure that the receiving county is aware of the actions that need to be taken when the file arrives.

D. Transfer of Venue in TPR Cases

The Juvenile Code does not address transferring venue in termination of parental rights proceedings. Therefore, it seems likely that provisions applicable to civil cases generally would apply, allowing a change of venue when:

- the action is filed somewhere other than a county of proper venue;
- a change of venue would promote the convenience of witnesses and the ends of justice; or
- the judge has, at any time, been interested as a party or counsel.

G.S. 1-83.

Chapter 4

Civil Procedure in Juvenile Court¹

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

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4.1 Introduction

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

A. Applicability of Rules of Civil Procedure in Juvenile Court

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

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

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

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

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

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

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

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

B. Rule Application Analysis

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

Yes, the rule applies if:

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

No, the rule does not apply if:

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

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

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

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

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

4.2 Petition

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

A. Contents of Petition

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

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

B. Verification of Petition or Motion

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

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

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

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

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

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

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

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

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

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

C. Signature of Attorney or Party

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

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

D. Amendments and Supplemental Pleadings

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

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

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

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

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

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

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

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

E. Responsive Pleadings

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

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

4.3 Summons

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

A. Content and Issuance of Summons

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

Tools: AOC Form AOC-J-142, “[Juvenile Summons and Notice of Hearing \(Abuse/Neglect/Dependency\)](#)” (Oct. 2013).

AOC Form AOC-J-208, “[Summons in Proceeding for Termination of Parental Rights](#)” (Mar. 2012).

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

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

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

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

B. Expiration of Summons

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

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

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

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

4.4 Service

A. The Impact of Service

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

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

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

B. Summons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Notice and Motions

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

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

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

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

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

4.5 Continuances

A. Continuances Disfavored

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

B. Abuse, Neglect, Dependency Proceedings

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

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

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

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

C. TPR Proceedings

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

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

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

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

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

D. Considerations

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

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

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

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

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

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

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

4.6 Discovery

A. Discovery Generally

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

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

B. The Juvenile Code and Discovery

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

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

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

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

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

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

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

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

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

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

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

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

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

4.7 Intervention

A. Abuse, Neglect, Dependency Proceedings

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

Only the following may intervene in an abuse, neglect, or dependency proceeding:

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

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

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

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

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

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

B. Termination of Parental Rights Proceedings

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

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

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

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

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

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

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

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

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

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

4.8 Motions in Juvenile Proceedings

A. Motions Procedure

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

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

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

B. Common Motions in Juvenile Proceedings

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

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

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

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

4.9 Judgments and Orders

A. Drafting Orders

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

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

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

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

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

B. Findings of Fact and Conclusions of Law²

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

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

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

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

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

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

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

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

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

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

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

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

C. Entry and Service of the Order

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

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

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

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

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

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

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

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

D. Time Requirements for Orders

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

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

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

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

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

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

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

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

In re T.H.T., 362 N.C. 446, 453–54.

E. Modifying, Vacating, and Obtaining Relief from Orders

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

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

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

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

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

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

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

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

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

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

- (e) Timing.** A motion pursuant to Rule 60 must be made “within a reasonable time” and in some circumstances within a year of the judgment from which relief is being sought. *See In re Saunders*, 77 N.C. App. 462 (1985) (affirming the decision to dismiss a motion for relief from a judgment or order where the respondent did not comply with time requirements of the rule).
- (f) Motion made while appeal is pending; combined hearings.** When a Rule 60(b) motion is made while an appeal is pending, a request may be made of the trial court to indicate how it *would* rule on the motion if an appeal were not pending, along with a request to the appellate court to delay consideration of the appeal until the trial court has considered the 60(b) motion. *See In re L.H.* 210 N.C. App. 355 (2011) (discussing this procedure pursuant to *Bell v. Martin*, 43 N.C. App 134 (1979), *rev’d on other grounds*, 299 N.C. 715 (1980)).

Chapter 5

The Pre-Adjudication Stage in Abuse, Neglect, and Dependency Cases¹

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1. Sources for some content in this chapter: JANET MASON, [REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA](#) (UNC School of Government, 3d ed. 2013); KELLA W. HATCHER, N.C. ADMIN. OFFICE OF THE COURTS, [NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL](#) (2007); DIV. OF SOCIAL SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL](#) (FAMILY SUPPORT AND CHILD WELFARE MANUAL) (2014).

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5.1 How a Case Enters the System**A. Reporting Suspected Abuse, Neglect, or Dependency**

Any person or institution with cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101, or has died as the result of maltreatment, must report the information to the county department of social services (hereinafter DSS). Knowingly or

wantonly failing to report or preventing someone from reporting when a report is required is a Class 1 misdemeanor. G.S. 7B-301.

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

The phrase “cause to suspect” is not defined by statute or case law, and a determination of when a concern rises to that level is necessarily subjective. In *Dobson v. Harris*, 352 N.C. 77, 84 (2000), the supreme court noted that the phrase “gives wide margin to whatever prompts the reporter to notify DSS” and “does not call for scrutiny, analysis, or judgment by a finder of fact.” It is reasonable, however, to view “cause to suspect” as more than a vague suspicion. For an individual, the “cause” may be based not only on objective facts and observations, but also on the context in which the concern arises, prior knowledge about a child’s situation, and how the child is being affected by the circumstances.

Resource: For a more detailed discussion of the topic of reporting, see JANET MASON, [REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA](#) (UNC School of Government, 3d ed. 2013).

1. Manner of report. Reports to a county department of social services may be made orally, by telephone, or in writing, and must include information the reporter has about the juvenile’s name, age, address, and present whereabouts; the name and address of the juvenile’s parent, guardian, custodian, or caretaker; the names and ages of other juveniles in the home or facility; the nature of the juvenile’s condition or injuries; and any other information the reporter believes would be helpful. The law requires the person making a report to provide his or her name, address, and telephone number, but the fact that a report is made anonymously does not affect DSS’s responsibility to do an assessment. G.S. 7B-301. (Note that this statute does not “authorize” anonymous reports, but seeks to protect the child by ensuring that anonymous reports will still receive attention.)

2. First determination: Does the report indicate abuse, neglect, or dependency? When DSS receives a report of suspected abuse, neglect, or dependency, its first task is to determine whether the facts as stated by the reporter, if true, fit within the definition of abuse, neglect, or dependency in G.S. 7B-101. *See supra* § 2.6 (relating to definitions). If they do not, DSS must notify the reporter that the report is not being accepted (*see infra* § 5.1.D, Notice to Person Making the Report), and DSS does not have a duty or even authority to investigate the matter. *See, e.g., In re Stumbo*, 357 N.C. 279 (2003) (holding that a petition for an order to cease interference with a DSS investigation should not have been granted because the facts reported, even if true, did not fit within the definition of abuse, neglect, or dependency).

3. Report may trigger notification to other agencies. When the report relates to sexual abuse in a child care facility, the DSS director must notify the State Bureau of Investigation (hereinafter SBI) within 24 hours or the next workday. Failure to do so is a Class 1 misdemeanor. G.S. 7B-301, 7B-307(b), (c). Any report of abuse or neglect in a child care facility triggers a requirement that the county DSS notify the state Department of Health and

Human Services (hereinafter DHHS). *See* G.S. 7B-307(a), (b). If DSS receives a report that a juvenile was physically harmed in violation of a criminal law by someone who is not the juvenile's parent, guardian, custodian, or caretaker, the director must make a report to local law enforcement and the district attorney within 48 hours. *See* G.S. 7B-307. *See also infra* § 5.1.F, Law Enforcement Involvement.

4. No privilege; narrow attorney exception. Child abuse reporting laws were enacted initially to encourage, then require, reporting by doctors and other professionals who, without the statutory mandate, would be prohibited from reporting by privilege or confidentiality. The Juvenile Code provides that, with one narrow exception, privilege is not a ground for failing to report. *See* G.S. 7B-310. For a discussion of privileges in the context of admissibility of evidence, see *infra* § 11.11.

The statute includes an exception for attorneys, but only with regard to knowledge an attorney gains from a client during representation in an abuse, neglect, or dependency case. It does not include an exception for an attorney who learns about a client's maltreatment of a child during representation in any other action. However, the Constitution may require a broader attorney exception in order to protect the rights of a client who has a constitutional right to the effective assistance of counsel. In addition, this duty to report may conflict with a lawyer's ethical duty to maintain a client's confidences pursuant to Rule 1.6 of the N.C. Revised Rules of Professional Conduct. The [North Carolina State Bar Ethics Opinions](#), RPC 175 (1995) and RPC 120 (1992), address this subject and give the lawyer broad discretion in deciding how to resolve the conflict ethically.

5. Immunity. Anyone who makes a report, cooperates with DSS in an assessment, testifies in a proceeding resulting from the assessment, or otherwise participates in the "program authorized by" the Code is immune from any civil or criminal liability if acting in good faith. G.S. 7B-309. *See also Dobson v. Harris*, 352 N.C. 77 (2000); *Davis v. Durham City Sch.*, 91 N.C. App. 520 (1988) (decided under an earlier version of the Juvenile Code). Someone who makes a report "with malice" does not have that protection from liability. *See Kroh v. Kroh*, 152 N.C. App. 347 (2002).

6. Other reporting laws. The reporting law discussed in this manual is in the Juvenile Code, applies to everyone, focuses on protecting children, and relates to cases that may become the subject of civil proceedings in juvenile court. Reports must be made to county departments of social services. Other laws require reports to law enforcement or punish the making of improper reports in some circumstances involving possible child maltreatment. These laws address:

- the duty to report to law enforcement the disappearance of a child under age sixteen (G.S. 14-318.5; G.S. 14-318.4(a6));
- failure to notify law enforcement of the death of a child, with the intent to conceal the child's death (G.S. 14-401.22);
- making false or misleading reports to law enforcement relating to the investigation of a child's disappearance or a child victim of a Class A, B1, B2, or C felony (G.S. 14-225);

- the duty of a school principal to report certain crimes that occur on school property to law enforcement (G.S. 115C-288(g)); and
- the duty of physicians and hospitals to report to law enforcement certain wounds, injuries, and illnesses, including any child's recurrent illness or serious physical injury that appears to be the result of non-accidental trauma (G.S. 90-21.20).

B. DSS Assessment of Report

When DSS receives a report and determines that the information in the report, if true, fits the legal definition of abuse, neglect, or dependency, DSS must conduct an assessment to ascertain the facts of the case, the extent of any abuse or neglect, and the risk of harm to the juvenile. G.S. 7B-302

1. Multiple response system. The multiple response system (MRS) provides for different response procedures for different types of reports. The “family assessment” response is used for reports meeting the statutory definitions of neglect and dependency. This response is a family-centered approach that is protection and prevention oriented and that evaluates the strengths and needs of the juvenile's family, as well as the condition of the juvenile. G.S. 7B-101(11a). The “investigative assessment” response is used for reports containing allegations meeting the statutory definitions of abuse and serious neglect or for reports concerning a child in the custody of a local DSS, family foster home, residential facility, or child care facility. This type of response uses a formal information gathering process to determine whether a juvenile is abused, neglected, or dependent. G.S. 7B-101(11b).

Investigative and family assessments have many procedures in common. Both use a structured decision-making process that requires that more than one person be involved in reaching a decision based on the legal definitions and on documented caretaker behavior that resulted in harm or a risk of harm to the child. An assessment must address and document findings about the frequency and severity of maltreatment, safety issues and risk of future harm, and the need for protection. A family assessment results in a determination of one of the following:

- services needed;
- services recommended (where the child's safety and risk of future harm are not issues);
- services provided and protective services no longer needed; or
- services not recommended.

At the end of an investigative assessment, DSS either substantiates abuse or serious neglect or does not (sometimes referred to as “unsubstantiating”). A determination by DSS that abuse, neglect, or dependency has occurred triggers specific statutory responsibilities. DSS must determine whether protective services should be provided or whether a petition should be filed to initiate a juvenile court proceeding. *See* G.S. 7B-302(a), (c). In the majority of cases in which the assessment indicates abuse, neglect, or dependency, DSS does not file a petition but provides services to protect the child and may enter into a service agreement or protection plan with the family. These agreements are voluntary and are not legally enforceable. Nevertheless, a parent's failure to comply with a service agreement or protection plan may be relevant later if DSS files a petition alleging abuse, neglect, or dependency.

Resources: For more information on DSS process and policies regarding intake, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. VIII §1407](#) (June 2008).

For policies and details of the family assessment response, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. VIII § 1408\(III\)](#) (Dec. 2009).

For policies and details of the investigative assessment response, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. VIII § 1408\(IV\)](#) (Dec. 2009).

2. Timing of assessment. When abuse or abandonment is alleged, DSS must initiate the assessment immediately and at least within 24 hours after receiving the report. When neglect (other than abandonment) or dependency is alleged, the assessment must be initiated within 72 hours. G.S. 7B-302(a).

3. Family privacy. As part of the assessment DSS is required to visit the place where the juvenile resides. G.S. 7B-302(a). However, DSS may not enter a private residence for assessment purposes without at least one of the following:

- a reasonable belief that a juvenile is in imminent danger of death or serious physical injury;
- permission of the parent or person responsible for the juvenile's care;
- accompaniment of a law enforcement officer who has legal authority to enter; or
- a court order.

G.S. 7B-302(h).

See generally Renn v. Garrison, 100 F.3d 344 (4th Cir. 1996) (holding that DSS workers alleged to have violated family privacy rights were entitled to qualified immunity where there was no showing that their actions exceeded the scope of the North Carolina state child protection statutes in effect at the time, which the court noted “plainly take into account” a family's right to privacy).

4. Confidentiality. DSS is required to hold all information it receives, including the identity of the reporter, in strictest confidence. G.S. 7B-302(a1). However, there are a number of exceptions to this requirement, detailed *supra* § 2.7.A.3.

5. Other juveniles. DSS must ascertain whether other juveniles who live in the home or who reside in the same facility are in need of protective services or require removal from the home or facility. G.S. 7B-302(b).

6. Immediate removal, protective services. If an assessment indicates that a juvenile is abused, neglected, or dependent, DSS must decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal is

not necessary, DSS must immediately provide or arrange for protective services. G.S. 7B-302(c). If immediate removal is necessary, DSS must file a petition and, in some circumstances, may assume *temporary custody* of the juvenile. G.S. 7B-302(d). *See infra* § 5.5.B (explaining temporary custody).

7. Parent refusing services. After a substantiation or a finding that a family is in need of services, if DSS does not file a petition, it provides or arranges for protective services based on the risks, needs, and strengths of the family identified during the assessment process. If a parent refuses to accept protective services that DSS has determined are necessary, DSS is required to file a petition to protect the juvenile. G.S. 7B-302(c).

8. Physical abuse may require mental health evaluation. When a child is removed from the home based on physical abuse, DSS must review the alleged perpetrator's background. If the review reveals a history of violent behavior against people, DSS must petition the court to order the alleged perpetrator to submit to a mental health evaluation. G.S. 7B-302(d1).

9. Reports to other agencies. Some circumstances require DSS to make reports to other agencies, explained *infra* § 5.1.F.

C. DSS Access to Information

In making the assessment of the child's status, DSS may consult with any public or private agencies or individuals, including law enforcement officers. G.S. 7B-302(e). *See also supra* § 2.7 (relating to confidentiality and DSS access to information).

1. Access to all relevant information. DSS may make a written demand for information or reports, whether or not confidential, that may be relevant to the assessment or to providing protective services, and that information must be provided (to the extent permitted by federal law, described *supra* § 2.7.B) unless protected by attorney-client privilege. G.S. 7B-302(e). (Note that refusals of DSS's written demands for information may result in interference proceedings pursuant to G.S. 7B-303, described *infra* § 5.1.G.) *See supra* § 2.7 related to confidentiality and access to information, including requirements for agencies to share information with DSS under G.S. 7B-3100, explained in § 2.7.B.6.

2. Criminal investigative information. If a custodian of criminal investigative information believes release of the information will jeopardize the criminal case or the defendant's right to receive a fair trial, the custodian may seek a court order to prevent disclosure. This kind of action must be set for immediate hearing, and any subsequent proceedings in the action must be given priority by trial and appellate courts. G.S. 7B-302(e).

D. Notice to Person Making the Report

1. After receipt of report. Within five days of *receiving the report*, DSS must give written notice to the reporter (unless the reporter has asked not to receive notice) as to whether the report was accepted for assessment and whether it was referred to a law enforcement agency. G.S. 7B-302(f).

2. After completing the assessment. Within five days after *completing the assessment*, DSS must give written notice to the reporter (unless the reporter has asked not to receive notice) as to whether there is a finding of abuse, neglect, or dependency; what, if any, action DSS is taking to protect the juvenile; and whether a petition has been filed. G.S. 7B-302(g).

3. Right to seek review. DSS must inform the reporter of the procedure allowing him or her to request a review by the prosecutor (discussed below) of a DSS decision not to file a petition. G.S. 7B-302(g).

E. Review by Prosecutor

When DSS decides not to file a petition alleging abuse, neglect, or dependency, the person who made the report can seek a review of that decision by the prosecutor. G.S. 7B-302(g), 7B-305, 7B-403(b).

1. Timing. Request for the review must be made within five days of receiving notice of a DSS decision not to file a petition. G.S. 7B-302(g), 7B-305. The prosecutor must review the DSS decision within twenty days after the person making the report is notified. G.S. 7B-306. The prosecutor notifies the reporter and DSS of the time and place for the review. G.S. 7B-305.

2. Substance of review. Once DSS receives notice of the time and place for review from the prosecutor, DSS must immediately transmit a copy of the summary of the assessment to the prosecutor. G.S. 7B-305. The prosecutor's review must include conferences with:

- the person making the report,
- the DSS protective services worker,
- the juvenile (if practicable), and
- other persons known to have pertinent information about the juvenile or the juvenile's family.

G.S. 7B-306.

3. Outcome of review. At the conclusion of the review, the prosecutor may:

- affirm the DSS decision not to file a petition,
- ask an appropriate local law enforcement agency to investigate, or
- direct DSS to file a petition.

G.S. 7B-306.

F. Law Enforcement Involvement

1. DSS to report to law enforcement. If DSS finds evidence of abuse, as defined in G.S. 7B-101, or receives a report of a crime involving physical harm to a child by someone other than a parent, guardian, custodian, or caretaker, DSS must make immediate oral and subsequent

written reports to the DA's office and to appropriate local law enforcement within 48 hours of DSS's receiving the report. G.S. 7B-307(a).

2. Law enforcement to investigate. Within 48 hours of receiving information from DSS, law enforcement must initiate a criminal investigation. If DSS is initiating an assessment, law enforcement's investigation must be coordinated with the protective services assessment. G.S. 7B-307(a).

3. Criminal prosecution. When law enforcement's investigation is complete, the DA must determine whether criminal prosecution is appropriate and, where abuse as defined in G.S. 7B-101 has occurred, may request DSS to appear before a magistrate to seek the issuance of a warrant. G.S. 7B-307(a).

4. Special requirements for sexual abuse in child care facility. DSS is required to notify the SBI at several stages of a case that involves or may involve sexual abuse of a child in a child care facility. This notification is required when

- DSS receives a report of sexual abuse in a child care facility. G.S. 7B-301(a).
- During an assessment of a report that did not involve sexual abuse in a child care facility DSS develops reason to suspect that sexual abuse has occurred in a child care facility. G.S. 7B-301(a).
- DSS finds evidence of sexual abuse in a child care facility. *See* G.S. 7B-307(b).
- DSS completes an assessment involving sexual abuse in a child care facility. G.S. 7B-307(c).

5. Relationship between DSS and law enforcement. Complications can arise when DSS and law enforcement are working on separate cases arising from the same circumstances. DSS and law enforcement may pursue interviewing the same individuals, and sometimes they may conduct interviews jointly. Attention should be given to the circumstances under which *Miranda* warnings are applicable. Even if DSS conducts an interview, if information learned in the interview is used in a subsequent criminal trial, the issue of whether DSS was acting as an "agent" of law enforcement may arise. *See State v. Morrell*, 108 N.C. App. 465 (1993) (holding that a social worker's failure to advise the defendant of her *Miranda* rights caused the defendant's statements in an interview with the social worker to be inadmissible because the social worker became like an agent of the state where the social worker went beyond her role and began working with sheriff's department on the case prior to interviewing the defendant). For a discussion of admissions of a party-opponent, see *infra* § 11.6.B.

G. Interference with DSS Assessment

When someone obstructs or interferes with an assessment, DSS may file an interference petition naming that person as a respondent and asking the court to order that person to cease the obstruction or interference. G.S. 7B-303. The court has exclusive original jurisdiction of proceedings in which a person is alleged to have obstructed or interfered with a DSS assessment. G.S. 7B-200(a)(6).

1. Meaning of interference or obstruction. Interference or obstruction includes any of the following:

- refusing to disclose the whereabouts of the juvenile;
- refusing to allow DSS to have personal access to the juvenile;
- refusing to allow DSS to observe or interview the juvenile in private;
- refusing to allow DSS access to confidential information and records pursuant to a request under G.S. 7B-302;
- refusing to allow DSS to arrange for an examination of the juvenile by a physician or other expert (see *In re Browning*, 124 N.C. App. 190 (1996), in which a father was not successful in claiming religious beliefs as a reason for refusing to permit a mental health evaluation of his children);
- other conduct that makes it impossible for DSS to carry out the duty to assess the juvenile's condition.

G.S. 7B-303(b).

2. Requirements for petition for interference. The petition must:

- contain the name, date of birth, and address of the juvenile;
- state the basis for initiating an assessment;
- include a description of conduct constituting obstruction or interference; and
- be verified.

G.S. 7B-303(a).

If DSS has reason to believe the juvenile needs immediate protection or assistance, the petition would allege that as well. *See* G.S. 7B-303(d). *See infra* § 5.1.G.7 (discussing ex parte interference orders).

3. File with clerk or magistrate. The interference petition is filed with the clerk of court when that office is open. In an emergency, when the clerk's office is closed, a magistrate who has been authorized by the chief district court judge to do so may "draw, verify, and issue" the petition, which must be delivered to the clerk for processing as soon as the clerk's office opens. G.S. 7B-404.

4. Service and notice. Service of the interference petition, summons, and notice of hearing must be made "as provided by the Rules of Civil Procedure," on:

- the person alleged to have obstructed or interfered with an assessment (the respondent);
- the juvenile's parent, guardian, custodian, or caretaker; and
- any other person determined by the court to be a necessary party.

G.S. 7B-303(c). *See supra* § 4.4 (relating to service).

5. Timing of hearing. The hearing on the interference petition must be held not less than five days after service of the petition and summons on the respondent. G.S. 7B-303(c). If the court has issued an ex parte order (*see* 7., below), then within 10 days of that order a hearing must be held to determine whether there is good cause for the order to continue or whether there should be a different order. G.S. 7B-303(d).

6. Hearing. The burden of proof at the hearing is on DSS. G.S. 7B-303(c). DSS must prove not only the conduct of the respondent and its effect on the assessment, but also that DSS was acting pursuant to a report that was sufficient to trigger DSS's duty and authority to conduct an assessment. Where the information in the report is not sufficient to constitute abuse, neglect, or dependency, filing an interference petition is improper. *See In re Stumbo*, 357 N.C. 279 (2003). If the court finds at the hearing by clear, cogent, and convincing evidence that the respondent, without lawful excuse, has obstructed or interfered with a required assessment, the court may order the respondent to cease the obstruction or interference. G.S. 7B-303(c).

The scope of the hearing does not extend to the issue of whether the child is abused, neglected, or dependent, and the court does not have jurisdiction to change the child's custody. *See In re K.C.G.*, 171 N.C. App. 488 (2005). The Code does not provide for appointed counsel for any party or for the appointment of a guardian ad litem for the child in an interference proceeding.

7. Ex parte interference orders. When DSS believes the juvenile needs immediate help or protection, DSS can allege this in the interference petition and seek an ex parte order. G.S. 7B-303(d).

(a) Standard. The court may enter an ex parte order to cease obstruction or interference if it finds probable cause to believe that:

- the juvenile is at risk of immediate harm, and
- the respondent is obstructing or interfering with DSS's ability to assess the juvenile's condition.

(b) Limitation. This ex parte order is limited to provisions necessary to enable DSS to conduct an assessment to determine whether the juvenile is in need of immediate protection or assistance.

(c) Subsequent hearing. Within 10 days of an ex parte order, a hearing must be held to determine whether there is good cause for the order to continue or whether there should be a different order.

(d) Service on respondent. The respondent must be served with the ex parte order along with a copy of the interference petition, summons, and notice of hearing.

8. Enforceability. An order to cease interference with or obstruction of a DSS assessment is enforceable by civil or criminal contempt as provided in G.S. Chapter 5A. *See* G.S. 7B-303(f). An indigent respondent is entitled to appointed counsel at a civil or criminal contempt

proceeding if the proceeding may result in imprisonment. *See McBride v. McBride*, 334 N.C. 124 (1993).

Tools: AOC Form AOC-J-120, “[Petition Obstruction of or Interference with Juvenile Investigation \(Abuse/Neglect/Dependency\)](#)” (Dec. 2009).

AOC Form AOC-J-121, “[Juvenile Summons and Notice of Hearing \(Obstruction of or Interference with Juvenile Investigation\)](#)” (July 1999).

AOC Form AOC-J-122, “[Ex Parte Order to Cease Obstruction of or Interference with Juvenile Investigation](#)” (July 1999).

AOC Form AOC-J-123, “[Order to Cease Obstruction of or Interference with Juvenile Investigation](#)” (July 1999).

H. Information Disclosure and Access

Most information related to abuse, neglect, and dependency cases is confidential and has special statutory protections. Although the Juvenile Code contains a provision addressing discovery, G.S. 7B-700, that provision is limited and is discussed *supra* § 4.6. Additional statutes govern the sharing of information among parties and among agencies. Details related to the confidentiality of records and hearings, as well as disclosure of and access to information are explained *supra* § 2.7.

5.2 Central Registry and Responsible Individuals List

A. Central Registry

The Department of Health and Human Services (DHHS) maintains a central registry of reports of abuse, neglect, and dependency and child fatalities that are the result of alleged maltreatment. This registry is maintained for study purposes and to identify cases of repeated maltreatment. The data is furnished to DHHS by the county DSSs, is confidential, and cannot be used in court “unless based upon a final judgment of a court of law.” G.S. 7B-311(a). The Administrative Code lists the organizations and persons who are permitted to access central registry data and the limited purposes for which the data may be accessed. *See* 10A N.C.A.C. 70A.0102. Confidentiality of central registry data is strictly enforced because the data is based on reports and DSS assessments, not judgments of a court, and no clear procedure exists for a person to discover or challenge information in the registry.

Resource: For more information about the Central Registry and the policies and administrative rules surrounding it, see 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. VIII §1426](#) (May 2012) and the North Carolina Administrative Code provisions related to the Central Registry at 10A N.C.A.C. 70A.0102.

B. Responsible Individuals List

DHHS also maintains a list of individuals determined by county DSSs to be responsible for a child being abused or seriously neglected. Unlike names in the Central Registry, names on the Responsible Individuals List can be provided to certain agencies, institutions, and facilities that need to determine individuals' fitness to care for children. Therefore, an effective procedure for challenging the placement of a name on the list is essential. These procedures have been in place since 2010 and were significantly revised in 2013. *See* S.L. 2010-90 and S.L. 2013-129 (changing the avenues for judicial review and adding a requirement that DSS make diligent efforts to give personal notice to one who is determined to be a responsible individual). The very first procedures for challenging placement of a name on the Responsible Individuals List, enacted by the General Assembly in 2005, were held to be unconstitutional in *In re W.B.M.*, 202 N.C. App. 606 (2010). The list now contains only the names of individuals for whom the procedures in place on or after July 11, 2010, were available.

When a DSS assessment determines that a child has been abused or seriously neglected, whenever possible DSS also identifies the person(s) responsible for the child's condition. G.S. 7B-320. "Serious neglect" is defined as "[c]onduct, behavior, or inaction of the juvenile's parent, guardian, custodian, or caretaker that evidences a disregard of consequences of such magnitude that the conduct, behavior, or inaction constitutes an unequivocal danger to the juvenile's health, welfare, or safety, but does not constitute abuse." G.S. 101(19a). The meaning of "abuse" is derived from the definition of "abused juvenile" in G.S. 7B-101(1).

Practice Note: Petitions alleging that a child is abused or neglected do not allege "serious neglect." Serious neglect relates only to placement on the Responsible Individuals List.

Upon identifying a person as a "responsible individual," DSS must deliver a written notice to that individual:

- informing the individual of whether DSS determined abuse or serious neglect or both;
- stating that DSS has identified the person as a responsible individual;
- summarizing substantial evidence supporting DSS's determination, without identifying the reporter or collateral contacts;
- informing the individual that unless he or she petitions for judicial review his or her name will be placed on the Responsible Individuals List, and describing DHHS's authority to release information on the list; and
- clearly describing steps the person must take to seek judicial review of DSS's determination.

A copy of a petition for judicial review form must be included with the notice. G.S. 7B-320.

The notice is to be *personally* delivered by DSS to the individual if possible. If personal written notice is not given within 15 days of the DSS determination and DSS has made diligent efforts to locate the individual, the director must send the notice to the individual by

registered or certified mail, return receipt requested, and addressed to the individual at his or her last known address. Unless the director can show that the individual received actual notice, the director may not place the individual on the responsible individuals list until an ex parte hearing is held at which a district court judge determines that the director made diligent efforts to find the individual. A finding that the individual is evading service is relevant to the determination. G.S. 7B-320, 7B-323.

An individual's name may be placed on the Responsible Individuals List only after one of the following:

- The person is properly notified (see specific notice requirements above) and fails to file a timely petition for judicial review; or
- the person files a petition for judicial review and after a hearing the court determines by a preponderance of the evidence that the person is a responsible individual; or
- the person is criminally convicted as a result of the same incident.

G.S. 7B-311(b).

The clerk is required to maintain a separate docket for judicial review proceedings; schedule a hearing within 45 days of the filing of a petition for judicial review or, if there is no juvenile court within that time, for the next session of juvenile court; and send a notice of hearing to the petitioner and the DSS director. G.S. 7B-323(b). If a person who files a petition for judicial review also is named as a respondent in a juvenile court case or a defendant in a criminal case resulting from the same incident, the court may stay the judicial review proceeding. G.S. 7B-324.

At the request of a party, the court is required to close the hearing to everyone except the parties, witnesses, and officers of the court. DSS has the burden of proving by a preponderance of the evidence that the person identified by DSS as a responsible individual abused or seriously neglected the child. The rules of evidence in civil cases apply. However, the court may admit any evidence that is reliable and relevant if doing so will best serve the general purposes of the rules of evidence and the interests of justice. The parties have the right to:

- present sworn evidence, law, or rules;
- represent themselves or obtain representation by an attorney at their own expense; and
- subpoena witnesses, cross-examine witnesses, and make closing arguments.

G.S. 7B-323(b), (c). The court may either uphold or reverse DSS's determination and must make findings of fact and conclusions of law and enter its order within thirty days after the hearing. Appeal of the court's decision is to the court of appeals. G.S. 7B-323.

A person is not entitled to file a petition for judicial review if he or she:

- is convicted criminally as a result of the same incident; or
- after proper notice, fails to file a timely petition for judicial review.

G.S. 7B-324. Despite the second disqualifier, in extraordinary circumstances or if conducting a review would serve the interests of justice, the court in its discretion may conduct a hearing on a petition for judicial review that is not timely filed. If the individual's name has already been placed on the list and the court reverses DSS's determination, the court must order the person's name expunged from the list. G.S. 7B-323(e).

Tools: AOC Form AOC-J-131, "[Petition for Judicial Review Responsible Individuals List](#)" (Oct. 2013).

AOC Form AOC-J-132, "[Notice of Hearing Judicial Review Responsible Individuals List](#)" (Oct. 2013).

5.3 The Petition, Summons, and Service of Process

The petition is the initial pleading, and filing of the petition is the means by which DSS commences an abuse, neglect, or dependency case and by which the court obtains jurisdiction over the case. The filing of a petition always requires the issuance of a summons. Service of the summons is the process by which the court obtains personal jurisdiction over the parties. G.S. 7B-401, 7B-405, 7B-406.

A. The Petition

1. Proper petitioner. Only DSS can file a petition alleging abuse, neglect, or dependency. *See* G.S. 7B-401.1(a), 7B-403(a).

2. Venue. A petition for abuse, neglect, or dependency may be filed in the district where the child resides or is present. G.S. 7B-400. It is not unusual for more than one county department of social services to have some degree of involvement in a child protective services case as families move, children are placed with relatives in other counties, or conflicts of interest require DSSs to call on neighboring counties to handle cases. Improper venue can be waived, and even if venue is proper, the court can grant a motion for change of venue for good cause. *See supra* § 3.5 (discussing venue in detail).

Tool: AOC Form AOC-J-130, "[Juvenile Petition \(Abuse/Neglect/Dependency\)](#)" (Apr. 2015).

3. File with clerk or magistrate. DSS must file the petition with the clerk when that office is open. When the clerk's office is closed, DSS may file the petition with a magistrate when a petition is required in order to obtain a nonsecure custody order. G.S. 7B-404.

Note: The wording of G.S. 7B-404 is somewhat confusing. It states that a magistrate "may be authorized by the chief district court judge to draw, verify, and issue petitions." It does not require any specific form of authorization, and since DSS must be able to file petitions in an emergency, it seems reasonable to assume that on-duty magistrates are implicitly authorized to accept petitions for filing unless a chief district court judge has ordered otherwise. (The

language in the comparable provision for delinquency cases, G.S. 7B-1804, says that “a magistrate may draw and verify the petition and accept it for filing, which acceptance shall constitute filing.”)

Issuance by the magistrate constitutes filing, and the petition must be delivered to the clerk’s office for processing as soon as that office is open. G.S. 7B-405, 7B-404. Because the magistrate is not authorized to issue the summons, the clerk should issue the summons upon receipt of the petition. Some districts may have local rules or an administrative order issued by the chief district court judge addressing the appropriate procedure for after-hours filing.

4. Substance of petition. The petition must contain:

- the name, date of birth, and address of the juvenile (*but see In re A.R.G.*, 361 N.C. 392 (2007) (holding that failure to list the juvenile’s address did not deprive the trial court of subject matter jurisdiction));
- the name and last known address of each party as determined by G.S. 7B-401.1; and
- facts sufficient to invoke jurisdiction over the juvenile.

G.S. 7B-402(a).

The petition should name and contain information about both parents, even if one of them has no involvement in the circumstances leading to the filing of the petition or is unknown or missing.

The petition or an attached affidavit must also contain information required by the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) under G.S. 50A-209, concerning the places and person(s) with whom the child has resided in the past five years and any other court actions concerning custody of the child. (The AOC form for the affidavit is AOC-CV-609, “[Affidavit as to Status of Minor Child](#)” (July 2011)). However, if a party alleges in an affidavit or pleading that the health, safety, or liberty of a party or child would be jeopardized by the disclosure of identifying information, the information must be sealed and may be disclosed to the other party or to the public only pursuant to a court order after a hearing in which the court considers the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice. G.S. 50A-209.

See supra § 3.2.C.2 (discussing problems with petitions that do not impact subject matter jurisdiction).

See supra § 4.2.D (discussing amendments and supplemental and responsive pleadings).

5. More than one child. A petition may contain information on more than one child when the children are from the same home and are before the court for the same reason. G.S. 7B-402(a). The petition must contain a separate file number for each child and the clerk must maintain a file for each child regardless of whether more than one child is named in a petition. *See* AOC Rules of Recordkeeping in appendix 4. Separate petitions are preferable for children who live

together but have different fathers or mothers and where the facts asserted to support the allegations of abuse, neglect, or dependency differ substantially from one child to another.

6. Verification essential. The petition must be signed and verified or the petition will be fatally defective and the court will not have subject matter jurisdiction. G.S. 7B-403(a); *In re T.R.P.*, 360 N.C. 588 (2006). *See supra* § 4.2.B (discussing in detail verification of the petition, including who may sign and verify).

7. DSS dismissal of petition. The Juvenile Code does not address voluntary dismissal of a petition by DSS, but the court of appeals has held that the voluntary dismissal of a juvenile petition by DSS is permissible. *In re E.H.*, ___ N.C. App. ___, 742 S.E.2d 844 (2013). The court found that the application of G.S. 1A-1, Rule 41(a)(1)(i) to abuse, neglect, and dependency cases advances the purposes of the Juvenile Code and does not conflict with its provisions. The court reasoned that the legislature has entrusted DSS with the duty to determine whether allegations of abuse, neglect, or dependency are credible and what action to take (subject only to limited review by the prosecutor), and that requiring the GAL or parents to consent to a dismissal would impermissibly shift this responsibility away from DSS. The court also discussed the need for judicial efficiency and conservation of limited social services resources.

8. Amendment of the petition. The court in its discretion may allow amendment of the petition. If the court allows an amendment, the court must also direct how the amended petition must be served and how much time a party has to prepare after the amendment. G.S. 7B-800.

See supra § 4.2.D (discussing amendments and supplemental pleadings).

B. The Summons and Process

See also supra §§ 4.3 (discussing civil procedure related to summons); 4.4 (discussing civil procedure related to service).

1. Timing. Immediately after filing of the petition, the clerk issues the summons. G.S. 7B-406(a).

2. Substance of summons. The summons is a printed AOC form that contains the detailed types of notice required by G.S. 7B-406(b) and (c), including:

(a) Nature of proceedings. The summons must include notice of the nature of the proceeding. G.S. 7B-406(b)(1).

(b) Counsel. The clerk's appointment of provisional counsel for each respondent parent must be indicated on the summons or an attached notice. G.S. 7B-602(a). In addition, the summons must include notice of the right to counsel and information about how a parent may seek the appointment of counsel prior to a hearing if provisional counsel is not identified. G.S. 7B-406(b)(2).

(c) Court determinations. The summons must include notice that if the court determines at the hearing that the allegations of abuse, neglect, or dependency in the petition are true, the court will conduct a dispositional hearing to consider the needs of the juvenile and enter an order designed to meet those needs and the objectives of the state. G.S. 7B-406(b)(3).

(d) Potential outcomes. The summons must include notice that the dispositional order or a subsequent order:

- may remove the juvenile from the custody of the parent, guardian, or custodian;
- may require that the juvenile receive medical, psychiatric, psychological, or other treatment and that the parent participate in the treatment;
- may require the parent to undergo psychiatric, psychological, or other treatment or counseling for the purpose of remedying the behaviors or conditions that are alleged in the petition or that contributed to the removal of the juvenile from the custody of the parent;
- may order the parent to pay for treatment that is ordered for the juvenile or the parent;
- may terminate the parent's parental rights after proper notice, a hearing, and a finding that grounds for termination exist.

G.S. 7B-406(b)(4).

(e) Jurisdiction. The summons must advise the parent that once served, the court has jurisdiction over the parent and that failure to comply with orders of the court may result in a finding of contempt. G.S. 7B-406(c).

3. Who receives summons. The summons is issued to each party named in the petition, except the juvenile. G.S. 7B-406(a). With respect to parents who are missing or unknown, see *infra* § 5.4.B.5 & 6.

4. Petition and notice to GAL. Immediately after a petition is filed, the clerk must provide a copy of the petition and any notices of hearings to the local GAL office. G.S. 7B-408.

5. Service of petition and summons. Service of the summons and petition is according to Rule 4(j) of the Rules of Civil Procedure not less than 5 days prior to the date of the scheduled hearing, but the time for service may be waived in the discretion of the court. G.S. 7B-407. See *supra* § 4.4 (discussing details related to service).

Tools: AOC Form AOC-J-141, "[Notice of Hearing in Juvenile Proceeding \(Abuse/Neglect/Dependency\)](#)" (Oct. 2013).

AOC Form AOC-J-142, "[Juvenile Summons and Notice of Hearing \(Abuse/Neglect/Dependency\)](#)" (Oct. 2013).

AOC Form AOC-J-155, "[Motion and Order to Show Cause \(Parent, Guardian, Custodian or Caretaker in Abuse/Neglect/Dependency Case\)](#)" (Nov. 2000).

5.4 Parties, Appointment of Counsel, and Guardians ad Litem

A. Parties to the Proceeding

Abuse, neglect, and dependency proceedings tend to involve many people, and it is important to sort out who the actual “parties” are and what rights those parties have in the proceedings. Relatives, foster parents, other caregivers, service providers, and law enforcement all can become involved in a case, but the Juvenile Code specifies that the parties in an abuse, neglect, or dependency proceeding are limited to: DSS; the juvenile’s parents (with limited exceptions); guardian, custodian, and caretaker (in certain circumstances); and the juvenile. G.S. 7B-401.1.

For a discussion of non-parties, see *infra* § 5.4.E.

B. Parents and other Care Providers

1. Parent is a party. The juvenile’s parent is a party to the case unless:

- the parent’s right have been terminated;
- the parent has relinquished the child for adoption, unless the court orders that the parent be made a party;
- the parent has been convicted of first degree or second degree rape or rape of a child and that criminal act resulted in the conception of the child.

G.S. 7B-401.1; G.S. 14-27.2, 14-27.2A, 14-27.3.

2. Guardians, custodians, and caretakers. Guardians, custodians, and caretakers are parties in certain circumstances:

- A court-appointed guardian of the person or general guardian of the child when the petition is filed is a party, and a person appointed as a guardian pursuant to G.S. 7B-600 automatically becomes a party if the court has found guardianship to be the permanent plan for the child.
- The custodian of a child at the time a petition is filed is a party, and a person who is awarded custody during the juvenile proceeding automatically becomes a party if the custody arrangement is the permanent plan.
- A caretaker, as defined in G.S. 7B-101(3), is a party only if the petition includes allegations relating to the caretaker, the caretaker has assumed the status and obligations of a parent, or the court orders that the caretaker be made a party.

G.S. 7B-401.1.

A guardian, custodian, or caretaker who is a party to the case may be removed as a party if the court finds that the person does not have legal rights that may be affected by the action and that the person’s continuation as a party is not necessary to meet the juvenile’s needs. G.S. 7B-401.1.

Definitions of caretaker, guardian, and custodian are addressed *supra* § 2.1.B.11.

The rights of the parent, including the right to counsel, are addressed *supra* § 2.5.

The court's authority over a parent at disposition is addressed *infra* § 7.5.

3. Appointment of parent's counsel. When a petition is filed, the clerk must appoint provisional counsel for each parent named in the petition and indicate the appointment on the summons or attached notice. At the first hearing, the court must affirm the appointment of counsel unless the respondent parent: (1) does not appear at the hearing; (2) does not qualify for court-appointed counsel; (3) has retained counsel; or (4) waives the right to counsel. If the court finds at the first hearing that any of those conditions exist, the court must dismiss the provisional counsel. The court can consider a parent's eligibility and desire for appointed counsel at any point in the proceedings. The appointment of provisional counsel must be pursuant to rules adopted by the Office of Indigent Defense Services. G.S. 7B-602(a).

See supra § 2.5.D (providing further detail related to appointment of counsel, waiver of counsel, withdrawal of counsel, pro se representation, and ineffective assistance of counsel).

Tool: AOC Form AOC-J-143, "[Waiver of Parent's Right to Counsel](#)" (Oct. 2013).

The Juvenile Code specifies only that a parent has a right to appointed counsel if indigent and, unlike some other states' codes, is silent with respect to representation of a guardian, custodian, or caretaker. (*See, e.g.,* Ky. Rev. Stat. Ann. § 620.100(1)(c), which authorizes the court "in the interest of justice, [to] appoint separate counsel for a nonparent who exercises custodial control or supervision of the child, if the person is unable to afford counsel . . .") Policy of the North Carolina Office of Indigent Defense Services states that IDS will pay for representation of an indigent nonparent, pursuant to G.S. 7A-498.3(a)(1), if a judge concludes that due process requires appointment of counsel for the non-parent respondent in an abuse, neglect, or dependency proceeding. *See* N.C. Office of Indigent Defense Services, [Appointment of Counsel for Non-Parent Respondents in Abuse, Neglect, and Dependency Proceedings](#) (July 2, 2008).

4. Appointment of guardian ad litem for parent. The Juvenile Code, in G.S. 7B-602, either requires or authorizes the court to appoint a guardian ad litem for the parent pursuant to Rule 17 of the Rules of Civil Procedure in two circumstances: 1) where the parent is an unemancipated minor, a GAL must be appointed; and 2) where the parent is incompetent, a GAL may be appointed. GAL representation for parents is discussed *supra* §2.5.F.

5. Significance of uninvolved, missing, or unknown parents. Even when allegations of a child's abuse, neglect, or dependency relate primarily or solely to one parent, both parents should be named as respondents in the petition and provisional counsel should be appointed for each known parent. Juvenile petitions are not filed "against" parents, and a parent who is not involved, whose whereabouts are unknown, or even whose identity is unknown has rights that may be affected by the proceeding. That parent or his or her relatives may be important resources for the child. All petitions should include information about both parents' identity,

location, and involvement or lack of involvement with the child. At a hearing to determine the need for continued nonsecure custody, the court is required to address the issue of missing or unidentified parents. *See infra* § 5.6.E (providing detail on inquiries the court must make at hearings to determine need for continued nonsecure custody).

6. Serving a missing parent. Service of the summons and petition may be made by publication when a party named in the petition cannot be found by diligent effort. G.S. 7B-407; N.C. R. CIV. P. 4(j1). *See supra* § 4.4.B.2 (providing more detail on service by publication).

7. Paternity and putative fathers. The term *putative father* refers to the person alleged to have fathered the child but whose parentage has not been legally established. Even if the mother was married at the time of the child’s conception or birth, it is possible that the child has both a “legal” father—the man to whom the mother was married—and a putative biological father.

A birth certificate may create a presumption of paternity but is not definitive. If a mother is married at the time of either conception or birth, or between conception and birth, the name of her husband must be entered on the birth certificate as the father of the child, unless paternity has been otherwise established by a court or by an affidavit. G.S. 130A-101(e). If a mother is unmarried at all times from the date of conception through birth, a father’s name can be entered on a birth certificate only if the parents complete an affidavit acknowledging paternity pursuant to G.S. 130A-101(f) or the certificate is amended pursuant to G.S. 130A-118(b) based on a judicial determination of parentage. In a termination of parental rights case in which the respondent father was not married to the child’s mother but his name appeared on the child’s birth certificate, failure to establish paternity was alleged as a ground for termination. The court of appeals affirmed the trial court’s order concluding that the ground had not been established, holding that the father’s name on the child’s birth certificate created a rebuttable presumption that his paternity had been established by affidavit or court order. *In re J.K.C.*, 218 N.C. App. 22 (2012). The court reasoned that the unmarried father could not have been listed as the father on the child’s birth certificate unless his name was placed on the certificate in accordance with either G.S. 130A-101(f) or G.S. 130A-118(b).

At the beginning of a case in which the child is in nonsecure custody, at each hearing on the need for continued nonsecure custody the court must “[i]nquire as to the identity and location of any missing parent and [as to] whether paternity is at issue.” The court must make findings about and may order efforts aimed at locating and serving a missing parent or establishing paternity. G.S. 7B-506(h)(1). While the Juvenile Code requires the court to address the issue of paternity, it does not provide procedures for doing that, other than its reference to certain procedures in G.S. 7B-1111(a)(5) addressing the ground for terminating parental rights based on failure to establish paternity. Statutory provisions relating to paternity that may be relevant in juvenile proceedings include:

(a) Blood or genetic marker test. In any civil action in which the question of paternity arises, on motion of a party the court must order the mother, the child, and the “alleged father-defendant” to submit to one or more blood or genetic marker tests. The court may order

the party seeking the test to pay for it. *See* G.S. 8-50.1(b1) (setting out procedures and standards for admissibility of test results).

- (b) Presumed father or mother is competent witness.** “Whenever an issue of paternity of a child born or conceived during a marriage arises in any civil or criminal proceeding, the presumed father or the mother of such child is competent to give evidence as to any relevant matter regarding paternity of the child, including nonaccess to the present or former spouse, regardless of any privilege which may otherwise apply.” G.S. 8-57.2.
- (c) DHHS registry.** One of the grounds for terminating parental rights refers to a putative father establishing paternity by “affidavit which has been filed in a central registry maintained by the Department of Health and Human Services.” G.S. 7B-1111(a)(5)(a). *See infra* § 9.11.E (explaining the TPR ground). (This “central registry” is not related to the central registry that collects information about child abuse, neglect, and dependency, described *supra* § 5.2.A.)

Practice Note: To file an affidavit of paternity or inquire as to whether one has been filed, contact:

North Carolina Division of Social Services
Adoption Review Team
820 S. Boylan Ave.
2411 Mail Service Center
Raleigh, NC 27699-2411
Telephone: 919-527-6370

- (d) IV-D parent locator service.** DHHS is required to “attempt to locate absent parents for the purpose of establishing paternity of and/or securing support for dependent children. The Department is to serve as a registry for the receipt of information which directly relates to the identity or location of absent parents [and] to assist any governmental agency or department in locating an absent parent” G.S. 110-139(a). This registry may be a source of information in abuse, neglect, and dependency cases. In addition, DSS or the court may initiate a request for parent locator services.

The state’s Child Support Enforcement Program (CSE) can obtain information about parents from the Federal Parent Locator Service and through the State Parent Locate Service. If the child support program has not already undertaken efforts to locate an absent parent in an effort to obtain child support from that parent, a county DSS can request location services when the child is receiving protective services or foster care services under Title IV-B or Title IV-E of the Social Security Act. The locate services can be used to obtain information about the location of a parent or putative father in relation to DSS’s efforts to keep a child within a family unit, to terminate parental rights, or to facilitate the child’s adoption. Information about DHHS policies relating to parent locator services are available in the “[Locate](#)” section of the NC DHHS Child Support Services Manual. Specific provisions for DSS to request “locate only” services can be found in the “[Locate Overview](#)” section of the Child Support Services Manual.

See also G.S. 110-139.1 (providing for DHHS access to federal parent locator services in cases of parental kidnapping, child custody, paternity determination, and child support when requests are made by judges, clerks of superior court, district attorneys, or U.S. attorneys).

(e) Civil action to establish paternity. Chapter 49 of the General Statutes provides for a civil action to establish paternity any time before a child's eighteenth birthday. G.S. 49-14.

(f) Establishing paternity for purposes of child support. G.S. 110-132 provides that affidavits of parentage executed by the putative father and the mother of a child constitute an admission of paternity that, subject to a limited right to rescind, has the same legal effect as a judgment of paternity "for the purpose of establishing a child support obligation." The legal effect of the affidavits for purposes other than child support is not altogether clear, although under G.S. 7B-1111(a)(5) the procedure precludes a finding that the father has not established paternity for purposes of establishing a ground for termination of parental rights. *See also Rosero v. Blake*, 357 N.C. 193 (2003) (declining in a custody action to give establishment of paternity pursuant to G.S. 110-132 less weight than an order under G.S. 49-14 in a civil action to establish paternity).

(g) Special proceeding to legitimate child. The putative father of a child born out of wedlock may file a petition to legitimate the child in a special proceeding before the clerk of superior court. If the child also has a "legal father," he is a necessary party to the proceeding. *See* G.S. 14-10 through 14-13.

Resource: DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, CHILD SUPPORT SERVICES MANUAL (see ["Voluntary Methods of Establishing Paternity"](#) in the "Paternity" section of this manual).

C. The Child

1. Child is a party. The Juvenile Code specifically states that the child who is the subject of an abuse, neglect, or dependency proceeding is a party to the case. G.S. 7B-401.1(f), 7B-601(a). However, the child cannot always be treated the same as any other party, as explained in §§ 2.3 and 2.4 *supra* and other relevant sections in this manual.

2. Appointment of guardian ad litem under G.S. 7B-601. In cases alleging abuse or neglect, the court *must* appoint a guardian ad litem to represent the child. If the guardian ad litem is not an attorney, the court also must appoint an attorney advocate. In cases alleging only dependency, the court *may* appoint a guardian ad litem (and an attorney advocate) to represent the child. G.S. 7B-601. Neither the Juvenile Code nor case law provides criteria for when GALs are appropriate in dependency cases; however, it is reasonable to consider factors such as the age of the child and the complexity of the case. A clear understanding of the rights of the child, the appointment and role of the GAL, the Guardian ad Litem Program, and best interest representation, is essential to understanding the child's status; see *supra* §§ 2.3, 2.4 for this information.

Tool: AOC Form AOC-J-207, “[Order to Appoint or Release Guardian ad Litem and Attorney Advocate](#)” (June 2014).

D. Department of Social Services

The director of the county Department of Social Services is the only permitted petitioner in an abuse, neglect, and dependency case and therefore is always a party to the proceedings. “Director” is defined in G.S. 7B-101(10) as the county social services director or the director’s authorized representative. DSS remains a party until the court terminates its jurisdiction in the case, although one DSS director may be substituted for another if venue is changed and custody is moved from one DSS to another. See G.S. 7B-401.1(a), G.S. 7B-900.1(c). The role, responsibilities, and policies of DSS in abuse, neglect, and dependency cases are addressed in § 2.2 *supra*.

E. Non-Parties

Abuse, neglect, and dependency cases can involve many people, but as described in A. through D., above, the only parties are the parent(s) (and/or guardian, custodian, or sometimes caretaker), the child, and DSS. The person providing care for the child, even if not a party, is sometimes entitled to notice and a right to be heard. *See, e.g.*, G.S. 7B-906.1(b) (review and permanency planning hearings). Others, such as relatives, may attend hearings and provide information for or be heard by the court, but neither receiving notice nor participating in the hearing makes the person a party. G.S. 7B-901. Persons who are not parties, except when they are witnesses, are most likely to participate in non-adjudicatory hearings, such as hearings on the need for continued nonsecure custody and dispositional hearings, which are informal and at which the usual rules of evidence are relaxed. The court generally may direct orders only to the parties. Only parties other than caretakers can appeal the court’s orders. *See* G.S. 7B-1001.)

See also supra § 4.7 (discussing intervention).

5.5 Purpose and Requirements of Temporary and Nonsecure Custody

A. Purpose of Temporary and Nonsecure Custody

DSS may determine that in order to protect the child, removal of the child from the home is necessary. This can happen at any stage of the case, including prior to the filing of a petition.

One of the purposes of the Juvenile Code is “[t]o provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.” Another purpose is “[t]o provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles’ needs for safety, continuity, and permanence.” G.S. 7B-100. The language of the statutes addressing temporary custody and nonsecure custody reflects the purpose of protecting the child while

putting requirements and time limitations in place to prevent unnecessary or inappropriate placements.

Resource: For studies, journal articles, and statistics related to initial placements in out-of-home care, see “[Initial Placements in Out-of-Home Care](#)” on the Child Welfare Information Gateway, U.S. Department of Health and Human Services website.

B. Temporary Custody

Temporary custody is extraordinary state intervention. It allows the state (through the county DSS or law enforcement) to take a child into custody with no notice, no hearing, no representation, and no court order. Therefore, the statutory grounds for temporary custody are very narrow. Temporary custody is used only briefly to protect a child while a petition or motion is filed and a court order for nonsecure custody is sought.

1. Circumstances for temporary custody. A child may be taken into custody without a court order by law enforcement or DSS, but only if there are reasonable grounds to believe:

- that the child is abused, neglected, or dependent; and
- that the child would be injured or could not be taken into custody if it were first necessary to obtain a court order.

When DSS takes a child into temporary custody, the department may arrange for the placement, care, supervision, and transportation of the child. G.S. 7B-500. When law enforcement takes a child into temporary custody, it should contact DSS immediately.

2. Length of temporary custody. Once the juvenile is taken into temporary custody, he or she cannot be held for more than twelve hours—or for more than twenty-four hours if any of the twelve hours fall on a Saturday, Sunday, or legal holiday—unless a petition or motion for review has been filed *and* an order for nonsecure custody has been issued. G.S. 7B-501.

3. Newborn abandonment. Certain individuals (health care providers, law enforcement officers, DSS workers, emergency medical workers) *must* take into temporary custody an infant under 7 days old if the infant is voluntarily delivered to that individual by the infant’s parent who does not express an intent to return for the infant. *Any* adult *may* take such an infant into temporary custody without a court order in the same circumstances. Those who take custody of the infant must do what is necessary to protect the infant and immediately notify DSS or law enforcement. The person can ask the parent questions about identity or medical history, but the parent is not required to give any information and must be informed of this. A person who takes custody of an infant in this circumstance is immune from civil or criminal liability if the person acts in good faith. G.S. 7B-500. This is part of North Carolina’s “safe surrender” law, which also gives the parent immunity from criminal prosecution for abandonment of an infant in this way if the baby is unharmed. While the parent may have immunity from criminal prosecution, safe surrender does nothing to change the juvenile court process and the parent’s involvement in that process. G.S. 7B-500(b), (c), (d), (e).

Resource: For more detail on newborn abandonment, see Janet Mason, [*Legal Abandonment of Newborns: North Carolina's Safe Surrender Law*](#), 75 POPULAR GOV'T 29 (UNC School of Government, 2009).

4. Medical professionals. Medical professionals can seek authorization from the court to retain physical custody of a juvenile suspected of being abused when the medical professional examines the juvenile and certifies in writing that the juvenile must remain for medical treatment or that it is unsafe for the juvenile to return home. The medical professional must then make a report to DSS. G.S. 7B-308. This statute is lengthy, with detailed requirements concerning procedures that are in addition to regular provisions concerning reporting and temporary custody.

Practice Note: This provision is rarely used by medical professionals, who are more likely to call DSS or law enforcement than to seek authority to assume temporary custody.

5. Duties of person with temporary custody. When a law enforcement officer or social services worker takes a child into temporary custody under G.S. 7B-500, that person must do the following:

- notify the child's parent, guardian, custodian, or caretaker that the child has been taken into temporary custody and advise that person of his or her right to be present with the child until a determination is made as to the need for nonsecure custody (failure to comply with this requirement is not grounds for releasing the child);
- release the child to the parent, guardian, custodian, or caretaker if the officer or social worker decides continued custody is unnecessary;
- communicate with appropriate DSS personnel who can determine whether a petition should be filed and, if appropriate, can seek an order for nonsecure custody.

G.S. 7B-501.

C. Nonsecure Custody

1. Summary. When DSS believes it is not safe for the child to remain in the home pending a court hearing on an abuse, neglect, or dependency petition, DSS must obtain a nonsecure custody order to take the child into custody or, if the child has been taken into temporary custody, to keep the child in custody more than 12 (or 24) hours. Note that DSS may seek an order for nonsecure custody even when the child could not be taken into temporary custody, because the grounds for nonsecure custody are substantially broader than those for temporary custody.

An order for nonsecure custody is directed to a law enforcement officer or "other authorized person," who is required to give a copy of the order to the child's parent, guardian, custodian, or caretaker. The order includes notice of a hearing, which must be held within seven calendar days, to determine whether continued nonsecure custody is warranted. The hearing may be

continued for up to 10 business days with the consent of the parties, but it cannot be waived altogether.

Distinctions among secure custody, nonsecure custody, custody, and placement: “Secure” custody is within a locked facility and is available only in cases of delinquent or undisciplined juveniles. “Nonsecure” custody is not locked—and therefore not “secure”—and usually refers to pre-adjudication placement of a juvenile in the custody of DSS or a relative. At disposition or post-disposition, the court may enter orders for custody, either as a disposition or as a permanent plan for the juvenile. A court order may distinguish between custody and placement, as when the court orders that DSS have custody and that the child be placed with a relative.

2. Authority to issue a nonsecure custody order. Any district court judge can issue a nonsecure custody order. In addition, the chief district court judge may delegate the authority to issue nonsecure custody orders to others by filing with the clerk an administrative order designating those persons to whom authority is delegated. G.S. 7B-502. The statute does not limit the chief judge’s options with respect to whom he or she may designate. The inherent conflict of interest strongly suggests that it should not be an official or employee of the county DSS. It should, however, be someone who understands the context and the extraordinary nature of nonsecure custody orders. Chief judges generally delegate this authority sparingly, and some do not delegate it at all. Entry of a nonsecure custody order by someone with delegated authority accelerates the timing of the first hearing on the need for continued nonsecure custody. *See infra* § 5.6.B (relating to timing).

Tool: AOC Form AOC-J-150, “[Order for Nonsecure Custody \(Abuse/Neglect/Dependency\)](#)” (June 2015).

Practice Notes: Nothing in the statute prevents the child’s GAL from seeking a nonsecure custody order. Although unusual, this might occur if DSS files a petition but does not seek nonsecure custody and the GAL believes nonsecure custody is necessary.

Nonsecure custody orders usually are requested and granted *ex parte*, soon after the petition is filed and before the parents have been served or are appointed counsel. If nonsecure custody is sought later in a case, when a parent is represented by counsel, the DSS or GAL seeking nonsecure custody should notify the parent’s counsel whenever possible.

3. Requirements and criteria for nonsecure custody order. G.S. 7B-503. A nonsecure custody order may be issued only if the following requirements and criteria are met:

(a) Petition. A petition alleging abuse, neglect, or dependency must have been filed in order for the court to have jurisdiction to enter a nonsecure custody order. *See In re Ivey*, 156 N.C. App. 398 (2003) (holding that the trial court erred in ordering DSS to assume nonsecure custody of an infant when a petition had been filed naming only the infant’s siblings); *see also In re T.R.P.*, 360 N.C. 588, 593 (2006) (stating that “[a] trial court’s subject matter jurisdiction over all stages of a juvenile case is established when the action

is initiated with the filing of a properly verified petition.”); *In re L.B.*, 181 N.C. App. 174 (2007) (holding that the trial court did not have jurisdiction when the order for nonsecure custody was filed, but gained jurisdiction when the petition was filed two days later).

(b) Release of child without court order. If the child is in temporary custody (without a court order), the court first must consider whether the child can be released to a parent, relative, guardian, custodian, or other responsible adult. Caveat: When a child is removed due to physical abuse and there is a resulting petition for the parent to submit to a mental health evaluation pursuant to G.S. 7B-302(d1), the court must rule on this petition before returning the child home. *See infra* § 5.5.C.6 for more detail.

(c) Need for protection. For a nonsecure custody order to be issued, there must be a reasonable factual basis to believe that matters alleged in the petition are true, that there are no other reasonable means available to protect the juvenile, and that:

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

G.S. 7B-503(a).

4. In person or by telephone. The nonsecure custody order must be in writing and direct an authorized person to assume custody of the child. G.S. 7B-504. However, a judge (or a person to whom the chief district court judge has delegated authority) may authorize nonsecure custody by telephone when other means of communication are impractical. Even if authorized by telephone, the order must be in writing and must include:

- the name and title of the judge (or person to whom authority has been delegated) who authorizes nonsecure custody by telephone,
- the signature and title of the official (usually a magistrate) signing the written order pursuant to the telephonic authorization, and
- the hour and date of the telephonic authorization.

G.S. 7B-508.

The role of the magistrate or other official completing the written order does not involve the exercise of discretion. He or she simply records accurately who gave the telephonic

authorization for nonsecure custody and when that occurred, then signs the order and indicates his or her title. (In some districts the same magistrate or official might be authorized by administrative order to actually make the decision about nonsecure custody when it is not possible to contact a judge—a very different role.) Each district or county should have clear procedures for ensuring that the order is filed with the clerk as soon as the clerk’s office opens.

An officer receiving a nonsecure custody order may execute it according to its terms without inquiring into its validity, and will not incur criminal or civil liability for its service. G.S. 7B-504.

5. Place of nonsecure custody. An order for nonsecure custody may direct that the child be placed with DSS or an individual designated in the order for temporary residential placement in:

- a licensed foster home or home authorized to provide foster care; or
- a DSS facility; or
- any other home or facility approved by the court and designated in the order.

G.S. 7B-505(a).

A child alleged to be abused, neglected, or dependent may never be placed in secure custody, which is a locked facility. G.S. 7B-503.

(a) Preference for placement with relatives. The court first must consider whether a relative 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 do this, then the court must order placement of the juvenile with the relative *unless* the court finds that placement with the relative would be contrary to the juvenile’s best interests. G.S. 7B-505(b). *See In re L.L.*, 172 N.C. App. 689 (2005) (analyzing an identical requirement for disposition and determining that the trial court’s failure to make a finding that it was contrary to the child’s best interest to place her with willing relatives before placing her with foster parents was error), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2007). Placement with a relative who lives in another state must comply with the Interstate Compact on the Placement of Children (Article 38 of the Juvenile Code). For more information on the Interstate Compact, see *infra* § 7.8.

(b) Nonrelative kin. If the court does not place the juvenile with a relative, the court may consider whether nonrelative kin is willing and able to provide proper care and supervision of the juvenile in a safe home, and order such placement if it finds that it is in the juvenile’s best interests. “Nonrelative kin” is an individual having a substantial relationship with the juvenile. If the juvenile is a member of a State-recognized Indian tribe, nonrelative kin includes any member of a state or federally recognized tribe, regardless of whether a substantial relationship exists. G.S. 7B-505(c).

- (c) Consideration of child's community.** In determining placement, the court must consider whether it is in the child's best interest to remain in his or her community. G.S. 7B-505(d).
- (d) ICWA, MEPA, and Native American children.** In placing a juvenile in nonsecure custody, the court must consider the application of the Indian Child Welfare Act (ICWA) and the Multiethnic Placement Act (MEPA). G.S. 7B-505(d). *See infra* §§ 13.6 and 13.7 (discussing ICWA and MEPA). If the juvenile is a member of a state recognized tribe, the court may order DSS to notify the tribe of the need for nonsecure custody for the purpose of locating relatives or nonrelative kin. G.S. 7B-505(c).
- (e) ICPC.** Placement of a juvenile with a person, including relatives, *outside of this state* must be in accordance with the Interstate Compact on the Placement of Children (ICPC). G.S. 7B-505(d). *See infra* § 7.8 (discussing the ICPC).

Practice Note: When a nonsecure custody order is issued ex parte, usually in an emergency, the court is unlikely to have enough information to fully consider potential relatives and kin, unless DSS has some history with the family and is making specific recommendations. These issues will receive greater attention at hearings on the need for continued nonsecure custody and at pre-trial conferences or hearings.

6. Violent caregivers. In cases involving allegations of physical abuse, special rules apply to returning a child to the home in which the alleged abuser lives. When a child is removed from a home due to physical abuse, DSS must thoroughly review the alleged abuser's background. This review must include a criminal history check and a review of any available mental health records. If the review reveals that the alleged abuser has a history of violent behavior against people, DSS must petition the court to order the alleged abuser to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist. If DSS files a petition for a mental health evaluation and requests a nonsecure custody order, the court must rule on the petition for an evaluation before returning the child to a home where the alleged abuser is or has been present. *See* G.S. 7B-302(d1), 7B-503(b).

5.6 Nonsecure Custody Hearings

A. Summary

The initial nonsecure custody order is the mechanism for quickly authorizing placement of the child for up to seven calendar days. Keeping the child in nonsecure custody longer requires a hearing and after that, if the child remains in nonsecure custody pending adjudication, opportunities for further hearings. The first hearing cannot be waived, although it can be continued for up to ten business days with the parties' consent. In hearings to determine the need for continued nonsecure custody (referred to here as "nonsecure custody hearings"), the court must determine whether the criteria for placing a child in nonsecure custody exist *and* must address a variety of additional issues if the child is kept in custody. In some districts the first nonsecure custody hearing is preceded by an informal meeting or

conference of the parties without the judge. Nonsecure custody hearings may be combined with required pre-adjudication hearings. *See supra* § 5.7 explaining pre-adjudication hearings and conferences.

B. Timing

1. Initial nonsecure custody hearing when nonsecure custody order entered by judge. The court must conduct a hearing within seven calendar days of the time the juvenile is taken into nonsecure custody. As a result, this hearing is often referred to as the “7-day hearing.” This initial hearing may be continued for up to ten business days with the consent of the parents and the child’s GAL, but the court may require the consent of DSS or other parties or deny a request for a continuance. G.S. 7B-506(a).

2. Initial nonsecure custody hearing when nonsecure custody order entered by delegate. If the original nonsecure custody order was issued by someone designated by the chief district court judge in an administrative order, the hearing must be conducted on the day of the next regularly scheduled session of court, but within seven days in any event. G.S. 7B-506(a).

3. Second and subsequent hearings. After the initial nonsecure custody hearing and pending the adjudicatory hearing, there must be a second nonsecure custody hearing within seven business days of the first hearing and hearings at least every thirty calendar days thereafter, unless waived with the consent of the juvenile’s parent, guardian, or custodian and the child’s guardian ad litem. G.S. 7B-506(e), (f).

4. Hearings by party request. In addition to the required hearings described above, any party may schedule a hearing on the issue of placement. G.S. 7B-506(g). This request can be made even after a party initially waived subsequent nonsecure custody hearings.

Tools: AOC Form AOC-J-141, “[Notice of Hearing in Juvenile Proceeding \(Abuse/Neglect/Dependency\)](#)” (Oct. 2013).

AOC Form AOC-J-142, “[Juvenile Summons and Notice of Hearing \(Abuse/Neglect/Dependency\)](#)” (Oct. 2013).

C. Jurisdictional Inquiry

Early in the nonsecure custody hearing, the court should consider information in the “status of child” affidavit filed with or included in the petition pursuant to G.S. 50A-209 and other information related to where the child is living or has lived; whether a custody order relating to the child has ever been entered in another court; and whether any other action involving the custody of the child is pending in any court. The hearing should proceed only after the court concludes that it has jurisdiction under the UCCJEA. *See supra* Chapter 3 related to jurisdiction and § 3.3 in particular related to UCCJEA requirements. The court also should consider whether proper service of process has occurred or been waived and, if not, whether appropriate efforts are being made to accomplish service of process. (Note that G.S. 7B-800.1, addressing pre-adjudication hearings, which may be combined with nonsecure custody

hearings, requires the court to make inquiries related to service, a verified petition, jurisdiction, and other factors prior to the adjudicatory hearing. *See infra* §5.7.A (pre-adjudication hearings).)

D. Nature of Hearing: Evidence and Burden of Proof

DSS bears the burden to provide clear and convincing evidence that the juvenile's continued placement in nonsecure custody is necessary. The court is not bound by the usual rules of evidence. However, the court must receive testimony and allow the guardian ad litem or juvenile, and the juvenile's parent, guardian, custodian, or caretaker to introduce evidence, to be heard, and to examine witnesses. G.S. 7B-506. Evidence should be limited to that which relates to the need for continued custody prior to adjudication. This hearing should not be a full hearing on the allegations in the petition unless all parties have consented to proceed with an adjudicatory hearing.

For a full discussion of evidence issues in juvenile proceedings, see *infra* Chapter 11.

The hearing is open unless the court orders it closed pursuant to G.S. 7B-801 (*see supra* § 2.7.A.5).

E. Findings and Issues for Consideration

At the hearing on the need for continued nonsecure custody, the court must inquire about and make findings as to all of the following:

- whether there is a reasonable factual basis to believe the matters alleged in the petition are true (the court cannot keep the child in custody unless it finds a reasonable factual basis);
- whether at least one of the conditions warranting nonsecure custody, listed in G.S. 7B-503(a), exists (*see supra* § 5.5.C.3) (the court cannot keep the child in custody unless it finds at least one of the conditions exists);
- whether there are reasonable means other than nonsecure custody available to protect the child (the court cannot keep the child in custody unless it finds there are no other reasonable means of protection);
- the identity and location of any missing parent and efforts that have been made to identify, locate, and serve that parent (the court may order specific efforts to determine the identity and location of a missing parent);
- whether paternity is at issue and, if it is, efforts that have been made to establish paternity (the court may order specific efforts to establish paternity);
- whether there are relatives who are willing and able to care for the juvenile and, if there are, whether placement with the relatives would be in the child's best interest (placement must be with willing and able relatives unless that is found to be contrary to the child's best interest);
- if there are no suitable relatives, whether there are nonrelative kin willing and able to provide proper care and supervision in a safe home;
- whether there are other juveniles in the home and, if there are, DSS's assessment findings and any actions taken or services provided by DSS to protect those children. (The court

does not have jurisdiction over a child who is not named in a petition. *See In re Ivey*, 156 N.C. App. 398 (2003).);

- the results of any mental health evaluation done pursuant to G.S. 7B-503(b) when a respondent alleged to have abused the child has a history of violent behavior, which the court must consider before returning the child home;
- if the juvenile is a member of a State-recognized tribe, whether DSS should be ordered to notify the tribe in order to locate relatives or nonrelative kin for placement.

See G.S. 7B-506, 7B-503, 7B-507.

When an order continues the placement of a juvenile in DSS custody, the court also must adhere to G.S. 7B-507, which requires the court to:

- determine whether DSS made reasonable efforts to prevent or eliminate the need for the juvenile's placement and whether DSS is required to make those efforts prospectively (a decision that DSS is not required to continue making these efforts requires very particular findings, as discussed *supra* § 2.6.E.6);
- make a finding that the child's continuation in or return to his or her own home would be contrary to the child's best interest; and
- specify that the juvenile's placement and care are the responsibility of DSS and that DSS is to provide or arrange for foster care or another placement of the juvenile.

G.S. 7B-507(a). After considering the recommendations of DSS, the court may order a specific placement that the court finds to be in the juvenile's best interest. G.S. 7B-507(a)(4). *See supra* § 2.6.E for details related to reasonable efforts and other findings required by G.S. 7B-507.

G.S. 7B-905.1 requires the court to address visitation that is in the child's best interests when it removes custody from a parent, guardian, or custodian or continues custody of the child outside the home. *See infra* § 7.4.D for details on visitation and the specific requirements of G.S. 7B-905.1.

If continuing a child's placement in nonsecure custody, the court must comply with the Indian Child Welfare Act (ICWA), the Multiethnic Placement Act (MEPA), and, if placement is with someone outside the state, the Interstate Compact on the Placement of Children (ICPC). G.S. 7B-506(h)(2). *See infra* §§ 13.6 and 13.7 (discussing ICWA and MEPA) and § 7.8 (discussing the ICPC).

Note: If the hearing on the need for nonsecure custody is combined with a pre-adjudication hearing pursuant to G.S. 7B-800.1, there are additional factors the court is required to consider, which are detailed *infra* in § 5.7.A.

F. Limits on Court's Authority at Nonsecure Custody Stage

After making proper findings, the court may order that the child remain in nonsecure custody or return the child to the parent, but may not dismiss the petition for reasons other than a

conclusion that the court lacks subject matter jurisdiction. *In re Guarante*, 109 N.C. App. 598 (1993). The court at this stage may not award permanent custody to a parent or any other person—that authority exists only after an adjudication that the child is abused, neglected, or dependent. *In re O.S.*, 175 N.C. App. 745 (2006). The court’s authority to direct orders to parents under G.S. 7B-904 also exists only after an adjudication.

G. Other Issues

If the court continues the child’s placement in nonsecure custody, the court should address the following as appropriate:

- school (including, where possible, efforts to ensure that the child is not required to change schools);
- services (including what services the child and parents should be receiving prior to adjudication and how, when, and by whom the services should be provided or arranged);
- financial support for the child; and
- other proceedings, such as pending domestic violence or criminal actions.

H. Requirements for Court Orders

An order for continued nonsecure custody must:

- be in writing;
- include findings of fact, including the evidence relied on in reaching the decision and the purpose of continued custody; and
- be entered—signed and filed with the clerk—within 30 days after the hearing.

G.S. 7B-506.

The required findings in the order are explained *supra* at § 5.6.E. *See also supra* § 4.9 (relating to court orders). See nonsecure custody hearing checklist *infra* at the end of this manual.

Tool: AOC Form AOC-J-151, “[Order on Need for Continued Nonsecure Custody \(Abuse/Neglect/Dependency\)](#)” (Jan. 2015).

I. Nonsecure Custody Order Is Not Appealable

Nonsecure custody orders are specifically excluded from the list of appealable orders in G.S. 7B-1001. G.S. 7B-1001(a)(4). *See also In re A.T.*, 191 N.C. App. 372 (2008).

5.7 Pre-adjudication Hearings, Conferences, and Mediation

A. Pre-adjudication Hearing

Before the adjudicatory hearing the court must address specific matters in a pre-adjudication hearing, but this hearing may be combined with a hearing on the need for continued nonsecure custody or any pretrial hearing conducted according to local rules. Under G.S. 7B-800.1, the court must consider the following:

- retention or release of provisional counsel;
- identification of the parties to the proceeding;
- whether paternity has been established or efforts made to establish paternity, including the identity and location of a missing parent;
- whether relatives have been identified and notified as potential resources for placement or support;
- whether all summons, service of process, and notice requirements have been met;
- whether the petition has been properly verified and invokes jurisdiction (S.L. 2014-16 added this requirement effective October 1, 2014);
- any pretrial motions, including motions for appointment of a GAL for a parent, for discovery, to amend the petition, or for a continuance;
- any other issue that can properly be addressed as a preliminary matter.

At the hearing, the parties may enter stipulations in accordance with G.S. 7B-807 or enter a consent order in accordance with G.S. 7B-801. G.S. 7B-800.1.

B. Child Planning Conferences

Some districts have developed procedures for bringing together everyone involved in a case as early as possible after a child is taken into nonsecure custody to share information and identify and resolve issues, often referred to as a “child planning conference.” (In some districts it may be called a “day-one conference” or something else.) Child planning conferences are not provided for by statute and do not involve the judge. They focus more on communication among the parties than on the resolution of legal issues. Child planning conferences generally seek to:

- facilitate the exchange of information, saving the parties time and effort and ensuring that everyone has the same information;
- expedite the delivery of services by identifying needs and appropriate community resources and contacts;
- aid in the early identification and involvement of relatives when appropriate;
- promote a problem-solving rather than adversarial approach to the resolution of issues;
- minimize court delays by coordinating schedules and addressing potential problems that might cause delay; and
- move the case more quickly toward the next stage, minimizing the time the child spends out of the home or speeding the process toward another permanent placement.

In some districts, local court rules establish procedures for these conferences. For example, see Rule 11 of the [Local Rules for Juvenile Court, 15A Judicial District](#) (Alamance County Local Juvenile Court Rules). Local rules for other districts are available on the “[Local Rules and Forms](#)” page of the North Carolina Administrative Office of the Courts website.

The Court Programs Division of the AOC has created guidelines for child planning conferences: [CHILD PLANNING CONFERENCES BEST PRACTICES AND PROCEDURES FOR JUVENILE ABUSE, NEGLECT AND DEPENDENCY CASES IN NORTH CAROLINA](#) (North Carolina AOC, 2009).

C. Permanency Mediation

The permanency mediation program (described *supra* § 1.3.B.11) is active in a few judicial districts and, according to G.S. 7B-202, will be established across the state in stages. The purpose of the program is to provide mediation services to resolve issues in cases in which a juvenile is alleged to be abused, neglected, or dependent or in which a petition or motion to terminate parental rights has been filed. Cases identified as appropriate for permanency mediation are typically ordered to mediation by the judge at the first court hearing after a child is removed from the home. In other cases, the guardian ad litem, a parent’s attorney, or DSS may request permanency mediation.

D. Discovery

Court hearings related to discovery motions may take place prior to adjudication. Discovery is addressed in G.S. 7B-700 and is explained in detail *supra*, § 4.6. However, information sharing among parties also takes place pursuant to other Juvenile Code statutes (explained *supra* § 2.7) and through permissible voluntary information sharing.

Chapter 6

Adjudication of Abuse, Neglect, or Dependency¹

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1. Source for some content in this chapter: KELLA W. HATCHER, N.C. ADMIN. OFFICE OF THE COURTS, [NORTH CAROLINA GUARDIAN AD LITEM ATTORNEY PRACTICE MANUAL](#) (2002).

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6.1 Summary and Purpose of Adjudication

“Adjudication” refers both to the hearing at which the court determines the existence or nonexistence of the facts alleged in the petition, and to the court’s action when it concludes as a matter of law that a child is an abused, neglected, or dependent juvenile. The petitioner—DSS—must prove the facts by clear and convincing evidence. The adjudication is a formal trial before a judge, and the rules of evidence apply. If the alleged facts are proven and the court concludes that they are sufficient to support an adjudication, the child is adjudicated abused, neglected, or dependent and the court may proceed to the dispositional phase of the case to determine the best way to address the family’s needs. If the allegations are not proven by clear and convincing evidence, there can be no adjudication and the court must dismiss the case.

A stated purpose of the Juvenile Code is to provide hearing procedures that assure fairness and equity and that protect the constitutional rights of juveniles and parents. G.S. 7B-100(1). The Code specifically instructs the court to protect the rights of the child and the parent to assure due process at the adjudication hearing. G.S. 7B-802. An important aspect of assuring fairness and protecting rights is appropriately separating the adjudication and disposition phases of the case. While it is permissible for the two phases to take place in one court setting, the purposes, procedures, and standards applicable to the two phases are different.

If all parties are present, or are represented by counsel who is present and authorized to consent, a consent order can be entered and a full formal trial is not required; however, the court still must make findings of fact sufficient to support the order.

This chapter addresses the adjudication hearing only. All matters that are prerequisites or preliminary to the adjudication hearing are addressed *supra* in Chapter 5 and elsewhere in this manual. These include:

- the filing of a proper petition alleging abuse, neglect, dependency (*supra* §§ 5.3.A; 4.2);
- the summons and service of process (*supra* §§ 5.3.B; 4.3; 4.4);
- jurisdiction (*supra* chapter 3);
- appointment of counsel and guardians ad litem for parents (*supra* §§ 2.5.F; 5.4.B);
- appointment of guardian ad litem and attorney advocate for child (*supra* §§ 5.4.C; 2.3);
- orders for nonsecure custody and hearings on the need for continued nonsecure custody (*supra* §§ 5.5; 5.6);
- discovery and access to information (*supra* §§ 4.6; 2.7); and
- pre-adjudication hearing and other pre-trial conferences (*supra* § 5.7).

6.2 The Adjudication Hearing

A. Timing

1. Within 60 days. The adjudication hearing must be held within 60 days from the time the petition is filed unless the court orders that it be held later, as described below. G.S. 7B-801(c).

2. Continuances. The court may hold the hearing outside the 60-day time limit if it finds that grounds for a continuance exist. G.S. 7B-801(c). Under G.S. 7B-803, continuances are permissible only:

- for good cause, for as long as is reasonably required, to receive additional evidence, reports, or assessments the court has requested, or other information needed in the best interests of the juvenile;
- to allow a reasonable time for the parties to conduct expeditious discovery; or
- in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

However, resolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition may not be the sole extraordinary circumstance for granting a continuance.

It is also important to be familiar with any local rules relating to continuances. *See supra* § 4.5 (providing more detail and case law related to continuances and the consequences of delay).

B. Procedure

Most procedural aspects of an adjudication hearing are governed by the Juvenile Code, but in some circumstances the Rules of Civil Procedure apply. When the Juvenile Code provides a specific procedure, that procedure prevails over the Rules of Civil Procedure. Otherwise, the Rules may apply when they do not conflict with the Juvenile Code and to the extent that they advance the purposes of the Code. *In re L.O.K.*, 174 N.C. App. 426 (2005). *See supra* § 4.1 (providing detail related to the applicability of the Rules of Civil Procedure to juvenile cases).

C. Participants and Public Access to Hearing

At adjudication, DSS is the petitioner with the burden of proof, and the respondents (parents, guardian, custodian, or caretaker) and the juvenile (usually through a GAL and attorney advocate) have the right to present evidence and cross-examine witnesses. The court may proceed with an adjudication hearing even if only one parent has been served, although efforts to serve the other parent should continue. *See In re Poole*, 357 N.C. 151 (2003), *rev'g per curiam for the reasons stated in the dissent*, 151 N.C. App. 472 (2002). When a parent has been served, it is critical that the parent be given notice of all hearings and be served with all documents filed in the case, even if the parent is not represented by counsel and does not

attend every hearing. *In re H.D.F.*, 197 N.C. App. 480 (2009) (requiring that all papers and notices be served on the father even though he waived his right to counsel and did not attend all hearings). If proper notice has been given, the court may proceed with the hearing even if the parents are not present. However, DSS still must present evidence and prove its case. The court may not adjudicate based on the petition alone (*see infra* § 6.2.F.), and may enter a consent judgment only when all parties are present or are represented by counsel who is present and authorized to consent. See *infra* § 6.5, discussing requirements for consent orders.

The beginning assumption is that hearings in juvenile cases are open to the public, and if the juvenile requests that a hearing or part of a hearing be open, it must be open. G.S. 7B-801(b). Otherwise, the court may determine whether a particular hearing or part of a hearing should be closed to the public after considering the circumstances of the case and the following factors:

- the nature of the allegations in the petition;
- the child's age and maturity;
- the benefit to the child of confidentiality;
- the benefit to the child of an open hearing;
- the extent to which the confidentiality of the juvenile's record pursuant to G.S. 7B-2901 will be compromised by an open hearing; and
- any other relevant factor.

G.S. 7B-801(a).

Even if a hearing is open, electronic media and still photography coverage of juvenile proceedings is prohibited by Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure. Local rules should also be consulted on this issue.

D. Record of Proceedings

The hearing must be recorded by stenographic notes or electronic or mechanical means. G.S. 7B-806. Audio recording is the means typically used by courts. Recordings of juvenile court hearings may be reduced to writing only when notice of appeal has been filed, and recordings may be erased only pursuant to court order after the time for appeal has expired with no appeal having been filed. G.S. 7B-2901(a). However, Administrative Office of the Courts records retention policies may require that the recordings, which are considered part of the juvenile file maintained by the clerk, be kept longer.

Appellate cases have indicated that gaps in a recording or the accidental destruction of the tape recording is reversible error only if it results in prejudice. See *In re L.B.*, 184 N.C. App. 442 (2007) and cases cited therein. The fact that the recording is of poor quality or inadequate will matter only if the appellant shows specific error (as opposed to probable error) in the recording and that the appellant was prejudiced as a result of the recording

problems. *See, e.g., In re L.O.K.*, 174 N.C. App. 426 (2005); *In re Howell*, 161 N.C. App. 650 (2003); *In re Bradshaw*, 160 N.C. App. 677 (2003).

Problems with the recording of a hearing present issues to be dealt with in settling the record on appeal pursuant to Rule 9 of the Rules of Appellate Procedure. When an adequate verbatim transcript is unavailable, there may be means of reconstructing the testimony, and there is an expectation that an appellant do everything possible to reconstruct the transcript. *See In re L.B.*, 184 N.C. App. 442 (2007) (rejecting respondent's contention that she was denied due process where electronic recordings were accidentally destroyed, finding that respondent did not do all that she could to reconstruct the transcript and did not show prejudice).

E. Scope of Hearing and Amendment of the Petition

In conducting the adjudication hearing, the court is required to protect the rights of the juvenile and the parent to assure due process. G.S. 7B-802. The court may consider only matters relating to the conditions alleged in the petition. *See* G.S. 7B-802, 7B-805, 7B-807 (referencing matters alleged in petition in relation to adjudication). *See also In re D.C.*, 183 N.C. App. 344 (2007) (holding that it was error for court to allow DSS to proceed on a theory of neglect and to adjudicate neglect when the petition alleged only dependency and did not put respondent on notice as to a neglect allegation); *In re L.T.R.*, 181 N.C. App. 376 (2007) (rejecting the father's claim that the petition did not put him on notice that the child's bathing routine would be at issue because an attachment to the petition addressed an injury occurring during bathing and the father did not object to evidence of child's bathing routine when it was offered at trial). In addition, events that occur after the filing of the petition are not to be considered at adjudication, because the issue at adjudication is whether the facts alleged in the petition are true. *See In re A.B.*, 179 N.C. App. 605 (2006). *See also infra* § 6.3.B (explaining the separation of evidence for adjudication and disposition). At the conclusion of the hearing, the court must adjudicate the existence or nonexistence of any conditions alleged in the petition. G.S. 7B-802.

Where parties or the court seek to consider matters outside the scope of the petition, DSS may seek to amend or supplement the petition to broaden or change its scope. Under the Juvenile Code, the court in its discretion may permit amendment of a petition, but must direct how the amended petition must be served and specify the time a party has to prepare after the amendment. G.S. 7B-800. *See supra* § 4.2.D (discussing amendments in juvenile cases).

Practice Note: A particular problem occurs when parties attempt to “negotiate” or “stipulate” to amend the petition to reflect a status or allegations that are not supported by the evidence. *See infra* practice note in § 6.5 below (explaining problems created by this situation).

F. No Default Judgment

An adjudication of abuse, neglect, or dependency cannot result from a default judgment or judgment on the pleadings. In the absence of a properly entered consent order, the Juvenile

Code requires a hearing. *See In re I.D.*, __ N.C. App. __, 769 S.E.2d 846 (2015); *In re Shaw*, 152 N.C. App. 126 (2002); *In re Thrift*, 137 N.C. App. 559 (2000).

G. Stipulations

Stipulations by a party may constitute evidence at adjudication. A record of specific stipulated adjudicatory facts must be made by either:

- submitting to the court written stipulated facts, signed by each party stipulating to them; or
- reading the stipulated facts into the record, followed by an oral statement of agreement by each party stipulating to them.

G.S. 7B-807(a). Stipulations are binding admissions to the court, “preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party from the necessity of producing evidence to establish” what is stipulated to. *In re A.K.D.*, __ N.C. App. __, 745 S.E.2d 7, 9 (2013) (quoting *Thomas v. Poole*, 54 N.C. App. 239 (1981)). When construing a stipulation, the court must attempt to effectuate the intention of the stipulating party. However, stipulations as to questions of law are invalid and not binding on the courts. *In re A.K.D.*, *Id.* (citations omitted) (holding that the parties' stipulation that the TPR ground of willful abandonment existed was an invalid stipulation to a conclusion of law).

6.3 Evidence and Proof

This section addresses evidentiary standards, burden of proof, and case law related to the sufficiency of evidence and findings in abuse, neglect, and dependency cases. Other evidence topics such as hearsay, experts, child witnesses, judicial notice, and other matters related to the admissibility of evidence are addressed *infra* in Chapter 11, Evidence.

A. Standard and Burden of Proof

The allegations of the petition must be proven by clear and convincing evidence. G.S. 7B-805; *In re Pittman*, 149 N.C. App. 756 (2003). DSS is the petitioner and has the burden of proof.

The determination of whether a child is abused, neglected, or dependent is about the circumstances and conditions of the child, not the fault or culpability of the parent. *See In re Montgomery*, 311 N.C. 101 (1984); *In re S.H.*, 217 N.C. App. 140 (2011); *In re J.S.*, 182 N.C. App. 79 (2007). However, identifying the perpetrator of abuse (or in some cases neglect) may be a goal of DSS or an issue for the court in determining whether reunification is possible. *See In re Y.Y.E.T.*, 205 N.C. App. 120 (2010) (finding that both parents were jointly and individually responsible for their child's injuries where infant suffered non-accidental injuries while in the care of both parents, DSS and the court sought to determine which parent was the perpetrator, but a perpetrator could not be identified).

B. Evidentiary Standards

The rules of evidence in civil cases apply to adjudication hearings. G.S. 7B-804. In reaching an adjudication decision, the court must consider only evidence that is relevant to a determination of the existence or nonexistence of the facts and conditions alleged in the petition. *See In re A.B.*, 179 N.C. App. 605 (2006). The prohibition of considering post-petition evidence was not applicable when it is evidence that paternity has been established after a petition was filed but before the adjudication hearing. *In re V.B.*, __ N.C. App. __, 768 S.E.2d 867 (2015). In a dependency action, the petitioner failed to allege in the petition or present evidence that the father was unable to provide or arrange for the care and supervision of the child. The court of appeals reasoned that paternity was a fixed and ongoing circumstance that was extremely relevant to determining whether the child was dependent. *Id.*

Stipulations as to adjudicatory facts may be made but must be properly recorded as described *supra*, § 6.2.G. G.S. 7B-807(a).

See *infra* Chapter 11, Evidence, for detailed information on evidence issues in juvenile proceedings.

Ordinarily, an adjudication hearing is conducted and the court makes findings and conclusions related to adjudication before proceeding to a disposition hearing. Proceeding in this manner helps to ensure that the appropriate evidentiary standards are applied to the adjudication and disposition phases of the case. However, appellate courts have indicated that it is not error for the court to combine the adjudication and disposition hearings if proper evidentiary standards and rules are applied. *See In re O.W.*, 164 N.C. App. 699 (2004). If the hearings are combined, evidence that relates to facts occurring after the date of the petition, or evidence relating to the needs and interests of the child or parents but not relevant to proving allegations of abuse, neglect, or dependency, may be considered only for the purpose of making dispositional determinations. Predisposition reports may not be submitted to or considered by the court until after adjudication. G.S. 7B-808(a).

Where failure to apply the appropriate evidentiary standards and rules to the separate phases of the case is asserted as error on appeal, appellate courts have refused to find error absent a showing that evidence was improperly considered. *See In re O.W.*, 164 N.C. App. 699. In a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it. *See Powers v. Powers*, 130 N.C. App. 37 (1998) (presuming that the judge considered evidence related to post-petition occurrences, which had come in prior to the adjudication determination, only for dispositional purposes).

C. Evidence at Adjudication

1. Facts must meet statutory definition. A court's determination that a child is an abused, neglected, or dependent juvenile is a conclusion of law. At adjudication, the issue is whether the petitioner has presented clear and convincing evidence to support findings of fact from which the court can conclude that the child is abused, neglected, or dependent as alleged in the

petition. However, it is not unusual for courts to refer to “evidence of abuse, neglect, or dependency” as shorthand for the same thing. The facts alleged in the petition and the evidence introduced to establish those facts must relate to the statutory meaning of the alleged status—abused, neglected, or dependent, as defined in G.S. 7B-101. The statutory definitions are especially important given the fact that they do not necessarily conform to common perceptions of what constitutes abuse, neglect, or dependency. These definitions and case law interpreting them are discussed in detail *supra* at § 2.6.

2. Evidence of abuse, neglect, and dependency in other types of hearings. Abuse, neglect, and dependency are, or are part of, some grounds for termination of parental rights, so case law addressing evidence to prove abuse, neglect, or dependency sometimes arises from TPR proceedings. However, in the TPR context the court may consider factors different from those it considers in an original adjudication hearing, because the issue in a TPR case is the conduct of the parent while the issue in an underlying adjudication is the condition of the child. Therefore, some case law concerning evidence to prove abuse, neglect, or dependency as grounds for TPR may not be directly applicable to original abuse, neglect, or dependency adjudications. However, some TPR cases do provide guidance regarding whether circumstances meet the definition of abuse or neglect since the definitions are the same in both types of proceedings. *See In re K.J.D.*, 203 N.C. App. 653 (2010) (stating that it is appropriate in examining an adjudication of neglect to look to TPR cases addressing whether circumstances meet the definition of neglect since the definition of neglect is the same in both types of proceedings). *See supra* § 2.6.B.7 (discussing the difference between an original adjudication of neglect and neglect as a ground for TPR); *infra* § 9.11.A (citing case law discussing abuse and neglect grounds for TPR).

D. Evidence to Establish Abuse

1. Definition of abuse. *See supra* § 2.6.A (discussing the definition of abuse and cases interpreting the definition). The Juvenile Code defines an abused juvenile as any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

- inflicts or allows to be inflicted on the juvenile a serious physical injury by other than accidental means;
- creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
- uses or allows to be used on the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;
- commits, permits, or encourages the commission of a violation of laws involving sex crimes (the statute lists specific laws) by, with, or upon the juvenile;
- commits or allows to be committed against the child an offense involving human trafficking, involuntary servitude, or sexual servitude;
- creates or allows to be created serious emotional damage to the juvenile (serious emotional damage is evidenced by a juvenile’s severe anxiety, depression, withdrawal, or aggressive behavior toward himself, herself, or others); or

- encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

G.S. 7B-101(1).

2. Evidence related to abuse. Case law related to evidence for an adjudication of abuse is relatively limited, as compared to case law related to neglect. Since the definition of abuse specifies *serious* physical injury and *grossly* inappropriate procedures or devices to modify behavior, circumstances involving child maltreatment more often meet the definition of neglect, in the form of improper care, than abuse. Where a child suffers physical injuries such as bone fractures or brain trauma there may be little dispute about whether the injuries actually occurred or are serious enough to come within the definition of abuse if caused by a parent, guardian, custodian, or caretaker. Other situations are less clear regarding what constitutes abuse. Some key issues related to abuse have been discussed in appellate cases.

(a) Serious injury, corporal punishment, and cruelty. Appellate decisions examining the type of injuries sustained from corporal punishment have varied in determining what constitutes abuse. In one case, the court of appeals found that temporary bruising or temporary marks resulting from a spanking were insufficient to rise to the level of “serious injury” to fit within the definition of abuse. *See In re C.B.*, 180 N.C. App. 221 (2006). However, serious injury constituting abuse was found to have occurred where an almost four-year-old child whose stepfather had hit him with a brush had a dark, six-inch bruise on his thigh that lasted well over a week, a doctor testified that it would have taken considerable force to cause such a bruise, and the child was still experiencing sufficient discomfort to complain of pain several days later. *In re L.T.R.*, 181 N.C. App. 376 (2007). In this case the court noted that neither the statute nor case law requires that the injured child receive medical attention to sustain a determination that the injury is serious. In the case *In re H.H.*, ___ N.C. App. ___ 767 S.E.2d 347 (2014), the petition alleged physical discipline as cruelty under the third prong of the abuse definition and did not allege serious injury under the first prong of the definition. The court of appeals determined that sufficient findings supporting an adjudication of abuse were made where the mother struck her eight year-old five times with a belt, leaving multiple bruises on the inside and outside of his legs that were still visible the next day, and the child described it as “a beating.”

Some cases involving an assessment of injuries sustained from physical discipline are examined in the context of neglect allegations, as opposed to abuse. Because neglect does not require a finding of serious physical injury or cruelty, the analysis is different, making it difficult to compare corporal punishment cases alleged as neglect versus those alleged as abuse. *See also infra* § 6.3.E.2.d (discussing inappropriate discipline as neglect).

(b) Munchausen syndrome by proxy (Note: The DSM 5 Replaced Munchausen Syndrome with Factitious Disorder by Proxy). Findings of abuse were affirmed where three experts testified that the child was the probable victim of Munchausen syndrome by proxy (MSP), which involves a person deliberately causing injury or illness to another person and seeking medical attention for that person, often as a means of gaining attention. During her

hospitalization, the child underwent numerous painful and invasive medical procedures to determine the source of symptoms reported by her mother, who one doctor believed had potentially induced the symptoms by either smothering or administering toxin to the child. *In re McCabe*, 157 N.C. App. 673 (2003); *see also In re Greene*, 152 N.C. App. 410 (2002) (affirming TPR on ground of abuse in case in which experts had diagnosed Munchausen syndrome by proxy).

- (c) **Emotional damage.** Evidence of serious emotional damage due to the parents' long-standing, acrimonious marital dispute, resulting in chronic adjustment disorder and depression in their children, was sufficient to support a finding of emotional abuse. *Powers v. Powers*, 130 N.C. App. 37 (1998).
- (d) **Sexual acts.** Evidence was sufficient to establish abuse where the child had made statements that the father had asked the child to touch his penis, asked her to look at magazines with pictures of naked people, and put his hand on her crotch in bed; and in response to the trial court's question about what she saw when she was in the basement with the child and her father, the child's cousin made a drawing that depicted a man exposing himself. *In re Cogdill*, 137 N.C. App. 504 (2000). Evidence was sufficient to support a determination of abuse where the father grabbed the child from behind and fondled her breasts and on another occasion inappropriately touched her in the vaginal area. *In re M.G.*, 187 N.C. App. 536 (2007), *rev'd in part on other grounds*, 363 N.C. 570 (2009).
- (e) **Nonaccidental injuries.** An adult's exclusive custody of a child who suffers nonaccidental injuries that were not self-inflicted can support an inference that the adult inflicted the injuries. *State v. Wilson*, 181 N.C. App. 540 (2007).
- An abuse adjudication was affirmed where there were findings of fact that the child was seen at a hospital for scratches, bruises, swelling, and a skull fracture; a pediatrician concluded that the skull fracture was caused by nonaccidental means; the mother's explanations were inconsistent with the injuries; the injuries occurred during the dates the mother had physical custody of the child; and the mother failed to obtain medical attention for the child even though the injuries were obvious and severe. *In re T.H.T.*, 185 N.C. App. 337 (2007), *aff'd as modified on other grounds*, 362 N.C. 446 (2008).
 - Nonaccidental injury was established where an infant had multiple rib fractures that were several weeks old and in different stages of healing, the parents were the primary caretakers but had not sought medical attention for the child, and there was an undisputed finding that the injury would have caused the child to cry. *In re S.W.*, 187 N.C. App. 505 (2007).
 - Evidence was sufficient to show nonaccidental injury where doctors testified that the child had suffered a severe blow to the head resulting in extensive bleeding over the surface of the brain within a relatively short time before being brought to the hospital. Doctors could not specify exactly where or how the injury occurred, but three of four doctors testified that the injuries were likely non-accidental. *In re C.M.*, 198 N.C. App. 53 (2009).

- Evidence was not sufficient to support a conclusion that a child with unusual fractures had been abused and neglected where medical testimony from eight physicians ranged from conclusions that the child's injuries were due to shaken baby syndrome to "I don't know what happened to this child," the child's regular pediatrician reported no concerns or "red flags" for child abuse in her dealings with the child's family, there was no evidence that the child's parents were anything other than loving and caring, nor was there any evidence of marital problems between parents or any psychiatric condition that affected their ability to parent the child appropriately. *In re A.R.H.*, 177 N.C. App. 797 (2006).

(f) Failure to prevent harm. Failure to prevent harm or allowing situations to occur that would tend to promote harm can be considered abuse. For example, where the mother knew of the father's violent and abusive nature and alcohol abuse, she witnessed many incidents where the father would consume alcohol to excess and act out against her and the children, she allowed the father to drive the children after he had consumed a large quantity of alcoholic beverages, and she failed to take necessary steps to protect the children, the evidence was sufficient to support an adjudication of abuse in that the mother allowed to be created a substantial risk of serious physical injury to the children by other than accidental means. *In re M.G.*, 187 N.C. App. 536 (2007), *rev'd in part on other grounds*, 363 N.C. 570 (2009). *See also In re Y.Y.E.T.*, 205 N.C. App. 120 (2010) (holding that where nonaccidental injuries occurred to infant while under the care of both parents and the perpetrator could not be identified, both parents were deemed responsible, either for directly causing the injury or for failing to prevent it); *In re Gwaltney*, 68 N.C. App. 686 (1984) (affirming adjudication of abuse and neglect where evidence showed that mother acquiesced in sexual abuse of the child).

E. Evidence to Establish Neglect

1. Definition of neglect. *See supra* § 2.6.B (discussing the definition of neglect and cases interpreting the definition). The Juvenile Code in G.S. 7B-101(15) defines a neglected juvenile as one who:

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

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

Some aspects of the definition of neglect are relatively vague, making it especially important for the court and parties to take into account community and cultural values as well as the purposes of the Juvenile Code when determining the meaning of phrases like "proper care

[and] supervision,” “necessary medical care,” or “environment injurious to the juvenile’s welfare.” See *supra* § 1.2 for a discussion of these purposes. However, the statutory definition of neglect has been found to be constitutional and not void for vagueness. See *In re Moore*, 306 N.C. 394 (1982); *In re Huber*, 57 N.C. App. 453 (1982); *In re Biggers*, 50 N.C. App. 332 (1981). [Note that these cases dealt with a previous, but similar, version of the definition.]

2. Evidence related to neglect. When evaluating evidence to establish neglect, appellate courts have said that the evidence must show that a child’s physical, mental, or emotional condition is impaired or is in danger of becoming impaired as a result of the failure of his or her parent, guardian, or custodian to exercise the degree of care consistent with the normative standards imposed on parents by society. See *In re J.W. and K.M.*, __ N.C. App. __, __ S.E.2d __ (May 5, 2015); *In re D.B.J.*, 197 N.C. App. 752 (2009); *In re Padgett*, 156 N.C. App. 644 (2003); *In re Thompson*, 64 N.C. App. 95 (1983). A trial court’s failure to make specific findings as to impairment or risk of harm does not require reversal where the evidence supports such findings. See *In re H.N.D.*, 364 N.C. 597 (2010) (adopting dissenting opinion in 205 N.C. App. 702 (2010)). Evidence that the parent loves or is concerned about his or her child will not necessarily prevent the court from making a determination that the child is neglected. *In re Montgomery*, 311 N.C. 101 (1984).

Much of the case law related to what constitutes neglect is in the context of termination of parental rights proceedings as opposed to proceedings on petitions alleging neglect. Appellate cases have distinguished neglect in the two types of proceedings, noting that parental rights may not be terminated for threatened future harm, but DSS may obtain temporary custody of a child when there is a risk of neglect in the future. *In re K.J.D.*, 203 N.C. App. 653 (2010) (citing *In re Evans*, 81 N.C. App. 449 (1986)). To the extent that TPR cases address the definition of neglect, they may be relevant to neglect adjudications. See *supra* § 6.3.C.2 for additional explanation of the applicability of TPR cases and *infra* § 9.11.A relating to neglect in the context of TPR cases.

Appellate cases typically deal with a trial court’s adjudication of neglect that is based on more than one aspect of the definition of neglect (e.g., a combination of lack of proper care, lack of proper supervision, and an injurious environment). The following cases highlight some aspects of neglect or factors contributing to neglect that have been discussed by appellate courts.

(a) Other children living in the home. Language in the Code about the relevance of abuse or neglect of other children does not mandate a conclusion that a child is neglected when another child in the home has been abused or neglected. The trial court has the discretion to determine the weight to be given to evidence related to abuse or neglect of other children. See *In re A.S.*, 190 N.C. App. 679 (2008), *aff’d per curiam*, 363 N.C. 254 (2009).

- Appellate courts have not interpreted the language in the definition “lives in the home” literally with respect to newborns who are still in the hospital, finding that the abuse or neglect of siblings or other children in the home, including events that occurred prior to the birth of the newborn, is relevant in assessing the risk to a newborn. See, e.g. *In*

- re A.S.*, 190 N.C. App. 679 (2008), *aff'd per curiam*, 363 N.C. 254 (2009); *In re A.B.*, 179 N.C. App. 605 (2006); *In re E.N.S.*, 164 N.C. App. 146 (2004); *In re McLean*, 135 N.C. App. 387 (1999) (decided under prior law).
- In considering the abuse or neglect of another child in the home when determining whether a child is neglected, the trial court must assess whether there is a substantial risk of future abuse or neglect of a child in that home based on the historical facts of the case. *See In re J.C.B.*, ___ N.C. App. ___, 757 S.E.2d 487 (2014); *In re S.H.*, ___ N.C. App. ___, 719 S.E.2d 157 (2011); *In re D.B.J.*, 197 N.C. App. 752 (2009); *In re P.M.*, 169 N.C. App. 423 (2005); *In re McLean*, 135 N.C. App. 387 (1999) (decided under prior law). This same analysis is applicable when the juvenile alleged to be neglected has never resided in the parent's home (as in the case of a newborn still in the hospital). *In re A.S.*, 190 N.C. App. 679 (2008), *aff'd per curiam*, 363 N.C. 254 (2009).
 - Failure to acknowledge responsibility for abuse or neglect of another child can contribute to a conclusion that there is a substantial risk of future abuse or neglect. *See In re N.G.*, 186 N.C. App. 1 (2007), *aff'd per curiam*, 362 N.C. 229 (2008).
 - When one child is adjudicated abused and neglected at the *same hearing* in which another child is alleged to be neglected, the trial court has the discretion to consider that adjudication relevant as an "other child in the home" who has been subjected to abuse and neglect. *In re D.B.J.*, 197 N.C. App. 752 (2009). *See also In re C.M.*, 198 N.C. App. 53 (2009).
 - Reversible error was found where an adjudication that a newborn was neglected was based on a prior adjudication of a sibling, when the trial court relied solely on prior orders concerning the sibling. The only prior order that could have been properly considered was from a hearing occurring many months earlier, and there was no evidence as to the parents' progress since that time or whether they still denied knowing the cause of the sibling's injuries. *In re A.K.*, 178 N.C. App. 727 (2006).
 - Where a child's siblings had been adjudicated abused and neglected because the mother's live-in boyfriend had pled guilty to several felony sex offenses against them, and the mother was indicted for felony child abuse, evidence supported the finding of an injurious environment to establish neglect. *In re D.S.A.*, 181 N.C. App. 715 (2007).
 - Where three siblings witnessed a slow deterioration of their younger sister's health as a result of their parents' failure to seek and obtain medical treatments for her, the abuse and neglect of their younger sister was properly considered (in combination with other evidence) by the trial court in concluding that the three children were neglected. *In re S.H.*, ___ N.C. App. ___, 719 S.E.2d 157 (2011).

(b) Lack of proper care and supervision.

- An anonymous call to DSS reporting a naked two-year-old playing unsupervised in a driveway was not sufficient, standing alone, to constitute a report of neglect or warrant an investigation by DSS. *In re Stumbo*, 357 N.C. 279 (2003).
- Evidence that a mother had left a 16-month-old child alone in a motel room for more than 30 minutes and that the child was later found by a motel employee after a guest reported continuous crying was sufficient to support an adjudication of neglect. *In re D.C.*, 183 N.C. App. 344 (2007).

- Where findings were that mother had previous problems with drugs and had previously injured the child while abusing drugs, was continuing to use drugs illegally, had hit and kicked the child, refused to cooperate with DSS, and had a friend-like relationship with child that seemed to contribute to the child's defiant behavior (child was diagnosed with oppositional defiant disorder), these findings supported the trial court's conclusion that the child was not receiving proper care and supervision and was living in an injurious environment. *In re J.D.R.*, ___ N.C. App. ___, 768 S.E.2d 172 (2015).
- Findings supported a neglect adjudication based on lack of supervision and substance abuse where: mother had an opiate dependency impairing her ability to parent; child was locked out of his house when mother was home, requiring law enforcement assistance to regain access; mother screamed obscenities at DSS in front of children for 45 minutes; children frequently missed school and mother did not respond to notices related to absences; and baby had not had routine immunizations and also had yeast infection, eczema, and cradle cap. *In re H.D.F.*, 197 N.C. App. 480 (2009).
- Evidence of the parents' habit of placing an infant on the sofa without surrounding him with pillows or other forms of restraint was not sufficient to establish neglect where there was also evidence that the infant was unable to roll over, was not mobile when placed on the sofa, had never missed any appointments with his pediatrician, was developing appropriately, and had no prior injuries (although other conduct on the part of the father was deemed abuse by the trial court). *In re J.A.G.*, 172 N.C. App. 708 (2005).
- Lack of cleanliness or food have been found to be factors contributing to neglect. For example, lack of cleanliness was a primary factor in a finding of neglect where a disabled child who attended a special school was repeatedly coming to school in a "filthy condition" and other children made fun of him, the staff would have to bathe him, and he was not taught hygiene at home. *In re Safriet*, 112 N.C. App. 747 (1993). Finding that a child's home is clean or that the child is well-fed will not prevent a finding of neglect; where there is a finding of physical, mental, or emotional impairment, or risk of impairment, a child may be considered neglected. *See In re Thompson*, 64 N.C. App. 95, 101 (1983).
- Failure to educate a child has been found to be lack of proper care in some circumstances. *See In re McMillan*, 30 N.C. App. 235 (1976) (affirming the determination of neglect where the parents did not send the children to school because school did not teach about Indian culture and heritage, and the parents failed to provide the children with an alternative education); *In re Devone*, 86 N.C. App. 57 (1987) (upholding determination that a mentally handicapped child was neglected where the father refused to send the child to school to receive remedial education and special education classes were critical to the child's development and welfare). Note that G.S. 115C-378 describes a school principal's responsibilities in relation to children who are repeatedly absent and sets out circumstances in which a principal is required to notify the district attorney or DSS regarding unlawful absences.
- Evidence of a mother's struggles with parenting skills, domestic violence, anger management, mental illness and a failure to obtain treatment for the illness, as well as her unstable housing situation and history of leaving the child without proper supervision, was sufficient to support an adjudication of neglect because her failure to

provide proper care and supervision placed the child at substantial risk of harm. *In re K.D.*, 178 N.C. App. 322 (2006).

- On appeal, respondent mother argued that the child should not have been adjudicated neglected, because at the time of the petition the child was in a kinship placement where care was appropriate and the child was safe. The court disagreed, analyzing the situation as analogous to TPR cases based on neglect in which a child has not lived with the parent for a period of time, finding that evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect should be considered. Here, the findings supporting an adjudication of neglect were sufficient: the child was placed in kinship care due to both parents' inability to care for the child and this inability continued; the mother continued to engage in assaultive behavior; she had not completed counseling to address anger issues or sought treatment for her mental disorder; and the mother did not have stable housing or a job. The court concluded that the child would be endangered if the mother removed the child from the relative's home, which legally she could do. *In re K.J.D.*, 203 N.C. App. 653 (2010).

(c) Lack of necessary medical or remedial care.

- Neglect was established where findings of fact showed that respondents engaged in multiple acts of domestic violence including an incident resulting in an injury to the infant child, after which respondents did not seek medical treatment for the child. Mother also informed a social worker that the child had other serious health issues but the mother had cancelled medical appointments for the child. *In re A.R.*, ___ N.C. App. ___, 742 S.E.2d 629 (2013).
- Neglect was established where children had never received any medical care, and their younger sister had suffered cardiac arrest as a result of starvation and had to be airlifted to the hospital. *In re S.H.* ___ N.C. App. ___, 719 S.E.2d 157 (2011).
- Neglect was shown where the mother delayed in seeking medical help to find the cause of serious bruising on much of child's body (found to be due to blood disorder) and delayed in seeking help for disciplinary, behavioral, and developmental problems displayed by the children. *In re C.P.*, 181 N.C. App. 698 (2007). Similarly, the parent's failure to seek a recommended evaluation to determine whether a child was developing normally and to seek treatment if necessary supported a finding of neglect. *In re Thompson*, 64 N.C. App. 95 (1983).
- Not sending a child to therapeutic day care was considered to be a failure to provide necessary medical or remedial care (along with other circumstances contributing to a finding of neglect). *In re Cusson*, 43 N.C. App. 333 (1979).
- A finding of neglect was supported by evidence showing that the child had a severe speech defect that was treatable and that the mother refused to allow the child to receive the necessary medical and remedial care that would allow the child to develop to her full educational and emotional potential. *In re Huber*, 57 N.C. App. 453 (1982).
- A finding of neglect was supported by evidence that the children were being denied the opportunity to participate in free day care, which the social worker believed was necessary for their "adequate stimulation and socialization," and instead were being kept at home where they did not receive proper medical care, supervision, or nutrition.

In re Bell, 107 N.C. App. 566 (1992).

- In a criminal case, the court looked to the Juvenile Code definition of neglect in affirming a conviction for contributing to the neglect of a minor, in the case of a father who failed to provide a child with necessary medication. *State v. Harper*, 72 N.C. App. 471 (1985).

(d) Lack of proper discipline. A child who does not receive proper discipline may be a neglected juvenile. Neglect in this form may involve overly severe discipline that does not result in “serious physical injury” or constitute “grossly cruel or inappropriate means to correct behavior” within the statutory definition of abuse. Where a parent is using inappropriate discipline, the court may also find that the child is living in an environment injurious to the child’s welfare. Note that the variance in appellate analysis of corporal punishment and its impact on a child depends in part on whether the petition alleges the punishment as constituting abuse or neglect. *See supra* § 6.3.D.2(a) (cases analyzing corporal punishment in the context of abuse allegations).

- Evidence contributing to the affirmation of an adjudication of neglect was the fact that the father had beaten a child with various instruments for disciplinary purposes resulting in pain for several days and sustained deep bruising and scarring. *In re S.H.* ___ N.C. App. ___, 719 S.E.2d 157 (2011). Hitting children with a belt as a form of discipline, along with failing to fully comply with a mental health evaluation and resulting therapy and missing arranged visits with the children, was found to be neglect. *In re A.J.M.*, 177 N.C. App. 745 (2006).
- Evidence was sufficient to withstand a motion to dismiss a neglect petition at the close of petitioner’s evidence, where the evidence showed that an eight-year-old child had been left alone for three hours as a form of discipline; she had a cut on her lip and bruising on her face; her mother’s boyfriend (known for damaging a wall and car in anger) had spanked her and hit her face when she misbehaved; and the mother refused to cooperate with DSS. *In re Gleisner*, 141 N.C. App. 475 (2000) (remanding with instructions for trial court to make proper findings of fact and clear conclusions of law).
- A mother’s actions resulting in bruises and other injuries were found to be inappropriately severe discipline establishing neglect. *In re Thompson*, 64 N.C. App. 95 (1983).

(e) Injurious environment: instability, substance abuse, and domestic violence. An injurious environment may be an environment that puts the child at substantial risk of harm as well as one in which the child has been harmed. *In re Helms*, 127 N.C. App. 505 (1997); *In re Safriet*, 112 N.C. App. 747 (1993). The finding of an injurious environment often overlaps with a finding of improper care, supervision, or discipline.

- The court of appeals upheld the trial court’s finding of neglect where the mother had: taken out a protective order against the father for strangling her and attempting to rape her but she continued to be in contact with him; stated she could not care for the children and asked DSS to place them in foster care but often changed her mind about her children’s placement; had a history of problems with her children requiring DSS

- intervention; behaved inappropriately during some visits with children; and had a history of drug abuse and mental health issues. *In re J.W. and K.M.*, __ N.C. App. __, __ S.E.2d __ (May 5, 2015).
- The trial court's findings related to the parents' history of domestic violence and the negative impact of the violence on the children along with a refusal to develop an in-home services agreement were sufficient to support the conclusion that the children were neglected. *In re J.C.*, __ N.C. App. __, 760 S.E.2d 778 (2014).
 - Evidence was sufficient to support an adjudication of neglect where respondent mother and her boyfriend had a physical altercation while mother was holding one-month-old child which caused mother to fall and become injured (child was not injured); mother failed to report the incident to law enforcement when they were called to the scene; mother was being treated for bipolar disorder but did not believe her treatment was working. *In re A.N.L.*, 213 N.C. App. 266 (2011).
 - Substance abuse by a parent may contribute to a finding of neglect but, without proof of an adverse impact on the child, is not sufficient itself to support a finding of neglect. *See In re E.P.*, 183 N.C. App. 301 (2007), *aff'd per curiam*, 362 N.C. 82 (2007); *Powers v. Powers*, 130 N.C. App. 37 (1998); *In re McDonald*, 72 N.C. App. 234 (1984); *In re Phifer*, 67 N.C. App. 16 (1984).
 - Where findings were that respondent grew and consumed marijuana in the child's home, engaged in domestic violence in the child's presence, choked the child's mother to unconsciousness while the child was in vitro, and insulted and raised his voice to social workers, the findings were sufficient to support the conclusion that the child lived in an injurious environment and was neglected. *In re W.V.*, 204 N.C. App. 290 (2010).
 - Evidence of an inability to maintain a secure living situation where mother moved six times during four months and failed to maintain an environment free of drugs, violence, and attempted sexual assaults supported a conclusion of neglect. *In re Helms*, 127 N.C. App. 505 (1997).
 - A petition for neglect was filed after law enforcement had been called to a home where parents argued in the presence of their four children, the father left home taking the three older children with him, and mother obtained warrants charging father with assault by pointing a gun and communicating threats. The court of appeals affirmed the trial court's decision that DSS failed to prove that the children were neglected: the mother's statements were conflicting and she did not proceed with the case against the father, which the district attorney's office dismissed; the father was not in possession of a firearm when arrested; children had left with father voluntarily; and there was no evidence of domestic violence or that the children were put in danger. *In re H.M.*, 182 N.C. App. 308 (2007).
 - Evidence of cocaine use during pregnancy, the newborn's positive cocaine test, the mother's refusal to sign a safety plan, and domestic violence between respondents was sufficient to support a conclusion of neglect of the newborn. *In re B.M.*, 183 N.C. App. 84 (2007).
 - Evidence was sufficient to establish neglect based on the child's exposure to domestic violence: respondent mother had a prior abusive relationship; respondent had a current abusive relationship and an inability to abide by safety agreements designed to insulate her child from domestic abuse; child had experienced physical abuse by respondent

and her boyfriend; DSS observed bruising on child; and child displayed aggressive, volatile behavior after coming into DSS custody. *In re T.M.*, 180 N.C. App. 539 (2006).

- Evidence that the mother tested positive for marijuana use on the day the child was born, that another child had been adjudicated abused and neglected, that the mother was unemployed, and that her whereabouts were unknown at the time the petition was filed were sufficient to support an adjudication of neglect. *In re M.J.G.*, 168 N.C. App. 638 (2005).
- Evidence was sufficient to support a finding of neglect where mother kept the child in a filthy room, would leave home for several days at a time, would sleep for long periods of time with the child in the bed and not awaken when the child cried, came home drunk or under the influence of drugs, and did not complete her substance abuse treatment program. *In re E.C.*, 174 N.C. App. 517 (2005).

(f) Abandonment. A juvenile who has been abandoned is considered neglected. G.S. 7B-101(15). Abandonment has been described as “willful or intentional conduct” that “evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child;” or a “refusal to perform the natural and legal obligations of parental care and support,” including withholding “presence, . . . love, . . . [and] the opportunity to display filial affection.” *Pratt v. Bishop*, 257 N.C. 486, 501 (1962); *see also In re Adoption of Searle*, 82 N.C. App. 273 (1986); *In re Apa*, 59 N.C. App. 322 (1982); *In re Stroud*, 38 N.C. App. 373 (1978). *See generally supra* § 2.6.B.2 (relating to the definition of abandonment as neglect). Most appellate cases addressing abandonment are in the context of abandonment as a ground for termination of parental rights context. To the extent that those cases discuss the definition of abandonment, they may be relevant to abandonment in the context of neglect. *See infra* § 9.11.G (cases discussing evidence to establish abandonment as a TPR ground).

F. Evidence to Establish Dependency

1. Definition of dependency. A dependent juvenile is one in need of assistance or placement because

- the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision, or
- the juvenile’s parent, guardian, or custodian is unable to provide for the child’s care or supervision and lacks an appropriate alternative child care arrangement. G.S. 7B-101(9).

Both prongs of this definition must be met.

2. Evidence related to dependency. Allegations of dependency are often combined with allegations of neglect and sometimes with abuse as well. Therefore, appellate cases examining evidence related to dependency often discuss the totality of facts supporting dependency and neglect (and/or abuse), and few cases isolate discussions regarding facts supporting dependency.

See infra § 6.5, practice note (discussing the importance of stipulations reflecting actual facts—for example, not stipulating to dependency instead of neglect when the facts do not support dependency).

(a) No capable parent, guardian, or custodian.

- A child is not dependent when there is one parent who can care for his/her child or make arrangements for appropriate alternative child care. An adjudication of dependency will be reversed where the petitioner fails to prove both parents are incapable of providing care for the child or arranging for appropriate alternative child care. *In re J.D.R.*, ___ N.C. App. ___, 768 S.E.2d 172 (2015); *In re V.B.*, ___ N.C. App. ___, 768 S.E.2d 867 (2015).
- Where the mother had severe psychological problems and the children had psychological problems, learning disabilities, and behavioral and other problems that were not being addressed by the mother and her significant other, the children were adjudicated dependent. *See In re T.B.*, 203 N.C. App. 497 (2010).
- Where an infant suffered head trauma while in the father's care, evidence was insufficient to adjudicate the infant dependent because the mother was capable of providing care and supervision. *In re J.A.G.*, 172 N.C. App. 708 (2005).
- Where the trial court did not find that the father was unable to care for the child and lacked an alternative child care arrangement, a finding that the child was conceived as a result of the father's commission of statutory rape was not sufficient to support a conclusion that the child was dependent. *In re J.L.*, 183 N.C. App. 126 (2007).
- Where a child was repeatedly raped by the father, the father agreed to cease contact with her but moved back into home one week later, and the mother would not enforce DSS's safety plan to keep the father away from child, evidence was sufficient to support an adjudication that child was abused, neglected, and dependent. *In re K.W.*, 192 N.C. App. 646 (2008)

(b) Lacking alternate child care arrangement. An adjudication of dependency requires evidence and findings establishing that the parent does not have an appropriate alternative child care arrangement. *In re K.D.*, 178 N.C. App. 322 (2006); *In re P.M.*, 169 N.C. App. 423 (2005).

- Where DSS failed to present any evidence on lacking alternative child care at the hearing and the trial court made no findings as to alternative child care, the adjudication of dependency was reversed. *In re J.D.R.*, ___ N.C. App. ___, 768 S.E.2d 172 (2015); *see also In re V.B.*, ___ N.C. App. ___, 768 S.E.2d 867 (2015).
- Evidence was sufficient to support an adjudication of dependency where neither the mother nor the father was able to care for the children, the father's proposed alternate placement was with an aunt to whom he had not spoken in five years, and there was no evidence that the aunt was willing or able to care for the children. *In re D.J.D.*, 171 N.C. App. 230 (2005).
- Where the mother's significant other had been acting in a parental role for 12 or 13 years, during which the children exhibited multiple problems and had needs that were not met, the significant other could not be considered an appropriate alternate child

- care arrangement. *In re T.B.*, 203 N.C. App. 497 (2010).
- In a private TPR case, the mother could not claim that an alternative child care arrangement existed where an unrelated acquaintance had been awarded permanent custody of the child by the court, because the acquaintance did not have custody at the respondent's request and the mother had no ability to decide custody. *In re K.O.*, ___ N.C. App. ___, 735 S.E.2d 369 (2012).

6.4 Adjudication Order

A. General Requirements

Note: For further discussion of technical aspects of orders in juvenile court, including timing and drafting of the order, proper findings of fact and conclusions of law, see *supra* § 4.9.

Tool: AOC Form AOC-J-153, "[Juvenile Adjudication Order \(Abuse/Neglect/Dependency\)](#)" (Oct. 2013).

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

If the allegations are not proven by clear and convincing evidence, the court must dismiss the petition with prejudice and release a child who is in nonsecure custody to his or her parent, guardian, or custodian. G.S. 7B-807(a). If the petition alleges more than one status (abuse, neglect, or dependency) and the court adjudicates one but not another, it must dismiss the allegation that is not proven. See *In re T.B.*, 203 N.C. App. 497 (2010) (holding that trial court erred when it adjudicated children dependent but purported to hold in abeyance its ruling on the neglect allegation, when nothing in the record indicated that a future adjudication hearing was to be scheduled).

An order that adjudicates a child to be abused, neglected, or dependent must state that the findings of fact are based on clear and convincing evidence. Failure to state the standard of proof in the order is reversible error; however, there is no requirement as to how or where a recital of the clear and convincing standard should be included. *In re O.W.*, 164 N.C. App. 699 (2004) (holding that the statement in the trial court's order that it "concludes through clear, cogent, and convincing evidence. . ." was acceptable).

The Juvenile Code requires that an adjudication order:

- be in writing;
- contain appropriate findings of fact;
- contain appropriate conclusions of law; and
- be reduced to writing, signed, and filed with the clerk no later than 30 days following the completion of the hearing.

G.S. 7B-807(b). *See also supra* § 4.9.D (discussing the clerk’s responsibility to schedule a special hearing when the order is not entered within 30 days, as well as the appropriate remedy for untimely orders).

Practice Note: Just as it is permissible for more than one child to be named in a petition (when the children are from the same home and are brought to court for the same reason), one order may serve as the order in the case of each child named in the petition. If the findings or conclusions, or both, differ significantly from child to child, or if the adult respondents in each child’s case are not the same, the entry of a separate order for each child may be preferable. Any order that is being entered in more than one child’s case should clearly indicate which findings relate to which children and must include the file number for each child.

B. Findings of Fact and Conclusions of Law

Findings of fact and conclusions of law must be stated in the order separately and specifically. Common issues on appeal include whether the evidence supports the findings of fact and whether the findings of fact support the court’s conclusion of law that a child is abused, neglected, or dependent. The topic of what constitutes proper findings of fact and conclusions of law is addressed in detail *supra*, § 4.9.B.

Appellate cases have pointed out that in an adjudication order, a conclusion of law that a juvenile is abused, neglected, or dependent is about the *status* of the child and should not be connected to *whose* actions resulted in the adjudication. The supreme court has said, “In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.” *In re Montgomery*, 311 N.C. 101, 109 (1984). Other cases have said the same about adjudications of abuse and dependency—“By determining that a juvenile is abused, neglected or dependent, the court . . . determines the status of the juvenile so that his or her best interests may be ascertained.” *In re B.M.*, 183 N.C. App. 84, 87 (2007). *See also In re A.S.*, 181 N.C. App. 706, 714 (2007) (Levinson, J., concurring in part and dissenting in part) (stating that it is “unhelpful and confusing” for conclusions of law regarding the status of the child to include language such as “as to” [father, mother, guardian] or “because of” [father, mother, guardian]); *In re J.S.*, 182 N.C. App. 79 (2007).

6.5 Consent Orders

The Juvenile Code allows the court to enter a consent order on a petition alleging abuse, neglect, or dependency if:

- all parties are present or represented by counsel who is present and authorized to consent,
- the child is represented by counsel, and
- the court makes sufficient findings of fact.

G.S. 7B-801(b1).

The adjudication part of a consent order must comply with all requirements for adjudication orders. *See supra* § 6.4 (relating to adjudication orders).

A consent order that conforms to statutory requirements operates as a judgment on the merits and acquires the status of a final judgment. *See In re Thrift*, 137 N.C. App. 559 (2000); *Buckingham v. Buckingham*, 134 N.C. App. 82 (1999). Where the requirements of a consent order are not met, the court is not bound to honor an agreement made among the parties. The court of appeals upheld the trial court's order adjudicating neglect and rejecting a plan of reunification, where the parties had stipulated to facts supporting an adjudication and the DSS attorney indicated later that the agreement was contingent on DSS's working toward reunification. The court held that the requirements of a consent order had not been met and at most there were stipulations as to certain facts. *In re L.G.I.* __ N.C. App. __, 742 S.E.2d 832 (2013).

Practice Note: When parties negotiate in an attempt to resolve a case by consent, they should exercise caution to avoid stipulations or agreements that do not accurately reflect the facts of the case or the allegations in the petition. For example, if a petition alleges only neglect and the factual allegations relate only to neglect, a consent order adjudicating dependency is improper. Findings and conclusions in an order must be directly related to what is alleged in the petition and what the facts reflect. While parties may view amendment of a petition as a way to address the difference between what is alleged in the petition and what the parties want to agree to, the petition can be amended only with the court's approval. G.S. 7B-800. *See supra* § 4.2.D (relating to amendments).

6.6 Consequences of Adjudication

A. Continued Jurisdiction and Authority for Disposition

An adjudication of abuse, neglect, or dependency enables the court to proceed to the dispositional phase of the case in which the court determines the needs of the child and family and makes orders accordingly. An adjudication allows the court to continue exercising jurisdiction over the child and the parents (if parents are properly served) until the child reaches age 18 or is emancipated, or until the court orders termination of jurisdiction, whichever occurs first. *See* G.S. 7B-200, 7B-201.

B. Impact on Parents and Future Proceedings

An adjudication that a child is abused, neglected, or dependent essentially allows the state to intervene in the constitutionally protected parent-child relationship. *See supra* § 2.5.A (discussing the protection of parent-child relationships). An adjudication is a prerequisite to disposition, in which the court has the authority not only to remove the child from the home, but also to order the parents to take specific actions to address the causes of the adjudication and, if the child is removed from the home, the reasons for the removal. *See* G.S. 7B-904. *See also infra* § 7.5 (relating to disposition and the court's authority over parents).

An adjudication may affect parents in future proceedings. An adjudication that a child is abused or neglected can contribute to a later adjudication that another child living in the same home is neglected, because the Juvenile Code makes abuse or neglect of other children living in the home relevant to a determination of neglect. *See* G.S. 7B-101 (15). *See also supra* § 6.3.E.2.a (discussing other children in the home). Also, evidence of an adjudication of abuse, neglect, or dependency can be introduced in a subsequent action to terminate the parents' rights. *See infra* § 9.11.A.4 (discussing the grounds for TPR and the use of prior adjudications of abuse, neglect, or dependency in a TPR proceeding).

The doctrine of collateral estoppel precludes parties from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. So, a critical finding of fact in an adjudication order may be adopted by the court and may not be challenged in a subsequent action involving another child of the parent or in a later termination of parental rights action. *See In re N.G.*, 186 N.C. App. 1 (2007), *aff'd per curiam*, 362 N.C. 229 (2008); *In re Wheeler*, 87 N.C. App. 189 (1987). *See also infra* § 9.10.B.2 (discussing collateral estoppel in TPR); § 11.7.D.2. (discussing the doctrine of collateral estoppel).

Courts have recognized that an adjudication may have “collateral consequences” that can affect the parent regardless of the dispositional outcome of the case in which the adjudication occurred. In the case *In re A.K.*, 360 N.C. 449 (2006), the North Carolina Supreme Court reversed the court of appeals' dismissal of an appeal as moot. The appeal had been deemed moot because custody of the child was returned to the parent before the court of appeals considered the parent's appeal from an order adjudicating the child to be neglected and placing the child in DSS custody. The supreme court held that the appeal was not moot, because a “neglect adjudication can reasonably result in collateral legal consequences.” *Id.* at 459 (discussing the potential impact of the adjudication on future proceedings as well as the social stigma involved for the parents in having their child adjudicated abused, neglected, or dependent). *See also In re Hatley*, 291 N.C. 693 (1977) (holding that an involuntary commitment order results in collateral consequences).

Chapter 7

Dispositional Purposes and Outcomes

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7.1 Introduction and Purpose of Dispositional Phase

A. Introduction

In this manual, the term “dispositional phase” refers collectively to initial disposition hearings, review hearings, and permanency planning hearings that take place after a child has been adjudicated abused, neglected, or dependent. [Requirements relating to the procedures for these hearings and resulting orders are discussed in Chapter 8. This chapter is meant to be read in combination with Chapter 8, and cross-references in this chapter to material in Chapter 8 are essential to an understanding of dispositional outcomes.] The dispositional phase involves proceedings that may be informal and in which the rules of evidence are relaxed. Throughout this phase the court determines and reviews the needs of the child and the family and the best way to meet those needs. The court’s guiding principle in the dispositional phase is the child’s best interests.

The Juvenile Code provides for various outcomes in the dispositional phase. Outcomes may relate to:

- services to the child and family;
- placement of the child;
- evaluation and treatment for the child and/or parents (or others);
- orders directed at DSS, parents, or others intended to address the family’s needs and the child’s best interests; and
- development and implementation of a plan for a safe, permanent home for the child within a reasonable period of time.

Outcomes related to placement, evaluation, and treatment of the child are addressed in G.S. 7B-903 and are referred to as “dispositional alternatives.” These dispositional alternatives, which can be combined, are available to the court at any hearing that takes place during the dispositional phase of the case. *See* G.S. 7B-903(a), 7B-906.1(i).

In addressing the child’s placement, the priority is to help the family through providing community-level services while the child remains in the home. However, if the court determines that the child’s safety and welfare require that the child be placed outside his or her home (or remain outside the home if the child is already placed outside the home), the

court will examine placement alternatives and the best strategy for making it possible for the child to return home safely. If the court determines that the child cannot be returned home within a reasonable period of time, the court must decide what other placement will provide the child with a safe, permanent home within a reasonable period of time.

Regardless of the child's placement, the court may order evaluations, treatment, or services for the child or parents (or sometimes guardians or custodians) in order to better understand or address their needs. Dispositional outcomes that require parents or others to participate in evaluations, treatment, or classes, or to take other actions to address the conditions that led to the adjudication or the child's removal from home, are authorized by G.S. 7B-904 and, indirectly, G.S. 7B-200(b), relating to the court's personal jurisdiction over individuals.

The court's authority to enter dispositional orders is not without limits, and the court is not permitted to make dispositional orders that are beyond the scope of the statutes. Initial disposition hearings are addressed in G.S. 7B-901, and review and permanency planning hearings in G.S. 7B-906.1.

[Note: Prior to legislative changes in 2013, review hearings were addressed in G.S. 7B-906 and permanency planning hearings in G.S. 7B-907. Cases decided under prior law will cite these two sections, which were repealed effective October 1, 2013. *See* S.L. 2013-129.]

Resources: Multiple resources addressing dispositional outcomes for children and issues faced by children and families in foster care, including publications and tools related to specific topics such as physical and mental health issues, child development, child safety, visitation, education, race and ethnicity, substance abuse, older youth, permanency, incarcerated parents, fatherhood, and much more can be found on the following websites:

- The [Child Welfare Information Gateway](#), a service of the Children's Bureau, part of the Administration for Children and Families, U.S. Department of Health and Human Services. For topics not listed in the topic index or more specific than the topic index, use the search box to retrieve a list of resources on a topic.
 - [National Council of Juvenile and Family Court Judges](#).
 - The website for the [American Bar Association Center on Children and the Law](#), and within that website, [ABA Child Law Practice online](#), a gateway to additional resources.
-

B. Purpose of Disposition

The Juvenile Code refers specifically to dispositional purposes in both G.S. 7B-100 and G.S. 7B-900, and other provisions in the Code expand on these purposes. Read collectively, these provisions indicate the following general purposes, which should guide the court in determining dispositional outcomes for any hearing in the dispositional phase.

1. Exercise jurisdiction to address child's needs. A stated purpose of disposition is to "design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." G.S. 7B-900. The court must examine the specific needs and limitations of the child and craft a plan that takes into account the child's need for safety,

continuity, and permanence. *See* G.S. 7B-100(2), 7B-100(3), 7B-100(5), 7B-900. In doing so, the court should focus on the conditions that resulted in the adjudication of abuse, neglect, or dependency, with safety as the primary objective. As a corollary, the court also must determine at what point it is no longer necessary or appropriate for the court to continue exercising jurisdiction.

2. Careful consideration of individual needs and circumstances. The Juvenile Code insists on a disposition that “reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.” G.S. 7B-100(2). Code procedures require the court to take into account detailed information from multiple sources when making dispositional determinations, and the court has wide latitude to consider relevant evidence for dispositional purposes. G.S. 7B-901.

3. Respect for family autonomy. Dispositional plans and orders must respect family autonomy and avoid unnecessary or inappropriate separation of children from their parents. *See* G.S. 7B-100(3), 7B-100(4). When possible, the initial approach should be for a child to remain at home with appropriate community-level services. G.S. 7B-900.

4. Preference for placement with relative. When a child must be removed from the home, the court must consider whether a relative is willing and able to provide proper care for the child. *See* G.S. 7B-903(a)(2)c. In situations where a child is removed from one parent’s home but living in the home of another parent is a possibility, placement with the other parent must be considered before other relatives or other placement options are considered.

5. Fair procedures and protection of rights. Dispositional procedures are meant to assure fairness and equity as well as protect the constitutional rights of juveniles and parents. *See* G.S. 7B-100(1).

7.2 Non-Placement Dispositional Alternatives

A. Dismissal

An adjudication that a child is abused, neglected, or dependent is a determination that the court has jurisdiction to enter dispositional orders. If the court determines at the conclusion of a disposition hearing that there is no purpose to be served by the continued exercise of jurisdiction by the court, the court has the option to dismiss the case. G.S. 7B-903. Dismissal results in termination of the court’s jurisdiction, and the legal status of the child and family (with respect to placement and custody) reverts to the status that existed prior to the filing of the petition, unless a valid order in another proceeding provides otherwise. G.S. 7B-201(b). *See supra* § 3.1.C (relating to ending jurisdiction).

Practice Note: Although dismissal at an initial disposition hearing is uncommon, it may be appropriate when circumstances since the filing of the petition have changed to the point that

there is no longer a need for court involvement (e.g., a parent who abused the child is now incarcerated and the other parent is providing proper care).

B. Continuance

The court has the dispositional alternative of continuing the case to “allow the parent, guardian, custodian, caretaker or others to take appropriate action.” G.S. 7B-903(a)(1). For example, the court may find that the family is on track for addressing the conditions that led to the adjudication, and may want to give the family more time to progress before entering a dispositional order or dismissing the case. Similarly, the court might hold a disposition hearing in which the evidence shows what the needs are, what the parents have accomplished so far, and what remains to be accomplished, then continue the case to a specific time to evaluate the parents’ continued progress and determine an appropriate disposition.

The Juvenile Code also permits the continuance of a hearing in order to receive additional evidence, reports, assessments, or other information needed in the best interests of the child. G.S. 7B-803. Parties may need more time to gather information in order to recommend, request, or develop an appropriate dispositional plan. Unlike the continuance described above, this type of continuance is not a disposition. *See supra* § 4.5 (relating to continuances). It is a delay of the dispositional hearing and is subject to specific time frames within which each type of hearing (disposition, review, and permanency planning) must be conducted. *See infra* § 8.2.A (relating to the timing of disposition, review, and permanency planning hearings).

C. In-Home Supervision and Services

The Juvenile Code sets out a preference for the use of in-home supervision and community-level services when the child can be safe at home. *See* G.S. 7B-900. The court may require that the child be supervised in his or her own home by DSS “or by other personnel as may be available to the court,” subject to any conditions the court places on the parent, guardian, custodian, or caretaker. G.S. 7B-903(a)(2)a. Some recent cases have interpreted the introductory language in G.S. 7B-903(a)(2) to be a required finding prior to adopting a dispositional alternative in that subdivision, so the court’s order for in-home supervision should be based on a finding that “the juvenile needs more adequate care or supervision.” *See In re S.H.* 217 N.C. App. 140 (2011); *In re B.S.*, __ N.C. App. __, 738 S.E.2d 453 (2013) (unpublished); *In re D.M.*, 219 N.C. App. 647 (2012) (unpublished).

Practice Notes: When a child remains in the home but is supervised by DSS, the court may or may not order that DSS have legal custody of the child while the parent retains physical custody. It is only when DSS has legal custody of the child that the court is required to conduct periodic reviews and permanency planning hearings. When the parent has both legal and physical custody of the child, there is no statutorily mandated proceeding in which the court receives an update on the family’s progress and has the opportunity to make or change dispositional orders. Nevertheless, reviews can take place on motion of a party, and the court always has the discretion to order that the case be scheduled for review. *See* G.S. 7B-1000.

Although permitted by the Juvenile Code, it is uncommon for the court to order someone other than DSS to provide in-home supervision. GALs cannot serve in a home supervision role, as this is beyond the scope and authority of a GAL's role as defined by statute. *See* G.S. 7B-601.

In-home supervision may be ordered as an initial disposition, but it also may be used later when the court orders the return home of a child who has been in foster care or other placement.

7.3 Evaluation and Treatment of Child

A. Court's Authority to Order Evaluation and Treatment

Regardless of the child's placement and other dispositional plans, the Juvenile Code authorizes the court to order that the child be examined by a physician, psychiatrist, psychologist, or other qualified expert in order to determine the child's needs. G.S. 7B-903(a)(3). Once the examination is completed, the court must conduct a hearing to determine whether the child needs treatment and, if so, who should arrange and pay for the treatment. G.S. 7B-903(a)(3)a. *See also infra* § 7.4.E.2 (discussing DSS authority for evaluation and treatment, applicable when a child is placed in DSS custody).

B. Hearing to Determine Treatment Needs

1. Combined hearing. After completion of a court-ordered evaluation, the court must have a hearing to determine the child's treatment needs. G.S. 7B-903(a)(3)a. This hearing is typically combined with a disposition or review hearing.

2. County involvement. Since treatment may involve county services and county finances, the county manager (or other person designated by the chair of the board of county commissioners) must be notified of the hearing and given an opportunity to be heard. G.S. 7B-903(a)(3)a.

3. Treatment arrangements. If the court finds that the child needs medical, surgical, psychiatric, psychological, or other treatment, the court must permit the parent or other responsible person to arrange for the treatment. However, if the parent declines or is unable to make the necessary arrangements, the court may order the needed treatment and direct the county to arrange for it. The statute requires DSS to recommend a facility that will provide treatment for the juvenile. G.S. 7B-903(a)(3)a. If the child needs psychological or psychiatric treatment, DSS ordinarily would coordinate with the local management entity (see § 5 below) in planning for the child's treatment.

4. Treatment costs. Whether or not the parent arranges for treatment, the court may order the parent to pay the cost of the child's treatment or care. G.S. 7B-903(a)(3)a, 7B-904(a). If the court finds that the parent is unable to pay the cost, the court must order the county to arrange and pay for the treatment. G.S. 7B-903(a)(3)a.

5. Mental illness or developmental disability.

(a) Mental health services. The Juvenile Code states that if the court believes or evidence is presented that the child is mentally ill or developmentally disabled, the court must refer the child to the area mental health, developmental disabilities, and substance abuse services [now, local management entity or LME] director for appropriate action, and that this director is responsible for arranging an interdisciplinary evaluation of the child and mobilizing resources to meet the child's needs. G.S. 7B-903(a)(3)b. Note: Because the local management entity is not a party to the juvenile action, the court should refrain from ordering the LME to take specific actions.

These Juvenile Code provisions were written before major mental health care reform legislation in North Carolina. Some terms used in the Code either are obsolete or have been redefined. The "area mental health, developmental disabilities, and substance abuse services" (MH/DD/SA) director referenced in the Code is now director of the "local management entity" (LME) or "local management entity/managed care organization" (LME/MCO). Unlike area authorities in the older system, this entity generally is not a direct service provider. Instead, the LME/MCO authorizes the expenditure of public funds to pay for mental health, developmental disabilities, and substance abuse services provided by LME-contracted service providers.

Medicaid and state-funded MH/DD/SA services can be provided only by service providers contracting with the LME/MCO. In order for a child to receive MH/DD/SA services through an LME/MCO provider, the child must first be evaluated and assessed by an authorized provider, who then seeks authorization from the LME/MCO for specific treatment services.

(b) Commitment. The court has no authority to commit a child directly to a state hospital or mental retardation center. If the interdisciplinary evaluation results in a determination that it is best for the child to be institutionalized, admission should be pursuant to the voluntary consent of the child's parent or guardian. However, if the parent or guardian refuses to consent, the court's signature may be substituted for the purpose of consent. G.S. 7B-903(a)(3)b.

If a regional mental hospital refuses admission to a child referred by mental health and the court, or discharges the child prior to the completion of treatment, the hospital must submit to the court a written report stating:

- the reasons for denying admission or for early discharge;
- the child's diagnosis;
- indications of mental illness and need for treatment; and
- the location of any facility known to have an appropriate treatment program for the child.

G.S. 7B-903(a)(3)b.

7.4 Out-of-Home Placement Dispositional Alternatives

Out-of-home placement dispositional alternatives include:

- DSS custody with or without placement authority,
- custody with a relative or other suitable person or agency, or
- appointment of a guardian.

G.S. 7B-903(a)(2) is the Juvenile Code provision addressing the court's placement options at disposition, introducing the options with the statement "[i]n the case of any juvenile who needs more adequate care or supervision or who needs placement, the court may . . ."

Although this language has long been in the Code, recent cases have interpreted the language as requiring the court to make a specific finding that the child needs more adequate care or supervision or needs placement before ordering a disposition listed in G.S. 7B-903(a)(2). *See In re S.H.* 217 N.C. App. 140 (Nov. 15, 2011); *In re B.S.*, __ N.C. App. __, 738 S.E.2d 453 (2013) (unpublished); *In re D.M.*, 219 N.C. App. 647 (2012) (unpublished).

In making placement decisions the court is required to consider placement with a parent or other relative first.

See also infra § 8.4.B (discussing out-of-home placement in the context of permanency options, including comparisons of the permanent placement options and requirements for modifying or terminating them); § 8.6 (discussing voluntary foster care placement, which is not a dispositional alternative but is a type of out-of-home placement that must be reviewed by the court).

A. Best Interest

1. Primary standard. The court's decisions related to placement center on the determination of what is in the child's best interests. *See supra* § 7.1 (discussing all dispositional purposes, including best interest). North Carolina appellate cases have referred to "best interest" as the "polar star" of the Juvenile Code. *See In re T.H.T.*, 362 N.C. 446 (2008); *In re R.T.W.*, 359 N.C. 539 (2005); *In re Montgomery*, 311 N.C. 101 (1984).

Practice Note: The determination of best interest is a judicial function, not to be confused with the role of the GAL to represent the best interests of the child and make recommendations to the court.

2. Not applicable between non-parent and fit parent. When the court is deciding between placing custody with a non-parent and placing the child with a fit and able parent, the best interest standard is not applicable (or, one might say, the law presumes that placement with a fit parent is in the child's best interest). The fit parent has a paramount right to the care and custody of his or her child. The best interest standard applies when the court is deciding a custody dispute between two parents or when neither parent is a candidate for custody. When the court is deciding between a parent and a non-parent, the best interest standard applies only

where there has been a showing that the parent is unfit, has neglected the child, or has acted inconsistently with the parent's constitutionally protected status as a parent. *See David N. v. Jason N.*, 359 N.C. 303 (2005); *Price v. Howard*, 346 N.C. 68 (1997); *Petersen v. Rodgers*, 337 N.C. 397 (1994); *In re D.M.*, 211 N.C. App. 382 (2011); *In re B.G.*, 197 N.C. App. 570 (2009). A determination that a natural parent has acted inconsistently with his or her constitutionally protected status must be supported by clear and convincing evidence. *See, e.g., David N. v. Jason N.*, 359 N.C. 303, 307 (2005).

DSS is considered a non-parent whose interests are not equal to those of a non-offending parent, making the best interest standard inapplicable when the court is deciding between custody to DSS and custody to a parent who has not been shown to be unfit, to have neglected the child, or to have acted inconsistently with his or her protected parental status. *See In re J.A.G.*, 172 N.C. App. 708 (2005) (reversing disposition order that placed child in DSS custody where findings did not support conclusion that mother neglected the child or that the child was dependent; mother no longer lived with father who had abused the child, and there was no indication that mother was unwilling to comply with order that the father have no contact with child).

Misapplication of the best interest standard must be raised in the trial court in order for the issue to be reviewable on appeal. The parental preference is based on the parent's constitutional rights, and constitutional issues not raised at trial cannot be considered for the first time on appeal. *See in re T.P.*, 217 N.C. App. 181 (2011). The trial court's determination of whether a parent's conduct was inconsistent with his or her parental status will be reviewed by appellate courts according to whether the court's findings of fact support its conclusion. *See Rodriguez v. Rodriguez*, 211 N.C. App. 267 (2011) (holding in a custody case between the child's mother and grandparents that a finding that the children had been adjudicated dependent in an earlier proceeding was not, by itself, sufficient to support a conclusion that the mother had acted in a manner inconsistent with her parental status); *In re D.M.*, 211 N.C. App. 382 (2011) (holding that the trial court erred in awarding permanent custody to a grandparent where the trial court specifically found that neither parent was unfit and made no findings or conclusions as to whether the father had acted inconsistently with his parental status).

3. Child's own community. In determining out-of-home placement, the court must consider whether it is in the child's best interest to stay in the child's own community rather than move elsewhere. G.S. 7B-903(a)(2)c. (Note also that most placements across state lines must be in compliance with the Interstate Compact on the Placement of Children, explained at § 7.8 *infra*.)

Practice Note: This provision related to the court's consideration of community ties is broad and suggests that the court might examine factors such as:

- the child's school and the impact of changing schools;
- ties with or support from siblings, relatives, or friends in the community and the impact that relocating could have on such ties or support;
- the child's current receipt of services from specific individuals or agencies in the

community and the impact of disrupting, changing, or losing relationships with particular service providers;

- the child's involvement with specific activities or groups and the impact of changing or losing that involvement (e.g., music, scouts, church, sports, etc.);
 - the location of the parents and the effect of a particular placement on the child's ability to see the parents.
-

4. Court's determination of best interest. There is no specific definition of "best interest" in the Juvenile Code or elsewhere. The determination of best interest is in the trial court's discretion, and an appellate court will review a trial court's best interest determination for an abuse of discretion. *See, e.g., In re D.S.A.*, 181 N.C. App. 715 (2007) (holding that trial court's determination that it was not in child's best interest to be placed in paternal grandparents' custody was not an abuse of discretion). In addition, a determination that a particular disposition is in a child's best interest is a conclusion of law that must be supported by findings of fact based on competent evidence in the record. *In re Helms*, 127 N.C. App. 505 (1997). In a custody action the court of appeals said the following, which is equally applicable to best interest determinations in juvenile cases:

[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award.

Carpenter v. Carpenter, ___ N.C. App. ___, 737 S.E.2d 783, 787 (2013), *quoting Dixon v. Dixon*, 67 N.C. App. 73, 76-77 (1984) (citations omitted).

What follows are a few of many cases discussing the court's determination of best interest. However, nearly all appellate cases discussing the sufficiency of the evidence to support a dispositional decision either discuss or mention best interest. Many of these are cited in other sections of this chapter and elsewhere.

Case examples related to best interest:

- Where a sixteen-year-old child had been in and out of foster care during his life, his mother had made some progress, and the child desired to return to his mother, it was not error for the trial court to conclude that it was nevertheless in the child's best interest to appoint the foster father as the child's guardian. The trial court's findings provided sufficient evidence that the plan for guardianship was in the child's best interest and that the respondent mother could not adequately care for him. *In re L.M.*, ___ N.C. App. ___, 767 S.E.2d 430 (2014) (published, but originally reported as unpublished).
- There was insufficient evidence to support a conclusion that the change in custody from

father to mother was in the child's best interest where the only relevant findings were that the child was not totally happy in her current residence; she missed her animals, her mother, her grandfather, and her stepfather (two of whom had neglected her); and she said she was glad that her biological father was in her life. The appellate court also found fault with an indication from the transcript that the principal basis for the change in custody was the fact that the father was unmarried, citing *Stanley v. Illinois*, 405 U.S. 645 (1972), which explicitly rejected this line of reasoning. *In re H.S.F.*, 177 N.C. App. 193 (2006).

- Evidence of a strong emotional bond between parent and child is critically important but not determinative on the issue of best interest. *In re Shue*, 63 N.C. App. 76 (1983), *aff'd as modified on other grounds*, 311 N.C. 586 (1984).
- Respondent mother asserted that the trial court erred in failing to consider the progress she had made and in ceasing reunification efforts, but the court of appeals found that while the trial court had considered her progress, there was not enough progress for the court to be assured that the children could be safely returned to her care, and the best interests of the children, not the rights of the parents, were paramount. *In re T.K.*, 171 N.C. App. 35, *aff'd per curiam*, 360 N.C. 163 (2005).
- Findings were insufficient to support the best interest determination as to custody outside of respondent's home, where findings were that respondent made diligent efforts to comply with the DSS case plan; both DSS and the GAL noted the absence of safety concerns in the home and recommended custody with respondent; and the trial court's findings that indicated some reservations about custody with the respondent were inadequate to support the best interest determination. *In re J.B.*, 197 N.C. App. 497 (2009).
- Where the trial court had made a finding that return of the child was contrary to the best interests of the child in that conditions leading to removal had not been alleviated, the court of appeals had difficulty determining which "condition" the trial court was referring to. One of the possibilities was the trial court's finding of "sexual deviancy" and that the respondent was bisexual, where the trial court had characterized this lifestyle as "abnormal" and "not conducive to child rearing." The court of appeals rejected such a finding, stating that it is not self-evident that sexual orientation has an adverse effect on the welfare of the child. Even if the court's finding that the parent is bisexual and people who surround her "engage in a similar lifestyle" were supported by evidence, there were no findings linking these circumstances to a negative impact on the child's welfare or on her parents' abilities to care for her. The court of appeals held that these conditions could not be a basis to take custody away from the child's biological parents. *In re M.M.*, ___ N.C. App. ___, 750 S.E.2d 50 (2013) (see also cases cited therein).

B. Relatives Considered First

In examining out-of-home placement options, the court and DSS are required to consider first whether a relative of the child is willing and able to provide proper care and supervision in a safe home. *See infra* § 7.4.C.2.a (related to custody and placement authority of DSS). Where there is a willing and able relative, the child must be placed with that relative *unless* the court finds that placement with the relative is contrary to the best interests of the child. G.S. 7B-903(a)(2)c. *See also In re L.L.*, 172 N.C. App. 689 (2005) (declaring that priority for placement with relative applies not only to a disposition hearing, but also to review and

permanency planning hearings), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008). Because placement with an out-of-state relative requires compliance with the Interstate Compact on the Placement of Children, immediate placement with a relative may not be possible. *Id.* See G.S. 7B-903(a)(2)c. See *infra* § 7.8 (discussing the Interstate Compact on the Placement of Children).

- Where the father had not submitted to a paternity test and DSS had not completed a home study of the father's parents, it was not an abuse of discretion for the court to determine that placement with the father's parents was not in the child's best interest, since the child could be subject to removal from that home. *In re D.S.A.*, 181 N.C. App. 715 (2007).
- It was error for the court to place a child with foster parents without finding that it was contrary to the child's best interests to place her with willing relatives. *In re L.L.*, 172 N.C. App. 689 (2005), *abrogated in part on other grounds by In re T.H.T.*, 362 N.C. 446 (2008).
- The trial court did not abuse its discretion in determining that placement with grandparents was not in the child's best interest, where the parents and grandparents were unwilling to consider or explain the source of an infant's serious injuries while in the parents' care, the grandparents were unlikely to deny their daughter access to the child, and it had been recommended that the grandfather attend intensive outpatient substance abuse treatment. *In re B.W.*, 190 N.C. App. 328 (2008).

When placement with a relative is considered, the court must also determine whether it is in the child's best interest to stay in the community where the child lives. See *supra* § 7.4.A.3 (discussing community considerations); see also *supra* § 3.5 (discussing change of venue).

Practice Note: When the court considers whether a relative is “willing and able” to care for a child, it is important for the court to make this determination in relation to the child's specific needs (e.g., special needs) and the relative's ability to meet those needs.

C. Meaning and Impact of “Custody” and “Placement”

1. Meaning of custody. The term “custody” is not specifically defined in the Juvenile Code. However, the Code does require the court to assure that a person receiving custody understands its legal significance and to address certain specific issues in “precise terms” in a dispositional order. See G.S. 7B-903(c), 7B-905. See *infra* § 8.5 (discussing in greater detail the impact and requirements of language in dispositional orders).

A custodian is the person or agency who has been awarded legal custody of a child by a court. G.S. 7B-101(8). A custodian is a party to the case if he or she: (a) is the custodian of the child when the petition is filed, or (b) is awarded custody of the child in the juvenile proceeding and the court has found that the custody arrangement is the permanent plan for the child. G.S. 7B-401.1. (Until 2013, “custodian” was defined both as a person or agency awarded legal custody by a court *and* as one who assumes the status of a parent without being awarded legal custody. The second prong of the definition that was removed from the statute addressed someone who now is considered a caretaker.)

The word “custody” is used in more than one way in the Juvenile Code in that it may refer to a temporary legal arrangement or a more permanent arrangement. Temporary custody, nonsecure custody, and custody granted at disposition are all different. A custody order entered after adjudication (whether at a disposition, review, or a permanency planning hearing) may be in the nature of a disposition. Only an order entered at a permanency planning hearing can award custody as the permanent plan for the child. *See In re D.C.*, 183 N.C. App. 344 (2007) (decided under prior law) (holding that it was error for the trial court to order a permanent plan of custody when the parent had not received notice that the hearing was a permanency planning hearing). *See also infra* § 8.4 related to permanent placement options. Also, “custody” may refer to a civil custody order entered pursuant to G.S. 7B-911 and Chapter 50. *See infra* § 7.7 (relating to civil custody orders).

Although the term “non-secure custody” is only used in Article 5 of the Juvenile Code, which addresses the pre-adjudication phase of a case, use of this term by the trial court in the dispositional phase was addressed by the court of appeals in *In re J.W. and K.M.*, __ N.C. App. __, __ S.E.2d __ (May 5, 2015). The court of appeals did not find error where the trial court awarded DSS “non-secure custody” of the juveniles at disposition. In doing so, the court of appeals focused on the definition of “non-secure,” stating that it merely distinguishes the type of custody from “secure custody,” which involves government-supervised confinement. The court rejected the respondent’s argument that “custody” and not “non-secure custody” could be awarded at disposition. Note: This case did not address the distinction between “non-secure custody” granted in the pre-adjudication phase of the case under Article 5 of the Juvenile Code and the use of the term “nonsecure custody” in the dispositional phase.

Practice Note: Assumptions tend to be made concerning the authority and duties that accompany an order giving one “custody,” but because “custody” does not have one distinct meaning and is not statutorily defined, it is important for the court to make its intentions clear when ordering custody. To avoid problems surrounding the meaning of custody, the court should anticipate questions that might arise with respect to the custodian’s authority or duties and specifically address them in the order.

2. Relationship between custody and placement. Legal custody, placement, and placement authority are not the same thing and are not automatically tied to one another. Consider the following:

(a) Custody and placement authority. A court’s order giving custody to DSS is required to specify that DSS has placement authority. G.S. 7B-507(a)(4). However, the court can direct a specific placement that it finds to be in the juvenile’s best interest, after considering DSS’s recommendations. G.S. 7B-507(a)(4).

(b) Joint custody is permissible. The court may order joint custody. In the case of *In re B.G.*, 197 N.C. App. 570 (2009), the trial court awarded joint legal custody of a child to her father and her maternal aunt and uncle, giving physical custody to the aunt and uncle. The court of appeals rejected the father’s argument that joint legal custody was not an authorized dispositional alternative. (The custody order was reversed, however, because

the trial court's findings of fact were insufficient to support application of the best interest standard.)

(c) The order cannot divide physical custody and physical placement. The court may not order physical custody with one person and physical placement with another person. The phrase “physical custody” is used to refer to the rights and obligations of the person with whom the child resides. *In re H.S.F.*, 177 N.C. App. 193 (2006). However, where the children were in a safe placement with a relative and the parties stipulated to an adjudication of neglect, the trial court did not abuse its discretion when it “sanctioned” continued placement with the relative but left custody with the mother. The court of appeals, distinguishing the case from *In re H.S.F.*, *id.*, emphasized that the trial court had not ordered physical placement of the children with the relative, but had approved the mother's decision about where the children should be placed. *In re D.L.*, 215 N.C. App. 594 (2011).

3. Life of a juvenile custody order. Custody pursuant to a juvenile disposition order can be modified by the court, but the custody order is effective only while the court continues to exercise jurisdiction in the juvenile case. G.S. 7B-201(b). Review of the custody order will take place periodically pursuant to G.S. 7B-906.1, unless the requirements for waiving reviews in G.S. 7B-906.1(n) are met or the court terminates its jurisdiction. *See infra* § 8.2.A.4 (discussing waiver of reviews); § 8.4.B (discussing custody as a permanency option, reasons and requirements for changing or ending custody, and comparing it to other permanency options); § 3.1.C (discussing continuing or ending jurisdiction).

Whenever the court places custody with a parent or other appropriate person, the court is required to determine whether jurisdiction in the juvenile proceeding should be terminated and custody of the child awarded to the parent or other appropriate person under Chapter 50 civil custody provisions. G.S. 7B-911. (Note that prior to 2013 the court had the option to convert to civil custody under certain circumstances but was not required to consider it.) Conversion to civil custody pursuant to G.S. 7B-911 may be preferred by the court when the need for intervention through a juvenile court action has ended, but there is a need to have a custody order remain in effect. *See infra* § 7.7 for details.

If the court retains jurisdiction over a juvenile, awards custody to a parent, and does not conduct periodic reviews of the placement, any new allegations of abuse, neglect, or dependency must be raised in a new petition and may not be asserted through a motion in the pending case. *See* G.S. 7B-401(b).

4. Permanent placement. The court may order a placement to be the child's permanent plan, but only at a permanency planning hearing. Although language in G.S. 7B-906.1(d)(3) says the court must “consider a permanent plan of care” when ceasing reunification efforts at any review hearing, G.S. 7B-507(c) states that when the court orders reunification efforts to cease at a hearing that is not a permanency planning hearing, a subsequent hearing within 30 days (which would be designated a permanency planning hearing) should be scheduled for the court to consider the child's permanent plan. This conforms with the decision in *In re D.C.*, 183 N.C. App. 344 (2007) (decided under prior law), where it was error for the trial court to

order a permanent plan of custody when the parent had not received notice that the hearing was a permanency planning hearing in which permanent placement would be considered by the court. *See also infra* § 8.4 related to permanent placement options.

D. Visitation

1. Visitation must be addressed for out-of-home placement. Anytime custody is removed from a parent, guardian, or custodian, or placement outside the home is continued, the order must address appropriate visitation that is in the child's best interest and consistent with the child's health and safety. G.S. 7B-905.1(a). Appellate cases have found reversible error for failing to address visitation in a disposition order. *See, e.g., In re S.C.R.*, 217 N.C. App. 166 (2011); *In re C.M.*, 198 N.C. App. 53 (2009); *In re C.P.*, 181 N.C. App. 698 (2007).

Note: Prior to 2013, visitation was addressed in G.S. 7B-905(c). Section 24 of S.L. 2013-129 enacted G.S. 7B-905.1, which includes more extensive and specific provisions relating to visitation.

(a) Specific orders required. Visitation orders must indicate the minimum frequency and length of visits and whether the visits must be supervised. G.S. 7B-905.1(b), (c). Even before this requirement was codified in 2013, decisions in several appellate cases found error when orders related to visitation were not specific enough. *See In re T.H.*, ___ N.C. App. ___, 753 S.E.2d 207 (2014) (remanding for failure to include minimum outline of time, place, and conditions of visitation); *In re J.P.*, ___ N.C. App. ___, 750 S.E.2d 543 (2013) (reversing and remanding visitation portion of disposition order for failure to contain a minimum outline); *In re M.M.*, ___ N.C. App. ___, 750 S.E.2d 50 (2013) (remanding in part because the visitation provisions were not specific enough and gave too much discretion to guardians to determine visitation); *In re W.V.*, 204 N.C. App. 290 (2010) (holding that order giving father weekly supervised visits was not specific enough and did not constitute a sufficient "minimum outline" of a visitation plan).

The statutory requirement that visitation orders indicate the "minimum frequency and length of visits" has been interpreted by the court of appeals to mean that the trial court must provide a framework for determining the time and place of visits but that the order itself does not have to include the particular time and place for visits. *In re N.B and L.B.*, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015) (here, the court's order was held to be in compliance with this statute where it provided for visits at a minimum of one hour once per month, to be supervised by the family therapist, the date and time of which was to be coordinated with the family therapist). A dispositional order that provides for weekly, supervised visits with the child and states that all prior orders remain in full force and effect, when read together with a prior order providing for weekly two-hour supervised visits with one child and weekly one-hour supervised visits with the other child, properly addressed the frequency and length of visits in compliance with G.S. 7B-905.1. *In re J.W. and K.M.*, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015).

(b) Electronic communication. In the case *In re T.R.T.*, ___ N.C. App. ___, 737 S.E.2d 823 (2013), the court of appeals held that communication via Skype is a form of electronic

communication that cannot take the place of face-to-face visitation. In so ruling, the court looked to G.S. 50-13.2(e), which states that electronic communication may not be used as a replacement or substitution for custody or visitation. The court emphasized that electronic communications supplementing visitation between a parent and juvenile must comply with G.S. 50-13.2(e), which provides specific guidelines relating to best interest, availability of equipment, and other factors.

Practice Note: In relying on G.S. 50-13.2(e), the court reasoned that while G.S. 50-13.2(a) explicitly limits its application to custody orders entered under 50-13.2, nothing in subsection (e), dealing with electronic communications, limits its application in that way. Therefore, the court said, G.S. 50-13.2(e) is a generic provision that applies to all custody actions. This reasoning raises a question as to whether other subsections of G.S. 50-13.2 could apply to orders under the Juvenile Code when they deal with matters not addressed by the Juvenile Code.

2. Visitation consistent with health, safety, and best interest. The Code requires that visitation orders be consistent with the health and safety of the child and in the child's best interest. G.S. 7B-905.1(a). While the court must address visitation, it may determine that visitation is not appropriate in some circumstances. *See, e.g., In re J.S.*, 182 N.C. App. 79 (2007) (holding that evidence was sufficient to support the trial court's order for no visitation with the father where evidence showed that the father beat the child two to three times a day causing injuries, thus no amount of contact could be said to be in the best interest of the child or consistent with the health and safety of the child); *In re K.C.*, 199 N.C. App. 557 (2009) (holding that while the court may have failed to make an express finding that visitation with mother would be inappropriate, the mother was not entitled to relief because any error was due to her own stated wishes not to see the children, her cancellation of visitation, her refusal to work with DSS toward reunification, and her unwillingness to follow through with agreed-upon recommendations).

3. DSS responsibility; court approval. If DSS has custody or placement responsibility for the child, the court may order DSS to arrange, facilitate, and supervise a *court-approved* visitation plan consistent with the best interests of the child. The plan must indicate the minimum frequency and length of visits and whether the visits must be supervised. G.S. 7B-905.1(b). Unless the court orders otherwise, DSS has the discretion to do the following:

- determine who will supervise visits when supervision is required;
- determine the location of visits;
- change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances.

Limited and temporary changes must be communicated promptly to the affected party, and ongoing changes must be communicated in writing to the party, stating the reason for the change. G.S. 7B-905.1(b).

If a child is in the custody or placement responsibility of DSS, the director may allow unsupervised visitation with the parent, guardian, custodian, or caretaker only after a hearing

at which the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903(a)(2)c.

4. Guardians and custodians. If the child is placed or remains in the custody or guardianship of a relative or other suitable person, any visitation order must specify the minimum frequency and length of the visits and whether the visits must be supervised. The court may authorize additional visitation agreed upon by the respondent and custodian or guardian. G.S. 7B-905.1(c). Determination of visitation rights is a judicial function that cannot be delegated to the child's custodians. *In re M.M.*, __ N.C. App. __, 750 S.E.2d 50 (2013); *In re L.B.*, 181 N.C. App. 174 (2007); *In re T.T.*, 182 N.C. App. 145 (2007); *In re E.C.*, 174 N.C. App. 517 (2005); *see also In re J.D.R.*, __ N.C. App. __, 768 S.E.2d 172 (2015) (although the father did not have complete authority to determine visitation, the degree of delegation given to father by the court to determine visitation by mother went too far, and the order related to visitation rights was therefore remanded).

5. Suspension of visitation. The court's order concerning visitation may specify conditions under which visitation may be suspended. G.S. 7B-905.1(a). When DSS has custody or placement responsibility, DSS may temporarily suspend all or part of the visitation plan if DSS makes a good faith determination that the plan is not consistent with the child's health and safety. G.S. 7B-905.1(b). If DSS suspends the plan, it must expeditiously file a motion for review and will not be subject to a motion to show cause for the suspension. *Id.*

The court of appeals held that a trial court may order a parent to pay for the cost of supervised visitation as part of ordering conditions for visitation that are in the best interests of the child. In ordering the parent to pay the cost of supervised visits, the court is not required to consider the parent's ability to pay. *In re J.C.*, __ N.C. App. __, 760 S.E.2d 778 (2014). The North Carolina Supreme Court reversed, holding that the trial court did not make sufficient findings for meaningful appellate review and remanded the case to the trial court to make findings about a parent's ability to pay. *In re J.C.*, __ N.C. __ (June 11, 2015). The remand suggests that a trial court may impose the costs of supervised visitation on a parent if the court finds the parent has an ability to pay for those costs.

6. Review of visitation plan and mediation. All parties must be informed of the right to file a motion for review of any visitation plan. Prior to or at a hearing to review visitation, the court may order DSS or the GAL to investigate and make written recommendations and provide testimony as to appropriate visitation. After a proper motion, notice, and a hearing to review visitation, the court may establish, modify, or enforce a visitation plan that is in the child's best interest. G.S. 7B-905.1(d).

To resolve visitation issues, the court may order the parents, guardian, or custodian to participate in custody mediation where such programs have been established (pursuant to G.S. 7A-494). When the court refers a case to custody mediation, it must specify the issues for mediation, including but not limited to whether visitation must be supervised and whether overnight visitation may occur. Participants in custody mediation may not consent to a change in custody. A copy of any mediation agreement must be provided to the parties and counsel

and must be approved by the court. G.S. 7B-905.1(d). Mediation of visitation issues is subject to the provisions of G.S. 50-13.1(d) through (f), which address:

- circumstances for dismissal of mediation and having the action heard in court;
- privacy and confidentiality of mediation proceedings as well as inadmissibility in court;
- mediator's authority to interview the child and others; and
- applicability or inapplicability of privilege, immunity, etc.

E. DSS Custody

1. Legal custody and placement authority. The court may order the child to be placed in DSS custody in the county of the child's residence. If the child's residence is in another state, the court may place the child in the custody of DSS in the county where the child is found so that DSS can return the child to his or her home state. G.S. 7B-903(a)(2)c.

Practice Note: The court cannot "transfer" custody of the child to an agency in another state unless a valid order giving that agency custody is already in place, so DSS should contact the appropriate child welfare agency in the other state to discuss the assumption of custody by that agency. However, neither DSS nor the court can force a person or agency in another state to initiate a court action in that state. If a custody action already exists in the child's home state, procedures in Chapter 50A, the UCCJEA, should be used. *See supra* § 3.3 (providing detail on the UCCJEA). The court cannot "transfer" an entire juvenile proceeding to another state.

If the adjudication occurred somewhere other than the county of the child's legal residence, or if the disposition involves placement in a different county, involvement of another county DSS and/or a transfer of venue may be appropriate. *See supra* § 3.5 (discussing transfer of venue).

Anytime the court orders placement or continues placement in DSS custody, the court order must:

- specify that the child's placement and care are the responsibility of DSS and that DSS is to provide or arrange for placement (*but* the court may order a specific placement after considering DSS's recommendations, *see supra* § 7.4.C.2.a);
- include a finding that the juvenile's continuation in or return to his or her own home would be contrary to the juvenile's best interest; and
- include reasonable efforts findings pursuant to G.S. 7B-507.

G.S. 7B-507. *See supra* § 2.6.E (relating to reasonable efforts requirements, including findings that must be made in order to cease reunification efforts). The court must also find as a precondition to placing the child in DSS custody that the juvenile needs more adequate care or supervision or needs placement. *See* G.S. 7B-903(a)(2); *In re S.H.* 217 N.C. App. 140 (Nov. 15, 2011), *followed by In re B.S.*, ___ N.C. App. ___, 738 S.E.2d 453 (2013) (unpublished) and *In re D.M.*, 219 N.C. App. 647 (2012) (unpublished).

See supra § 7.4.A (relating to the court's focus on best interest in determining out-of-home placement).

See supra § 7.4.B (relating to relatives as the first consideration for out-of-home-placement).

See supra § 7.4.C (relating to the meaning and impact of custody and placement).

See infra § 7.8 (relating to placements across state lines that must be in compliance with the ICPC).

See infra § 8.5 (relating to the contents of orders).

Resources: For DSS policies and procedures related to child placement, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201](#) (Dec. 2009). *See also supra* § 2.2.C.2 (relating to child placement).

DSS has a category of services designed for family reunification. For an explanation, policies, and procedures regarding these services, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. 2 \(Time Limited Family Reunification Services\)](#) (July 2013).

2. DSS authority for evaluations and treatment. When DSS has custody of a child, it may arrange for, provide, or consent to routine or emergency medical care or treatment. G.S. 7B-903(a)(2)c. *See also In re Stratton*, 153 N.C. App. 428 (2002) (holding that parents whose children were adjudicated neglected and dependent and placed in foster care did not have the authority to object to DSS's decision to immunize the children).

For psychiatric, psychological, educational, or remedial evaluations or treatment, DSS must make reasonable efforts to obtain consent from a parent or guardian. When the parent refuses consent or is unknown, unavailable, or unable to act on behalf of the child, DSS may arrange for, provide, or consent to the evaluations or treatment. However, DSS must notify the parent or guardian about the care or treatment and give them frequent status updates on the child's circumstances. A parent or guardian may request and receive results and records of any evaluations or treatment. G.S. 7B-903(a)(2)c. The DHHS manual also encourages DSS, as part of visitation best practices, to give the parent an opportunity to attend the child's doctor and dentist appointments. *See* 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(V\)\(D\)\(4\) \(2010\)](#). *See also supra* § 7.3.A (relating to the court's authority to order evaluations and treatment of a child).

3. Court approval for return home and visitation. Once the court orders a child to be placed in DSS custody, DSS may not permit unsupervised visitation or a return home without a hearing at which the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903(a)(2)c. *See also In re H.S.F.*, 177 N.C. App. 193 (2006) (holding that it was error for the court to return the child home to the mother without finding that the child would receive proper care and supervision in a safe home); *In re A.S.*, 181 N.C. App. 706 (holding that it was not error for the trial court to limit visitation or refuse to return

the children home where the trial court found that the conditions that led to removal from the home were still present and that return to the home would be contrary to the welfare of the children), *aff'd per curiam*, 361 N.C. 686 (2007).

“Return home” includes placement of the child in the home of either parent or the home of a guardian or custodian from whose home the child was removed by court order. G.S. 7B-101(18b). A “safe home” is defined as “[a] home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect.” G.S. 7B-101(19). *See infra* § 8.5.B.5 (relating to requirements of addressing visitation in dispositional orders).

4. Notice to GAL of change in placement. When DSS has custody or placement responsibility for a child, it must notify the child’s GAL of an intention to change the child’s placement unless prevented from giving notice by emergency circumstances. Where emergency circumstances exist, DSS must notify the GAL or the attorney advocate within 72 hours of a placement change unless local rules require that notification be made sooner. G.S. 7B-905(d).

F. Custody with Another Person or Agency

1. Alternatives to DSS custody. The court may order that the child be placed in the custody of “a parent, relative, private agency offering placement services, or some other suitable person.” G.S. 7B-903(a)(2)b. This gives the court broad authority to place custody with someone other than DSS. (Custody as a permanent placement must be made in the context of a permanency planning hearing, *see supra* § 7.4.C.4.)

See supra § 7.4.A (relating to the court’s focus on best interest in determining out-of-home placement).

See supra § 7.4.B (relating to relatives as the first consideration for out-of-home placement).

See supra § 7.4.C (relating to the meaning and impact of custody and placement).

(a) Parent. The provision allowing custody to a parent may apply where a child is removed from the home of one parent and placement with the other parent is appropriate; where the child has been in the custody of someone other than a parent and the court determines that custody should be returned to the parent [*but see supra* § 7.4.E.3 (relating to requirements for returning a child home)]; or where one parent needs the protection of a custody order to prevent interference by the other parent. It is error for the court to fail to consider giving custody to a parent where placement with a parent is a possibility. *See In re Eckard*, 148 N.C. App. 541 (2002) (holding that the trial court erred when it refused to consider whether the biological father of the child, who had entered the case late, was a candidate for custody of the child after it ceased reunification efforts with the mother). *See also supra* § 7.4.A.2 (discussing the inapplicability of the best interest standard where there is a fit and able parent).

(b) Relative. Willing relatives who can provide a safe home are always the preferred out-of-home placement option unless the court finds that the placement is contrary to the child’s

best interest. *See supra* § 7.4.B (preference for relatives).

(c) Private agency. While custody with a “private agency offering placement services” is permissible, it would be rare for the court to order this instead of ordering custody with DSS. A DSS with custody may arrange for a child’s placement with a private agency.

(d) Other person. The “catch-all” provision permits the court to place custody with “some other suitable person.” Thus, friends of the family or others can be given custody of the child if deemed “suitable” by the court.

2. Assurance of understanding and adequate resources. Before placing a child in the custody or guardianship of someone other than the parents, the court must verify that the person receiving custody or guardianship understands the legal significance of the placement (*see supra* § 7.4.C relating to the meaning and impact of custody and placement) and will have adequate resources to care for the child appropriately. G.S. 7B-903(c); G.S. 7B-600(c). This same determination is required by G.S. 7B-906.1(j) when the court awards custody or appoints a guardian at a review or permanency planning hearing.

Although the Code does not require the court to make specific findings in order to make this determination, appellate cases have required evidence in the record that this verification was made. *See In re P.A.*, __ N.C. App. __ (May 5, 2015) (holding that this requirement was not met where there was inadequate evidence in the record as to the guardian’s resources, and the guardian’s own assertion of having resources was simply her opinion, which was not evidence of her actual resources); *In re J.E.*, 182 N.C. App. 612 (2007) (holding in the context of a permanency planning hearing that the trial court’s determination was satisfactory where it had received into evidence and considered a home study conducted by DSS indicating that grandparents had a clear understanding of the enormity of the responsibility of caring for the children, that they were committed to raising the children, and that they were financially capable of providing for the children); *see also, In re N.B. and L.B.*, __ N.C. App. __, __ S.E.2d __ (April 7, 2015); *In re L.M.*, __ N.C. App. __, 767 S.E.2d 430 (2014) (published, but originally reported as unpublished).

The court’s verification that the person receiving custody or guardianship understands the legal significance and their responsibilities applies to *each person* receiving custody. In the case *In re L.M.*, the trial court properly verified this as to the foster father, but not the foster mother, although both were being awarded guardianship. The order of guardianship for the foster father was therefore affirmed but the order of guardianship for the foster mother was vacated and remanded. *In re L.M.*, __ N.C. App. __, 767 S.E.2d 430 (2014) (published, but originally reported as unpublished).

Practice Note: The court should consider both income and services available to the child and caregiver. Some caregivers may not be willing to apply for available monetary benefits, such as TANF (Temporary Assistance for Needy Families), because doing so will create a reimbursement obligation for the child’s parents and a duty on the part of the caregiver to cooperate with efforts to obtain support from the child’s parents. (Note, however, that a caregiver may be excused from the duty to cooperate if he or she can provide evidence to

support a claim that doing so would not be in the child's best interest.) Some services and benefits, such as scheduling of mental health or therapy appointments or help with the school IEP (Individual Education Plan) process, may not continue when DSS is no longer the child's custodian. The caregiver may need to apply for other services, such as transportation or day care, which had been provided without cost when the child was in DSS custody and now may become an expense for the caregiver.

3. Placement in another county. Where placement with relatives or friends in another county is a possibility, under some circumstances the court may transfer venue of the case to the other county. *See supra* § 3.5 (relating to venue).

4. Caregiver with violent history. Whenever a child is removed from the home due to physical abuse, DSS must conduct a review of the background of the alleged abuser and if the abuser has a history of violent behavior against people, DSS must petition the court to order the alleged abuser to submit to a mental health evaluation. G.S. 7B-302(d1), 7B-503(b). The court must consider the opinion of the mental health professional who performs the evaluation before returning the child to the custody of that person. G.S. 7B-903(b).

G. Appointment of Guardian

1. Circumstances for appointment. In a juvenile case the court may appoint a guardian of the person for the juvenile when:

- no parent appears at a hearing with the child, or
- any time the court finds it would be in the best interests of the child.

G.S. 7B-600(a).

Note, however, that the best interest standard is not applicable unless the parents are unfit, have neglected the child, or have acted inconsistently with their constitutionally protected status as parents. *See supra* § 7.4.A.2.

A court-appointed guardian of the child is a party to the case if: (a) he or she was the guardian of the child when the petition was filed, or (b) the court appoints the guardian in the juvenile proceeding and orders that the guardianship is the permanent plan for the child. G.S. 7B-401.1(c).

Guardianship may be ordered as a temporary measure, as a disposition, or as a permanent plan. (However, guardianship as a permanent plan may be ordered only in the context of a permanency planning hearing, *see supra* § 7.4.C.4.)

See supra § 7.4.F.2 (relating to the requirement that the court verify that the person being appointed guardian of the child understands the legal significance of the appointment and will have adequate resources to care appropriately for the child).

See supra § 7.4.A (relating to the court’s focus on best interest in determining out-of-home placement).

See supra § 7.4.B (relating to relatives as the first consideration for out-of-home placement).

2. Role of guardian. A guardian appointed under G.S. 7B-600 in a juvenile case is completely different from the child’s GAL appointed pursuant to G.S. 7B-601. A guardian appointed for the child pursuant to G.S. 7B-600:

- operates under the supervision of the court, with or without bond;
- has the care, custody, and control of the child or may arrange a suitable placement for the child;
- files reports only when required by the court;
- may represent the child in any legal action;
- may consent to certain actions on the part of the child in place of the parent, including (i) marriage; (ii) enlisting in the military; (iii) enrollment in school; and (iv) necessary remedial, psychological, medical, or surgical treatment.

G.S. 7B-600.

3. Duration of guardian authority. The authority of the guardian continues until the guardianship is terminated by court order, the court terminates its jurisdiction in the juvenile case, or the child is emancipated or reaches the age of 18, whichever occurs first. When guardianship is for a temporary period or is ordered as a disposition (but not as the permanent plan), the court may end the guardianship based on a determination that it is no longer in the child’s best interests. G.S. 7B-600. *See also In re J.D.C.*, 174 N.C. App. 157 (2005). However, when guardianship is awarded as the permanent plan for the child pursuant to G.S. 7B-906.1 and the guardian is a party to the case (permanent guardianship automatically makes the guardian a party), it can be terminated only under certain circumstances. *See infra* § 8.4.B.2 (discussing details related to terminating guardianship when the court has ordered it as a permanent plan).

4. Meaning of the term “guardian.” In addition to its meaning under the Juvenile Code, the term “guardian” can be used in relation to a person appointed by the clerk of superior court, pursuant to G.S. Chapter 35A, as guardian of the person, guardian of the estate, or general guardian of (i) a minor who has no natural guardian, i.e., no parent; or (ii) a minor who is within six months of reaching age eighteen, is expected to require a guardian as an adult, and has been adjudicated incompetent. The term “guardian” is not to be confused with “guardian ad litem.” The term “guardian,” by itself, does not refer to a guardian ad litem appointed pursuant to G.S. 7B-601, G.S. 7B-602, or Rule 17 of the Rules of Civil Procedure. Appointment of a guardian pursuant to G.S. 7B-600 does not substitute for the appointment of a guardian ad litem.

7.5 Court's Authority over Parents and Others

The court has jurisdiction over the parent, guardian, custodian, or caretaker of a juvenile who has been adjudicated abused, neglected, or dependent, if that person has been served, has waived service, or has automatically become a party pursuant to G.S. 7B-401 by being awarded custody or guardianship as a permanent plan. G.S. 7B-200(b). See *supra* § 3.4 (related to personal jurisdiction). The court is specifically authorized to direct certain orders to parents and guardians, and sometimes to a “custodian, stepparent, adult member of the juvenile’s household, or adult relative entrusted with the juvenile’s care.” G.S. 7B-904.

A. Treatment and Counseling

1. Participation in child’s treatment. If the court finds that it is in the child’s best interest, the court may order a parent, guardian, custodian, stepparent, adult member of the child’s household, or an adult relative caring for the child to participate in medical, psychiatric, psychological, or other treatment of the juvenile. G.S. 7B-904(b).

2. Evaluations and treatment of parents and others. The court may order a parent, guardian, custodian, stepparent, adult member of the child’s household, or an adult relative caring for the child to undergo treatment or counseling if that person’s receiving treatment is in the child’s best interests. G.S. 7B-904(c). See *In re A.R.*, ___ N.C. App. ___, 742 S.E.2d 629 (2013) (holding that it was within the trial court’s authority to order the parents to comply with mental health assessments and recommendations, substance abuse evaluations, and random drug screens); *In re A.S.*, 181 N.C. App. 706 (holding that the trial court did not abuse its discretion in ordering the father to undergo a psychological evaluation, have a substance abuse assessment, and enroll in parenting classes, where DSS and the GAL recommended evaluations and classes and the trial court found them to be in the best interest of the children), *aff’d per curiam*, 361 N.C. 686 (2007).

(a) Type of treatment. The court may order psychiatric, psychological, or other treatment or counseling that is directed toward remediating or remedying behaviors or conditions that led or contributed to the child’s adjudication or to the court’s decision to remove the child from that person’s custody. G.S. 7B-904(c).

(b) Custody may be conditioned on treatment. The court may order that the parent or other person comply with a plan of treatment approved by the court in order to maintain or regain custody of the child. G.S. 7B-904(c).

B. Parenting Classes, Transportation, Remedial Steps, and Other Orders

The court may order a parent, guardian, custodian, or caretaker who has been served with a summons (or has otherwise submitted to the court’s jurisdiction) to:

- attend and participate in parenting classes, if classes are available in the judicial district where he or she lives;
- provide transportation for the child to keep appointments for any treatment ordered by the

court (if the child is in the home and to the extent the person is able to provide transportation);

- take appropriate steps to remedy conditions in the home that led or contributed to the adjudication or to removal of the child from the home.

G.S. 7B-904(d1). *See In re A.R.*, __ N.C. App. __, 742 S.E.2d 629 (2013) (holding that it was within the parameters of G.S. 7B-904 for the trial court to require the parents to provide copies of deeds, leases, and employment income, as well as inform social services of changed circumstances); *In re D.L.W.*, __ N.C. App. __, __ S.E.2d __ (May 19, 2015) (there was no evidence that mother’s “social phobia” or her lack of a budget contributed to the conditions that led to the children’s removal or adjudication, so the court’s expectation to get treatment for the social phobia and create a budget in order to show progress was therefore error); *In re H.H.*, __ N.C. App. __, 767 S.E.2d 347 (2014) (holding that it was error for the court to order the mother to maintain stable housing and employment where there was nothing to suggest that her lack of employment or unstable housing contributed to the removal of the children or formed the basis of their adjudications); *In re W.V.*, 204 N.C. App. 290 (2010) (holding that the trial court did not have authority to order a parent to obtain and maintain stable employment, when the parent’s employment status was not relevant to the adjudication that the child was neglected).

C. Cost Responsibilities

1. Child support and visitation. If the child is in the legal custody of someone other than a parent, the court may order the parent to pay a reasonable sum to cover (in whole or in part) the support of the child if the court finds that the parent is able to do so. The amount of child support is determined according to G.S. 50-13.4(c) and the Child Support Guidelines. If the child is in the custody of DSS and the court finds that the parent is unable to pay the cost of the child’s care, the cost must be paid by the county DSS (unless the child is receiving care in a state or federal institution). G.S. 7B-904(d). The court does not have the authority to order a parent to contact a child support enforcement agency to arrange to pay child support. *In re A.S.*, 181 N.C. App. 706, *aff’d per curiam*, 361 N.C. 686 (2007). However, when a child is placed in foster care, DSS has an obligation to seek support from the child’s parents. If support is not addressed in the juvenile court order, DSS can pursue support through the IV-D child support enforcement program.

While the visitation statute, G.S. 7B-905.1, does not specifically address the cost of visitation, the court of appeals has affirmed a trial court’s order requiring a parent to pay visitation costs, reasoning that it was within the trial court’s authority to do so. *In re J.C.*, __ N.C. App. __, 760 S.E.2d 778 (2014). The court of appeals also rejected the respondent parent’s argument that it was error for her to be ordered to pay visitation costs without a finding that she had an ability to pay. The North Carolina Supreme Court reversed the court of appeals and remanded the case to the trial court to make findings about a parent’s ability to pay. Without those findings, the supreme court held it there could not be a meaningful appellate review. *In re J.C.*, __ N.C. __, (June 11, 2015). The remand suggests that the court may order a parent to pay for the cost of supervised visitation if the court finds the parent has an ability to pay.

Practice Note: Child support orders usually are not entered in juvenile court, and child support generally is best dealt with through the IV-D Child Support Enforcement office. The court may order DSS to pursue the establishment, modification, or enforcement of a support obligation through the IV-D office. In any event, a parent may volunteer to go to the child support enforcement office. The parent is under an obligation to pay child support whether or not he or she has a formal support obligation through agreement or court order.

2. Treatment of child or participating adult. Regardless of whether the parent arranges for treatment for the child, the court may order the parent “or other responsible parties” to pay for the cost of treatment or care ordered by the court, including treatment in which the parent or others are ordered to participate. G.S. 7B-903(a)(3)a, 7B-904(a), (b). If the court finds that the parent is unable to pay the cost of the child's treatment, the court must order the county to pay for treatment. G.S. 7B-903(a)(3)a. *See supra* § 7.3 (evaluation and treatment of child).

3. Treatment of parent or others. If the court orders treatment for the parent (or others), the court may order that person to pay the cost of his or her own treatment. If the court finds that the parent or other person is unable to pay, the court may:

- order the person to receive treatment currently available from the area mental health program (local management entity); or
- if the court has conditioned custody on compliance with treatment, charge the cost of treatment to the county where the child lives.

G.S. 7B-904(c).

D. Failure to Comply with Court Orders

On motion of a party or on the court’s own motion, the court may issue an order for a parent, guardian, custodian, or caretaker who has been served with a summons to show cause why he or she should not be found in contempt (civil or criminal) for willfully failing to comply with a court order. G.S. 7B-904(e). *See* AOC Form AOC-J-155, “[Motion and Order to Show Cause \(Parent, Guardian, Custodian or Caretaker in Abuse/Neglect/Dependency Case\)](#)” (Nov. 2000). Contempt proceedings are governed by Chapter 5A of the General Statutes.

Practice Note: The statute seems to say that an order to show cause may be issued only to one who is served with a summons. It is unclear whether an order to show cause may issue when there is personal jurisdiction without service (e.g., when a parent waives service).

E. Court’s Authority over DSS

The court’s authority over DSS is clear in some circumstances and less clear in others. When a child is placed outside the home, the court “may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court.” G.S. 7B-905.1(b). At any stage, the court may determine whether DSS should continue to make reasonable efforts to prevent or eliminate the need for the child’s placement. G.S. 7B-507(a). *See supra* § 2.6.E (relating to

reasonable efforts). The court's authority to "provide for services or other efforts aimed at returning the juvenile to a safe home or at achieving another permanent plan for the juvenile," in G.S. 7B-507(a), may imply the authority to order DSS or others to do specific things. However, the Juvenile Code is not entirely clear about the court's authority to order DSS to take actions beyond those specifically required or authorized by the Code.

F. Court's Authority over GAL

The Juvenile Code does not specifically address the court's authority over the child's GAL. However, the court presumably has the authority to order a GAL to fulfill his or her statutory responsibilities, but not to do things beyond the scope of those responsibilities, such as provide transportation or supervise visits. *See supra* § 2.3 (relating to the GAL role and responsibilities).

7.6 Limitations on Court's Dispositional Authority

The court's authority in juvenile dispositions is limited to statutory options and existing programs or programs for which the funding and machinery for implementation are in place. In the absence of a statute providing otherwise, the court generally has no authority over agencies or individuals who are not parties to the case. Absent a general appearance, due process requires that a person (or organization) be given "reasonable notice and opportunity to be heard" before any proceeding that results in entry of an order against that person or a deprivation of that person's rights. *See Helbein v. Southern Metals Co.*, 119 N.C. App. 431 (1995).

- The court could not require DSS to implement the creation of a special type of foster home. *In re Wharton*, 305 N.C. 565 (1982).
- Where there was no alternative education program for an expelled/suspended student, the court could not send the student back to public school absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow for a return to school. *In re Jackson*, 84 N.C. App. 167 (1987).
- In a delinquency case, the court had no authority to order the state to develop and implement specific treatment programs and facilities. *In re Swindell*, 326 N.C. 473 (1990).
- There was no statutory authorization for the court to grant legal and physical custody of a child to the Willie M. Services Section of the Division of Mental Health, Developmental Disabilities and Substance Abuse Services. *In re Autry*, 115 N.C. App. 263 (1994), *aff'd per curiam*, 340 N.C. 95 (1995).
- Although the Code allows the court to order a parent to "pay a reasonable sum that will cover in whole or in part the support of the juvenile," the statute does not give the trial court authority to order a parent to contact a child support enforcement agency. *In re A.S.*, 181 N.C. App. 706, *aff'd per curiam*, 361 N.C. 686 (2007); *In re Cogdill*, 137 N.C. App. 504 (2000) (decided under former law).
- The court may not commit a child directly to a mental institution. G.S. 7B-903(a)(3)(b). *See also In re Mikels*, 31 N.C. App. 470 (1976).

7.7 Conversion to Civil Custody Order

A. Purpose of Conversion

If the need for intervention through a juvenile court action has ended, but there is a need to have a custody order remain in effect, G.S. 7B-911 allows the court, at a dispositional or subsequent hearing, to create or modify a civil custody order under Chapter 50 of the General Statutes and terminate jurisdiction in the juvenile proceeding. G.S. 7B-911. Note that this procedure is available only if there has been an adjudication of abuse, neglect, or dependency, and it is not a dispositional alternative listed in G.S. 7B-903 (although this is a potential dispositional outcome where certain requirements are met).

The conversion of a juvenile court custody order to a Chapter 50 custody order should occur only when (1) there is a need for a custody order to remain in effect and be enforceable and modifiable, and (2) continued state intervention through a juvenile court proceeding is no longer necessary or appropriate. Terminating jurisdiction in the juvenile case, by itself, nullifies any custody order entered in the case and results in the reversion of the legal status of the child and parties to whatever it was prior to the filing of a petition (unless another valid order has been entered). A civil custody order will remain in effect and be subject to modification and enforcement until the child reaches age 18 or is otherwise emancipated. *See also infra* § 8.4.B (discussing custody as a permanency option and comparing it to other permanency options).

If a civil custody order is created when one or both parents are deployed in the military, special requirements apply under Article 3 of G.S. 50A, the Uniform Deployed Parents Custody and Visitation Act.

B. Requirements and Jurisdiction

The juvenile court may enter or modify a civil custody order and terminate jurisdiction in the juvenile case only if the court finds that:

- there is not a need for continued state intervention through a juvenile court proceeding, *and*
- placement with the person being awarded custody has been the permanent plan for the child for at least six months (unless that person is a parent or the person with whom the child was living when the petition was filed).

G.S. 7B-911(c)(2). *See In re J.M.D.*, 210 N.C. App. 420 (2011); *Sherrick v. Sherrick*, 209 N.C. App. 166 (2011); *see also In re J.D.R.*, __ N.C. App. __, 768 S.E.2d 172 (2015) (order terminating jurisdiction was reversed and remanded because the trial court failed to make findings required by G.S. 7B-911(c)(2)(a)).

C. Creating or Modifying a Civil Custody Order

In the order, the court must make proper findings and conclusions that support the creation or

modification of a Chapter 50 custody order. G.S. 7B-911(c)(1). *See also* G.S. 50-13.2; 50-13.5; 50-13.7; *In re J.B.*, 197 N.C. App. 497 (2009) (holding that the necessary findings were lacking). The order should be filed in both the civil and the juvenile case files.

1. Initiating a civil action. If there is no existing civil custody action, the court must instruct the clerk to treat the order as initiating a civil custody action. The order must satisfy all the requirements for a civil custody order and should not simply refer to or incorporate a juvenile court order or anything else in the juvenile file. The court must designate the parties to the action and indicate whether filing fees are waived. Any motion to enforce or modify the order must be pursuant to the requirements of Chapter 50. G.S. 7B-911(b).

2. Modifying a civil action. If the custody order is entered in an existing civil action and the person who is being awarded custody is not a party to that action, the court must order that the person be joined as a party and that the caption be modified accordingly. The modification order must satisfy all requirements for modifying a civil custody order. G.S. 7B-911(b).

Note: A thorough description of all of the required contents or characteristics of a valid civil custody order or an order modifying a civil custody order is beyond the scope of this manual. See generally G.S. 50-13.1, 50-13.2, 50-13.7, and cases decided thereunder.

7.8 Interstate Compact on the Placement of Children¹

Resource: Website for the [Association of Administrators of the Interstate Compact on the Placement of Children](#) (AAICPC), an affiliate of the American Public Human Services Association.

A. Introduction to the ICPC

Special laws govern the placement of children in foster care, adoptive homes, and institutions across state lines, including most placements with parents or other relatives. Article 38 of the Juvenile Code, G.S. 7B-3800 et seq., contains the Interstate Compact on the Placement of Children (ICPC), which has been adopted in all states to govern interstate placements. (Note that a new compact, the Interstate Compact *for* the Placement of Children, has been adopted by at least ten states, but it does not become effective until at least 35 states have adopted it. *See* "[New ICPC](#)" on the website for the Association of Administrators of the Interstate Compact on the Placement of Children. The Compact consists of ten articles, which are

1. This section provides only an overview of the ICPC and is not intended to be a comprehensive guide. Source for some section content: "[ICPC FAQ](#)" page on the website for the Association of Administrators of the Interstate Compact on the Placement of Children; SECRETARIAT TO THE ASSOCIATION OF ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, AN AFFILIATE OF THE AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (2002); 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. XI \(Interstate/Intercountry Services to Children\)](#) (Feb. 2013); Jane Thompson, N.C. Assistant Attorney General, Interstate Compact on Placement of Children (summary written April 2010).

referenced throughout the discussion below. The juvenile court has exclusive original jurisdiction over ICPC proceedings. G.S. 7B-200(a)(1).

1. Purpose. The purpose of the ICPC is to ensure appropriate foster care and adoption placements of children across state lines. The Compact provides a framework for exchanging information, evaluating potential placements and the child's circumstances, and ensuring that the child receives adequate care and protection while the sending state retains jurisdiction over the child.

2. State and agency structure. Some version of the ICPC has been adopted by all states, and each state has a Compact Administrator. A national association of compact administrators (see link listed above in resource box) promulgates regulations that are key to interpreting and applying the Compact. North Carolina's compact administrator and staff are located in the Division of Social Services within the N.C. Department of Health and Human Services. (See link below in resource box for N.C. contact information.) The compact administrator and staff handle all in-coming and out-going referrals for interstate placements. They oversee the investigation of proposed placements here to determine whether the placement is consistent with or contrary to the child's best interests.

3. Source of requirements and procedures. Requirements and procedures related to the ICPC are determined by the ten ICPC articles themselves as well as the regulations promulgated by the association of state compact administrators. Some regulations have undergone recent amendments that clarify certain issues. However, in some instances the amended regulations conflict with earlier North Carolina appellate court decisions interpreting the Compact. The state DSS manual includes policies and procedures that provide a framework for compliance with the ICPC.

Resources and Tools: For forms and regulations related to the ICPC, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. XI § 1605](#).

FOR DSS policies, procedures, and explanations related to interstate placement, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. XI](#).

North Carolina's Compact Administrator contact information can be found on the "[North Carolina Consultants/Specialists](#)" page on the ICPC website.

B. Applicability of the ICPC.

1. When the ICPC does apply. The ICPC applies to the interstate placement of a child:

- by DSS or a child-placing agency in a foster home or a pre-adoptive placement;
- by any individual or entity (including the court and parents) if the placement is for the purpose of adoption or preadoption (but see (b) below related to some placements by parents, guardians, and certain relatives);

- by any individual or entity (including DSS, the court, and parents) into a child caring institution, but not a medical facility, psychiatric institution, or boarding school (see (b) below).

If a child is removed from only one parent, placement with the other parent in another state is subject to the ICPC unless the court does not have evidence that the out of state parent is unfit, does not seek evidence of fitness, and relinquishes jurisdiction over the child immediately upon placement with the parent. *See* ICPC Regulation 3.

Regulation 3 makes it clear that the ICPC applies to placements with relatives. *See In re V.A.*, 221 N.C. App. 637 (2012) (citing Regulation 3 in reversing the trial court's dispositional order placing a child who was in DSS custody with a great-grandmother in another state without complying with the ICPC requirement for a favorable home study). Prior to amendments to ICPC Regulation 3, North Carolina appellate cases held that the ICPC did not apply to placements out of state with parents or certain relatives. *See In re J.E.*, 182 N.C. App. 612 (2007); *In re Rholetter*, 162 N.C. App. 653 (2004).

Where birth parents allowed their infant to go with an out-of-state couple (non-relatives) pursuant to a private adoption agreement, but then changed their minds about adoption, ICPC provisions applied. It was proper for the birth parents to be considered a "sending agency" within the meaning of the ICPC, so that the birth parents retained jurisdiction over the child, including the power to effect the child's return to the birth parents' state, until his adoption. *Stancil v. Brock*, 108 N.C. App. 745 (1993). See also ICPC Regulations 3 and 4 related to definition of sending agency.

2. When the ICPC does NOT apply. The ICPC does not apply to the sending or bringing of a child into a receiving state by any of the following relatives or a nonagency guardian who leaves the child with any of these relatives or a nonagency guardian in the receiving state: [Article VIII]

- parent,
- stepparent,
- grandparent,
- adult sibling, or
- adult uncle or aunt.

Note that exclusion from application of the ICPC occurs only when both the person making the placement and the placement recipient belong to the above classes of individuals.

The ICPC also does not apply to:

- juveniles who are adjudicated delinquent and on probation or conditional release;
- any child placed in a facility for the sole purpose of education;
- any child placed in a medical facility for the sole purpose of medical care;
- any child placed pursuant to any other interstate compact (e.g., Interstate Compact on Juveniles, Interstate Compact on Mental Health);

- child placements handled in court cases of paternity, divorce, custody, and probate; or
- requests for protective services investigations and follow-up services.

3. The ICPC and placement with a nonremoval parent or with a relative. In 2004 the North Carolina Court of Appeals held that the provisions of the ICPC did not apply at a permanency planning hearing when the court awarded custody to an out-of-state mother. *In re Rholetter*, 162 N.C. App. 653 (2004). In that case the children had been removed from the custody of the father and stepmother in North Carolina, based on adjudications of abuse and neglect, and placed in DSS custody. The court eventually gave custody to the mother who lived in South Carolina, even though two home studies by South Carolina declined to approve the placement. The court of appeals held that the award of full custody to a non-removal parent was not a “placement” under the ICPC. The court found that the language of the ICPC was “clear and unambiguous” and that, because the trial court had not placed the children “in foster care or as a preliminary [placement] to adoption,” the ICPC did not apply. *Rholetter*, 162 N.C. App at 664.

However, in 2011 and 2012, the AAICPC substantially rewrote some of the ICPC regulations, including Regulation 3, which covers definitions, placement categories, applicability, and exemptions. Under Regulation 3, placement categories that require compliance with the ICPC include placements with parents and relatives when the other parent or relative is not making the placement. The definition of foster care was also amended to include 24-hour-a-day care provided by the child’s parent by reason of a court-ordered placement (and not by virtue of the parent-child relationship). However, the amended regulations exempt the ICPC from a placement with a parent if all of the following are true:

1. the parent is not the parent from whom the child was removed;
2. the court has no evidence that the parent is unfit;
3. the court does not seek any evidence from the receiving state regarding the parent’s fitness; and
4. the court relinquishes jurisdiction over the child immediately upon placement with the parent.

The language of the AAICPC regulations that include parents in the definition of foster care has been decided by some state courts to exceed the ICPC statute and therefore have no effect. Applying the same reasoning as the North Carolina Court of Appeals in *Rholetter*, the Connecticut Supreme Court concluded that the ICPC’s language, “placement in foster care or as a preliminary to a possible adoption,” does not include placement with a noncustodial parent. The court went on to say that “it is reasonable to conclude that the drafters determined that the statute should not be applied to out-of-state parents in light of the constitutionally based presumptions that parents generally are fit and that their decisions are in the child's best interests.” *In re Emoni W.*, 48 A.3d 1, 7 (Ct. 2012). The court went on to state in a footnote that even if the ICPC regulations have the force of law, they are invalid to the extent they impermissibly expand the scope of the compact itself. Similarly, but without reference to the regulations, a California Court of Appeals held that “[c]ompliance with the

ICPC is not required for placement with an out-of-state parent.” *In re Patrick S. III*, 160 Cal. Rptr. 3d 832 (Cal. Ct. App. 2013).

In contrast, the Arizona Court of Appeals reached the opposite conclusion in *Arizona Dept. of Economic Sec. v. Standard*, 323 P.3d 760 (Ariz. Ct. App.) (2014), finding that the court was a “sending agency” and, therefore, the ICPC regulations applied to placements with relatives and parents if none of the enumerated exceptions applied.

To date, North Carolina’s appellate courts have not had to address this issue. However, *In re Rholetter* was decided on the language of the statute and did not discuss the AAICPC regulations in effect at the time. If the regulation applies, the holding in *Rholetter* would be contrary to the language of the regulation.

Note: The regulations allow a state to request a “**courtesy check**” of a non-removal parent’s home by the receiving state, without invoking the full ICPC home study process. Whether to conduct a courtesy check is in the discretion of the receiving state. When placement with a non-removal parent is made without ICPC compliance or with only a courtesy check, the receiving state has no responsibility for supervising or monitoring the placement.

4. The ICPC and visitation. The ICPC applies only to interstate placements of children, not visits. Regulation 9 of the ICPC defines a visit according to the purpose, duration, and intention behind a child’s stay. The purpose of a visit is to provide the child with a social or cultural experience of a short duration, such as a camp stay or visit with a friend or relative. A stay for such a purpose that is less than 30 days is presumed to be a visit. A stay of more than 30 days is presumed to be a placement. If, however, for a school-aged child, a stay is more than 30 days but less than the duration of a school vacation period (e.g., 45 days during a summer break), it can be considered a visit and does not require ICPC approval. A stay that does not have a terminal date will be considered a proposed placement and should not occur without ICPC approval. ICPC Regulation 9.

If, however, the sending state has requested a home study or supervision and sends the child to stay with the proposed caregiver in the receiving state, there is a rebuttable presumption that it is a placement and not a visit.

Note that if a court in North Carolina does not follow the ICPC requirements, another state can decline to monitor the placement or provide services.

C. Summary requirements of the ICPC and Regulations.

1. Notice and best interest. When the ICPC applies, prior to sending or bringing a child from one state to another, the sending agency (which includes the court) must furnish the receiving state with written notice of its intention to send, bring, or place the child. Article III(b) (see the article for the content of the notice). The receiving state may then request any supporting or additional information it deems necessary. Article III(c). The sending agency may not send or bring the child into the receiving state until the receiving state notifies the sending agency in writing that the proposed placement does not appear to be contrary to the interests of the child.

Article III(d). Specific forms are available for these purposes. (*See supra* § 7.8.3, Resources and Tools, for the forms.)

2. Social history, case plan, and review. The sending agency (e.g., a DSS caseworker) must prepare a packet containing items such as the child's social, medical, and educational history; the current status of any court case involving the child; and information about the person being considered for placement in the receiving state. The packet will first be sent to the central ICPC office in the sending state where it will be examined and, if approved, sent to the receiving state. Once it arrives in the receiving state's central ICPC office, the packet will be examined, and if everything is in order it will be sent to the DSS office in the community where the prospective placement is located. *See* "[ICPC FAQ](#)" on the Association of Administrators of the Interstate Compact on the Placement of Children website. *See also* ICPC Regulation 1 for specific requirements.

3. Reports, recommendations, approval or denial. The local agency receiving the packet will evaluate the prospective home for placement, and a completed home study report will be sent to the central ICPC office in the receiving state. The central ICPC office reviews the report and determines whether ICPC requirements have been met, and either approves or denies the recommendation of the report. If the placement is approved, once all plans and agreements have been completed the child is moved to the receiving state. The placement may not be approved if the local agency recommends against the placement or the Compact Administrator determines that a lawful placement cannot be completed, unless the problems can be remedied. Whether the placement is approved or denied, there are requirements related to copies of specific documents and reports that must be sent to the sending or receiving state's central office. *See* "[ICPC FAQ](#)"; *see also* ICPC Regulation 1.

4. Jurisdiction and responsibility for child under the ICPC. The sending agency retains jurisdiction over the child to determine all matters relating to the custody, supervision, care, treatment, and disposition of the child until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the receiving state. This jurisdiction includes the power to return the child to the sending state or transfer the child to another location. The sending agency also continues to have financial responsibility for the support and maintenance of the child during the period of placement. However, a public agency may enter into an agreement with an agency in a receiving state to provide services as an agent for the sending agency. Article V. Financial responsibility and agreements between agencies are also addressed in G.S. 7B-3801, 7B-3802, and 7B-3803.

5. Priority placement procedures. An issue with the ICPC is the length of time it can take for states to process cases and approve interstate placements. ICPC Regulation 7 was adopted to allow for expedited ICPC procedures when a judge finds a child meets the criteria for priority ICPC status. DSS has forms and sample orders relating to Regulation 7 (see resources and tools listed previously). Criteria for priority status are:

- the child sought to be placed is four years of age or younger, including older siblings sought to be placed in the same proposed placement; or
- the child currently is placed in an emergency placement; or

- the child is unexpectedly dependent due to sudden or recent incarceration, incapacitation, or death of a parent or guardian; or
- the court finds that any child in the sibling group sought to be placed has a substantial relationship with the proposed placement resource.

Regulation 7 outlines the manner in which the process is expedited, and includes specific time frames for completing different steps.

The Safe and Timely Interstate Placement of Foster Children Act of 2006 (P.L. 109-239) and the amended Regulation 1 require states to complete and report foster and adoptive home studies requested by other states within 60 days and encourage decisions within 30 days if at all possible. The 60 days begin to run when a properly completed home study request is received by the state ICPC office. The 60-day time frame does not apply to any education or training of prospective foster or adoptive parents, and does not include criminal record checks needed for licensing or approving a placement.

6. Illegal placements. Article IV of the Interstate Compact addresses placements made in violation of the Compact. Violations are punishable according to the laws of each state involved. In addition, violations constitute grounds for the suspension or revocation of any license, permit, or other authorization under which the sending agency operates.

Chapter 8

Disposition, Review, and Permanency Planning Hearings and Orders

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8.1 General Standards and Procedures

At every dispositional hearing—whether an initial disposition, a review, or a permanency planning hearing—the court has the same dispositional alternatives and the same authority over parents. This chapter is meant to be read in combination with Chapter 7, which covered the purposes and possible outcomes of dispositional hearings. Cross-references in this chapter to material in Chapter 7 are essential to an understanding of dispositional hearings. In addition, this chapter is best understood when read in its entirety, as subsections within the chapter are not meant to be stand-alone explanations of a topic given regular cross-

referencing within the chapter. Hearing checklists at the end of this manual bring together requirements for each type of hearing and may serve as useful references.

Note: Procedures related to the Rules of Civil Procedure are discussed in Chapter 4 of this manual.

A. Introduction and Relationship among Disposition, Review, and Permanency Planning

Initial disposition hearings, review hearings, and permanency planning hearings share most of the same purposes and procedures. *See supra* § 7.1 (relating to the purpose of disposition); *In re Montgomery*, 77 N.C. App. 709 (1985) (stating that a hearing on a motion for review is in the nature of a dispositional hearing). Yet each type of hearing has distinct purposes and procedures as well. The term “dispositional phase” is used in this manual to refer collectively to the initial disposition hearing, review hearings, and permanency planning hearings.

The initial disposition hearing is the first hearing in the dispositional phase of the case. At disposition, all parties may submit to the court (via testimony, other evidence, and argument) their perspectives on what the child’s and family’s needs are and how those needs can be met. The Code gives the court dispositional alternatives related to in-home services, evaluation, treatment, placement of the child, and directives to parents and others to take steps to address the child’s needs or correct conditions that led to the adjudication. The same dispositional alternatives are available at review and permanency planning hearings. The initial disposition hearing is pursuant to G.S. 7B-901.

Review hearings are held in cases in which the child has been removed from the home. They provide the court with an opportunity to assess what is happening in the case and to determine whether any changes should be made concerning the disposition. A permanency planning hearing is a specific type of review hearing held for the purpose of determining whether the child’s return home is likely and, if it is not, developing another plan to achieve a safe, permanent home for the child within a reasonable period of time. A permanency planning hearing is required in any case in which custody is removed from a parent, guardian, or custodian and the child is not returned home within a year. Review hearings after the initial permanency planning hearing are automatically designated as permanency planning hearings. Review and permanency planning hearings are addressed in G.S. 7B-906.1, which specifies criteria the court must consider and findings the court must make at each type of hearing. *See infra* § 8.3.

At dispositional hearings of any type, the court may be considering:

- whether the child can safely remain at home or be returned home,
- who should have legal custody of the child,
- where the child should be placed,
- what services the child should receive,
- what services the parent(s) or other caregivers should receive,
- what visitation is appropriate if the child is out of the home,
- what directives should be made to the parent concerning expected changes or

- accomplishments that would place him or her in a better position to care for the child,
- whether efforts by DSS to reunify the family have been made and whether they should continue, and
- the date of the next hearing.

At permanency planning hearings, the court must also determine the best permanent plan of care for the child and the steps necessary to achieve that plan within a reasonable period of time. Permanency options include reunification, adoption, guardianship, custody, or for older youth, another planned permanent living arrangement (APPLA), all of which are discussed in detail *infra* § 8.4.

Permanency planning should occur from the very beginning of a child's placement and throughout the case. The requirement for permanency planning hearings ensures that a child does not remain in care for an extended period without the court and parties directly addressing the question of when the child can return home and, if necessary, making an alternative permanent plan for the child. Permanent plans may change, and two permanency options may be explored and worked toward concurrently. Nevertheless, some children will not achieve one of the permanent placement options before leaving the foster care and juvenile court systems. A few children will be emancipated, and others will simply not have a permanent family before aging out of the system. DSS has the responsibility to help prepare foster children who do not have a permanent family for independent living. *See* 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201](#) (Dec. 2009).

Note: Prior to legislative changes in 2013, the Juvenile Code addressed review hearings in G.S. 7B-906 and permanency planning hearings in G.S. 7B-907. The Juvenile Code now addresses both types of hearings in G.S. 7B-906.1, which incorporates most of the language of the two previous statutes. Many of the cases cited in this chapter were decided pursuant to the earlier statutes that contained language the same as or similar to the current statute.

B. Open or Closed Hearings

Hearings are presumed to be open unless the court specifically excludes the public. If, however, the child moves for the hearing to be open, the court must grant the motion. G.S. 7B-801, 7B-901. Otherwise, the court has discretion to exclude the public from a hearing, but in deciding to do so must consider the circumstances of the case, including the following:

- the nature of the allegations;
- the age and maturity of the child;
- the benefit to the child of confidentiality;
- the benefit to the child of an open hearing; and
- the extent to which an open hearing would compromise the confidentiality afforded the child's record by G.S. 7B-2901.

G.S. 7B-801. Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure prohibits electronic media and still

photography coverage of juvenile proceedings. In some districts local rules may address open hearings.

C. Evidentiary Standard and Burden of Proof

1. Informal; relaxed rules of evidence. Hearings in the dispositional phase may be informal, and the rules of evidence are relaxed. *See* G.S. 7B-901, 7B-906.1(c); *In re M.J.G.*, 168 N.C. App. 638 (2005); *In re Montgomery*, 77 N.C. App. 709 (1985). The court may hear and consider any evidence, including hearsay, that the court finds to be reliable, relevant, and necessary to determine the child's needs and the most appropriate disposition. G.S. 7B-901, 7B-906.1(c). The parties must be allowed to present evidence, subject to the court's discretion to exclude cumulative testimony. *See* G.S. 7B-901; *In re Shue*, 311 N.C. 586 (1984).

- The trial court did not abuse its discretion in refusing to admit hearsay evidence in a permanency planning hearing when there was no explanation as to why the authors of documents were not present to testify, there was no support for the contention that the documents were reliable, and DSS strenuously objected to the documents. *In re P.O.*, 207 N.C. App. 35 (2010).
- It was not error for the court to exclude hearsay testimony of mother's sister regarding child's statements about abuse by father because it was cumulative—there was already an abundance of testimony regarding abuse of child by father. *In re J.S.*, 182 N.C. App. 79 (2007).
- It was error for the court to decline to “hear anything else about this thing today” and cut off a party's attempt to introduce evidence regarding best interest where there was no finding that the evidence was incompetent, irrelevant, or cumulative. *In re O'Neal*, 140 N.C. App. 254 (2000).
- It was error for the trial court to base findings on statements made in the dispositional hearing by parties and other individuals who had not been duly sworn; this was not competent evidence. *In re J.N.S.*, 207 N.C. App. 670 (2010).

For a discussion of handling different evidentiary standards when adjudication and disposition are combined, see *supra* § 6.3.B.

See *infra* Chapter 11 for detailed discussion of evidence issues in juvenile proceedings.

2. No burden of proof. Code provisions related to proceedings in the dispositional phase do not place a burden of proof on any party. The essential requirement is that sufficient evidence be presented so that the court can make sufficient findings and a determination regarding best interests. *See In re L.M.T.*, ___ N.C. ___, 752 S.E.2d 453 (2013) (stating that neither the parent nor DSS bears the burden of proof in a permanency planning hearing); *In re Shue*, 311 N.C. 586 (1984).

D. Reports

After an adjudication, the court must proceed to the dispositional hearing when it receives sufficient social, medical, psychiatric, psychological, and educational information. G.S. 7B-

808(a). Reports containing this type of information may be presented to the court by DSS, the guardian ad litem, and the parent at any type of hearing in the dispositional phase of the case.

1. DSS predisposition reports. A “predisposition report” is a written report prepared by DSS that provides social, medical, psychiatric, psychological, and educational information, and sometimes recommendations, related to disposition. The court may not receive or consider the predisposition report until the adjudicatory hearing is completed. G.S. 7B-808(a). *Cf. supra* § 6.3.B (discussing combining of adjudication and disposition hearings while considering certain evidence for dispositional purposes only).

Unless the court makes a written finding that the report is unnecessary, DSS is required to prepare a predisposition report containing:

- the results of any mental health evaluation under G.S. 7B-503 (ordered by the court when the alleged abuser has a history of violent behavior against people);
- a placement plan; and
- a treatment plan to meet the child’s needs.

G.S. 7B-808.

2. GAL or parent reports. The Code does not require written reports from parties other than DSS. Nevertheless, guardians ad litem typically submit written reports to the court as part of their duties involving investigation, identification of resources, exploration of dispositional options, and promotion of the child’s best interests. *See* G.S. 7B-601. This report, submitted to the court in the disposition phase of the case, may address many of the issues addressed in the DSS predisposition report and include recommendations.

Parents or parents’ attorneys may submit written reports to the court, describing the parents’ circumstances and progress, identifying resources, discussing dispositional alternatives, and making recommendations, including the parents’ opinions about the best interest of the child.

These reports, like DSS’s report, can be given to the court only after adjudication.

3. Sharing of reports. Both judicial efficiency and the parties’ ability to prepare adequately are enhanced if reports to the court are shared among parties before the day of the hearing. The Juvenile Code requires the GAL to share reports and information with all parties before submitting them to the court, but the Code does not specify a time frame for sharing. G.S. 7B-700(f). The chief district court judge may adopt local rules or issue an administrative order establishing timeframes and procedures for the sharing of reports, including how a party’s objection to the content of another party’s report should be handled. The rules or order:

- may prohibit disclosure of the report to the child if the court determines that disclosure is not in the child’s best interests;
- may not prohibit a party entitled by law to receive confidential information from receiving that information; and

- may not allow disclosure of any confidential source protected by statute.

G.S. 7B-808(c). *See also supra* § 2.7.B (discussing other laws related to sharing information in juvenile cases).

4. Court's use of reports. When written reports are admitted as evidence, the appellate courts have distinguished between a court's consideration of the reports and a court's incorporation of entire reports into its order as findings of fact. The appellate opinions sometimes characterize broad incorporation as error, but more often they focus on whether the trial court made sufficient independent findings of fact to show that the court did not improperly delegate its fact-finding function by over-reliance on outside reports. *See, e.g., In re A.S.*, 190 N.C. App. 679 (2008) (explaining that the trial court's finding that the statements in the reports were true did not constitute independent findings and did not tell the appellate court on which statements the court relied), *aff'd per curiam*, 363 N.C. 254 (2009); *In re L.B.*, 181 N.C. App. 174 (2007) (holding that the trial court properly incorporated and made findings of fact based on DSS and guardian ad litem reports); *In re J.S.*, 165 N.C. App. 509, 511 (2004) (explaining that the trial court may consider all written reports but "may not delegate its fact finding duty," and instructing that "the trial court should not broadly incorporate these written reports from outside sources as its findings of fact"). *Cf. In re D.Y.*, 202 N.C. App. 140 (2010) (holding that where trial court considered only written reports and no testimony was taken, trial court failed to hold a proper permanency planning hearing because DSS had presented no competent evidence).

E. Reasonable Efforts

Whenever the child has been placed in the custody or placement responsibility of DSS, the court must make findings to support a conclusion regarding whether DSS has made reasonable efforts to:

- prevent the need for the child's placement;
- reunify the family; or
- secure another permanent placement for the child if returning home is no longer the plan.

See G.S. 7B-507. Note: The statute and appellate cases refer to reasonable efforts *findings*, but the determination as to reasonable efforts is a conclusion of law. *See, e.g., In re Helms*, 127 N.C. App. 505 (1997) (stating that "reasonable efforts and best interest determinations are conclusions of law because they require the exercise of judgment.").

If efforts to reunify the family are being made, at each hearing the court is required to determine whether these efforts should continue or cease. Because reasonable efforts findings are required for any order that places or continues the placement of a child in DSS custody, the court is often required to address reasonable efforts at disposition, review, and permanency planning hearings. *See* G.S. 7B-905(c), 7B-906.1(d)(3).

For a more detailed explanation of requirements for reasonable efforts and other findings required by G.S. 7B-507, *see supra* § 2.6.E. Appellate cases addressing orders resulting from

a hearing held in the dispositional phase often address the issue of ceasing reunification efforts. Some of these cases are discussed *supra* § 2.6.E. rather than in this chapter.

8.2 Timing, Notice, and Participants

A. Timing and When Required

1. Disposition hearing. The disposition hearing should be held immediately following adjudication but must be concluded within 30 days after the adjudication hearing. G.S. 7B-901. *See supra* § 4.5 (discussing continuances, delay, and remedy for delay). *See supra* § 7.2.B (discussing continuance as a dispositional alternative).

2. Review hearing. When custody is removed from the parent, guardian, or custodian a review hearing must be held within 90 days from the date of the disposition, and thereafter at least every six months. G.S. 7B-906.1(a). In addition, in all cases the court is required to conduct a review hearing when a party files a motion seeking review. G.S. 7B-906.1(n); *see also* G.S. 7B-1000. Review hearings are pursuant to G.S. 7B-906.1.

Practice Note: Some review hearings held on motion of a party are conducted pursuant to G.S. 7B-1000, which gives the court authority to modify or vacate an order in light of changed circumstances or the needs of the juvenile. *See supra* § 4.9.E (discussing modifying and vacating orders). Whether a review hearing that results from a party's motion is according to G.S. 7B-906.1 or G.S. 7B-1000 may depend on what the motion for review asks for, what is contained in the notice to the other parties, and the timing of the hearing. The parties or the court should make clear at the beginning of the hearing pursuant to what statute or statutes the hearing is being held, and this should also be stated in the court's order.

3. Permanency planning hearing. A type of review hearing called a permanency planning hearing is required in any case where custody is removed from a parent, guardian, or custodian and the child is not returned home within a year. The purpose is to develop a permanent plan for the child. The initial permanency planning hearing is required within 12 months of the initial order removing the child, which in many cases is a nonsecure custody order issued soon after the petition is filed. Hearings after the initial permanency planning hearing are automatically designated permanency planning hearings (taking the place of regular review hearings) and must be held at least every six months to review the progress made in finalizing the permanent plan or to make a new plan if necessary. G.S. 7B-906.1(a).

The scheduling of a permanency planning hearing also may be triggered by the court's decision to cease reunification efforts. If the court orders that reunification efforts cease at a hearing that is not a permanency planning hearing or that was not properly noticed as a permanency planning hearing, the court must schedule a permanency planning hearing within 30 days to address the child's permanent plan. G.S. 7B-507(c). Where the decision to cease reunification efforts is made at a hearing properly noticed as a permanency planning hearing,

the court may proceed at that hearing to consider additional evidence, make findings, and order a plan for permanency pursuant to G.S. 906.1. *Id.*

4. Waiver of hearings and departure from time requirements. The Code allows the court to depart from the schedule for review and permanency planning hearings in limited circumstances. The court may waive hearings, require written reports in lieu of hearings, or order hearings less often than every six months, but only if the court finds by clear, cogent, and convincing evidence that:

- the child has been living with a relative or has been in the custody of another suitable person for at least one year and the court has designated that person as the child's permanent caretaker or guardian of the person;
- the placement is stable;
- continuing the placement is in the child's best interests;
- neither the child's best interests nor the rights of any party require that review hearings be held every six months; and
- all parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.

G.S. 7B-906.1(n).

The court of appeals held that for purposes of the first condition stated above, a child had lived with a relative for a year even though the child had not lived with the same relative for the entire year. *In re T.P.*, 217 N.C. App. 181 (2011) (finding no error with the trial court's combining time spent with two different sets of grandparents to meet the one-year time period).

Waiver of review hearings is not automatic when the court appoints a guardian or places the child in the custody of someone other than DSS. Even if DSS no longer has custody, if the child is not returned home the reviews must continue until all of the conditions listed above are met and the court makes findings to that effect in an order waiving further reviews. Review hearings are no longer required if custody is placed with a parent. G.S. 7B-906.1(k). Even when reviews are not required, however, the court has discretion to continue to conduct reviews as long as it retains jurisdiction. *In re Shue*, 311 N.C. 586 (1984); *In re H.S.F.*, 177 N.C. App. 193 (2006).

Appellate courts have repeatedly found error where a trial court has waived further review hearings without making the findings required by G.S. 7B-906.1(n). *See In re P.A.*, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015) (holding that it was reversible error for the trial court to waive further review hearings without making findings of fact on each of the five statutory enumerated criteria); *In re L.B.*, 184 N.C. App. 442 (2007) (holding that it was error for the court to waive review hearings when it failed to find that child resided with custodians, designated as guardians, for at least one year; that neither the child's best interests nor the rights of any other party, including the mother, required the continued holding of review hearings every six months; and that the mother was aware she was entitled to a review by filing a motion for review). *See also In re M.M.*, ___ N.C. App. ___, 750 S.E.2d 50 (2013)

(reversing and remanding the portion of the trial court's order waiving further reviews without addressing two of the required findings); *In re A.Y.*, __ N.C. App. __, 737 S.E.2d 160 (2013) (reversing portion of order waiving future review hearings and remanding for the trial court to make necessary findings); *In re V.A.*, 221 N.C. App. 637 (2012) (reversing the trial court for ordering that no more review hearings be held without making the required findings); *In re P.O.*, 207 N.C. App. 35 (2010) (finding error where the trial court appointed relatives as legal guardians, released DSS and GAL from further responsibilities, and did not set a date for another hearing without making required findings for waiving further hearings); *In re R.A.H.*, 182 N.C. App. 52 (2007) (remanding the case because, after appointing foster parents as guardians at a permanency planning hearing, the trial court waived further reviews without making the necessary findings).

The appropriate remedy for a trial court's failure to conduct hearings in the dispositional phase within the statutory timeframes is mandamus, not a new hearing. *See In re T.H.T.*, 362 N.C. 446 (2008); *In re E.K.*, 202 N.C. App. 309 (2010). *See infra* § 4.5.D.5 (discussing this issue) and § 4.9.D.3 (discussing the elements for seeking mandamus specified in the *T.H.T.* case).

Practice Note: DSS remains a party even without custody, and is responsible for scheduling reviews pursuant to G.S. 7B-906.1(a). The court should make clear its expectations with respect to DSS's supervising the child's placement, providing services, and preparing reports for the court. Where it seems appropriate for DSS and juvenile court involvement to end, conversion of a juvenile order to a Chapter 50 custody order pursuant to G.S. 7B-911 may be considered. *See supra* § 7.7 (explaining conversion to a civil custody order).

B. Notice and Calendaring

DSS is required to make a timely request to the clerk to calendar each review and permanency planning hearing at a juvenile court session. The clerk is required to give 15 days' notice of the hearing and its purpose to:

- the parent,
- the child if 12 or older,
- the guardian,
- the person providing care for the child,
- the custodian or agency with custody,
- the guardian ad litem, and
- any other person or agency the court may specify.

G.S. 7B-906.1(b).

For purposes of notice to a person providing caring for the child, DSS must either provide the clerk with the name and address of the individual to be given notice or send the notice itself and file with the clerk written documentation that notice of the hearing has been sent to the child's current care provider. G.S. 7B-906.1(b).

Notice of the permanency planning hearing and its purpose is required. The court can order that a placement arrangement be a “permanent plan” only at a hearing for which proper notice was given that the court will be considering a permanent plan for the child at a permanency planning hearing. *See* G.S. 7B-507(c) (requiring that proper notice as a permanency planning hearing is required when the court seeks to order a permanent plan after ceasing reunification efforts). *See also In re S.C.R.*, 217 N.C. App. 166 (2011) (holding that trial court erred where it authorized a permanent plan at a disposition hearing without the proper notice required for a permanency planning hearing); *In re D.C.*, 183 N.C. App. 344 (2007). However, appellate cases have held that respondents waive any objection to lack of such notice by failing to object at trial. *See In re T.H.*, ___ N.C. App. ___, 753 S.E.2d 207 (2014) (holding that respondent could not claim lack of notice where trial court made a “temporary permanent plan” at adjudication and respondent attended disposition hearing but did not object to a lack of notice at disposition); *In re J.P.*, ___ N.C. App. ___, 750 S.E.2d 543 (2013) (holding that because respondent and counsel attended the disposition hearing in which the trial court announced its intention to enter a permanent plan and they did not object to lack of notice, they waived their right to object); *In re J.S.*, 165 N.C. App. 509 (2004).

C. Participants

At disposition hearings, in addition to hearing from the petitioner DSS, the court must give the child and the child’s parents, guardian, or custodian an opportunity to present evidence and make recommendations about the disposition they believe to be in the child’s best interests. G.S. 7B-901.

At review and permanency planning hearings, the court is required to consider information from:

- the parent,
- the juvenile,
- the guardian,
- any person providing care for the child,
- the custodian or agency with custody of the child,
- the guardian ad litem, and
- any other person or agency that will aid in its review.

G.S. 7B-906.1(c).

At any hearing in the dispositional phase, testimony or evidence from persons who are not parties may be considered where the court finds it to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. G.S. 7B-901, 7B-906.1(c). (Parties are discussed *supra* §5.4.) The Code states specifically that its provisions should not be construed to make any person providing care to a child a party to the proceeding based solely on receiving notice and having a right to be heard. G.S. 7B-906.1(b).

Persons whose presence may not be required (unless subpoenaed by a party) but who could potentially provide useful information to the court because of their involvement with the

family or involvement/expertise on a particular relevant issue include:

- relatives or kin (a commonly used term to refer to non-relatives who often function as family),
- counselor/therapist,
- medical or other experts,
- foster parents or other caregivers,
- law enforcement officers,
- juvenile court counselor,
- probation/parole officer, and
- other service providers.

8.3 Dispositional Considerations and Findings

A. Scope and Explanation of Considerations and Findings

Several provisions of the Juvenile Code addressing the dispositional phase set out specific factors the court must consider or about which it must make findings. This chapter primarily covers required findings and considerations related to the type of hearing the court is conducting — disposition, review, or permanency planning — pursuant to G.S. 7B-901 and 7B-906.1. Other required findings and considerations are related to the type of outcome or dispositional alternative the court orders, pursuant to G.S. 7B-903 (dispositional alternatives), G.S. 7B-904 (authority over parents), or G.S. 7B-905.1 (visitation), which are covered primarily in Chapter 7. A variety of outcomes and dispositional alternatives are available to the court at disposition, review, and permanency planning, including:

- dismissal of the case (*see supra* § 7.2.A),
- continuance of the hearing (*see supra* § 7.2.B),
- in-home supervision and services (*see supra* § 7.2.C),
- evaluation and treatment of the child (*see supra* § 7.3),
- placement of the child in DSS custody (*see supra* § 7.4.E),
- placement of the child in the custody of a relative, agency, or other suitable person (*see supra* § 7.4.F),
- appointment of a guardian (*see supra* § 7.4.G),
- evaluation and treatment for parents or other caregivers (*see supra* § 7.5.A), and
- parenting classes or other remedial steps for parents or other caregivers (*see supra* § 7.5.B).

Note: Readers are encouraged to utilize the hearing checklists in the appendix of this manual as tools that summarize requirements relating to dispositional hearings.

B. Inquiry as to Missing Parent, Paternity, and Relatives Required at Initial Disposition

At the initial disposition hearing, the court is required to:

- inquire about the identity and location of any missing parent and whether paternity is at issue;
- make findings about efforts to locate and serve a missing parent and to establish paternity if paternity is in issue; and
- inquire about efforts made to identify and notify relatives as potential resources for placement or support.

G.S. 7B-901. The court may provide in its order for specific efforts aimed at locating, serving, or establishing the paternity of a parent. *Id.*

While the Code does not specifically address the issues of missing parents, paternity, or locating relatives in the context of review and permanency planning hearings, the court should address these issues at any hearing where they may have ongoing relevance.

C. Required Criteria for Review and Permanency Planning Hearings

The court is required to consider the following criteria at review and permanency planning hearings and make written findings concerning any that are relevant:

1. Reunification efforts. The court must consider services offered to reunite the child with either parent (whether or not the child resided with the parent at the time of removal) or with the guardian or custodian from whom the child was removed. G.S. 7B-906.1(d)(1). The court must also consider whether efforts to reunite the child with either parent clearly would be futile or inconsistent with the child's safety and need for a safe, permanent home within a reasonable period of time (regardless of whether the child lived with the parent, guardian, or custodian at the time of removal). G.S. 7B-906.1(d)(3). *See also supra* § 2.6.E.6 (relating to ceasing reunification efforts, including case law on evidence and findings to cease reunification efforts).

2. Visitation. The court must consider reports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan according to G.S. 7B-905.1. *See infra* § 8.5.B.5 and *supra* § 7.4.D (related to specific aspects of visitation that the court must address in its order). G.S. 7B-906.1(d)(2).

3. Foster care. The court must consider reports on the placements the child has had, goals of a foster care placement, and the appropriateness of the foster care plan, as well as the role the current foster parent will play in planning for the child. G.S. 7B-906.1(d)(4). *See also In re L.L.*, 172 N.C. App. 689 (2005) (holding that trial court erred in failing to address the goals for foster care and the role of the foster parents).

4. Permanent plan. If the court determines that reunification efforts should cease, the court must consider a permanent plan of care for the child. G.S. 7B-906.1(d)(3). *But see supra* §

8.2.B, explaining that a permanent plan may be ordered only in the context of a permanency planning hearing properly noticed as such.

5. Independent living. If the child is 16 or 17 years old, the court must consider a report on an independent living assessment of the child and, if appropriate, an independent living plan. G.S. 7B-906.1(d)(5). *See also infra* § 13.2.E (discussing the Foster Care Independence Act, which addresses transitioning older youth out of foster care, and related North Carolina resources). For resource materials, training, and tools related to older children in foster care and aging out of foster care, see the “[Youth Engagement Project](#)” page of the [ABA Center on Children and the Law website](#).

6. Termination of parental rights. The court must consider whether and when TPR should be considered. G.S. 7B-906.1(d)(6). *See also* subsection G below, explaining when DSS may be required to initiate TPR.

7. Any other criteria. The court may consider any other criteria it deems necessary. G.S. 7B-906.1(d)(7).

D. Required Finding of More Adequate Care or Supervision for any Placement

G.S. 7B-903(a)(2) is the Juvenile Code provision addressing the court’s placement options at disposition, introducing the options with the statement “[i]n the case of any juvenile who needs more adequate care or supervision or who needs placement, the court may . . .”

Although this language has long been in the Code, recent cases have interpreted the language as requiring the court to make a specific finding that the child needs more adequate care or supervision or needs placement before ordering a disposition listed in G.S. 7B-903(a)(2), which includes not only out-of-home placements but also in-home supervision and services. *See In re S.H.* 217 N.C. App. 140 (2011); *In re B.S.*, ___ N.C. App. ___, 738 S.E.2d 453 (2013) (unpublished); *In re D.M.*, 219 N.C. App. 647 (2012) (unpublished).

E. Required Findings for Custody and Guardianship

1. Assurance of understanding and adequate resources. Before placing a child in the custody of someone other than parents or appointing a guardian of the person pursuant to G.S. 7B-600, the court must, at any review or permanency planning hearing, verify that the person receiving custody or being appointed as guardian understands the legal significance of the placement or appointment and will have adequate resources to care for the child appropriately. G.S. 7B-906.1(j). *See also supra* § 7.4.F.2 (explaining this requirement in more detail); § 7.4.C (relating to the meaning and impact of custody and placement).

2. Review of guardianship. When a guardian of the person has been appointed and guardianship has been made the permanent plan for the child, the court must proceed in accordance with G.S. 7B-600(b), which has special requirements regarding a review of guardianship. G.S. 7B-906.1(n). *See infra* § 8.4.B.2 (relating to G.S. 7B-600(b)).

3. Consideration of conversion to civil custody. Whenever the court places custody with a parent or other appropriate person, the court is required to determine whether jurisdiction in the juvenile proceeding should be terminated and custody of the child awarded to the parent or other appropriate person under Chapter 50 civil custody provisions. G.S. 7B-911. Conversion to a civil custody case pursuant to G.S. 7B-911 is appropriate when the need for intervention through a juvenile court action has ended, but there is a need to have a custody order remain in effect. *See infra* § 7.7 for details.

F. Required Findings for Returning Home and Unsupervised Visitation

Once a child is in DSS custody, the child may not be returned home or have unsupervised visitation unless the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903(a)(2)c. *See supra* § 7.4.E.3 for additional explanation and case law related to this requirement.

G. Initiation of TPR under Certain Circumstances

As a means of ensuring that critical questions are asked in a timely way, the Code specifies three circumstances in which DSS is required to initiate termination of parental rights proceedings *unless* the court finds that one of three other circumstances exist. The circumstances that may require DSS to initiate termination proceedings are:

- the child is in the custody or placement responsibility of DSS and has been placed outside the home for 12 of the most recent 22 months; or
- a court has determined that the parent has abandoned the child; or
- a court has determined that the parent has committed murder or voluntary manslaughter of another child of the parent, or has aided, abetted, attempted, conspired, or solicited to do so.

G.S. 7B-906.1(f).

Where one of these circumstances exists, DSS must initiate TPR proceedings *unless*:

- the court finds that guardianship or custody with a relative or other suitable person is the permanent plan for the child; or
- the court makes specific findings as to why initiation of TPR proceedings is not in the child's best interest; or
- the court finds that reasonable efforts to reunify the family are still required and that DSS has not provided the family with the services DSS deems necessary to accomplish reunification.

G.S. 7B-906.1(f). Where TPR is determined to be necessary to perfect the permanent plan for the child, DSS must file a TPR petition or motion within 60 days of the date of the permanency planning hearing unless the court makes written findings as to why this 60-day time frame cannot be met. Where the 60-day time frame cannot be met, the court must specify the time within which the TPR petition or motion must be filed. G.S. 7B-906.1(m). The 60-

day time requirement is directory, and failure by DSS to file within the 60 days will not deprive the court of subject matter jurisdiction. *See In re T.M.*, 182 N.C. App. 566 (holding that the trial court was not deprived of subject matter jurisdiction when filing occurred after the 60-day period and that there was no error where no prejudice was shown from the delay), *aff'd per curiam*, 361 N.C. 683 (2007). *See also In re As.L.G.*, 173 N.C. App. 551 (2005); *In re W.L.M.*, 181 N.C. App. 518 (2007).

H. Permanency Planning Additional Requirements

Permanency planning hearings are a type of review hearing with the same requirements as other review hearings, explained above. At any permanency planning hearing where the child is not placed with a parent, the court must also consider additional criteria and make written findings regarding *those that are relevant*. While there is a need to address specifically the relevant criteria, appellate courts have not had the expectation that the findings include a formal listing of the factors in the Code or that they be expressly denominated as such, where it can be concluded from the findings that the relevant criteria were considered. *See In re T.R.M.*, 188 N.C. App. 773 (2008). The criteria that must be considered, with findings regarding those that are relevant, include:

1. Returning home. The court must consider whether it is possible for the child to be placed with a parent immediately or within the next six months and, if not, why placement with a parent is not in the child's best interest. G.S. 7B-906.1(e)(1). *See also In re I.K.*, ___ N.C. App. ___, 742 S.E.2d 588 (2013); *In re J.V.*, 198 N.C. App. 108 (2009); *In re J.S.*, 165 N.C. App. 509 (2004); *In re Ledbetter*, 158 N.C. App. 281 (2003) (all cases in which the trial court erred by failing to make adequate findings as to why it was not in the child's best interest to return home). However, the child cannot be returned home unless the court finds that the child will receive proper care and supervision in a safe home. G.S. 7B-903(a)(2)c. *See supra* § 7.4.E.3 (relating to court requirements for returning a child home).

Appellate cases have stated that in determining whether it is possible for the child to return home within six months of the permanency planning hearing, the court must look at the progress the parents have made in eliminating the conditions that led to the removal of the child. *In re J.V.*, 198 N.C. App. 108 (2009); *In re T.K.*, 171 N.C. App. 35 (2005), *aff'd per curiam*, 360 N.C. 163 (2005). The fact that parents have made some progress does not ensure that the child will be returned home. *See In re T.K.*, 171 N.C. App. 35 (2005) (upholding the trial court's determination that while the mother had made progress, the progress was insufficient for the court to be assured that the children could be safely returned to her care and that the best interests of the children, not the rights of the parents, were paramount), *aff'd per curiam*, 360 N.C. 163 (2005). Some other issues related to this permanency planning requirement that have been addressed in appellate cases include the following:

- A trial court's finding that the juvenile's return to the home was "improbable," rather than not possible (using a term other than the one in the statute) did not require a remand. Although it is the better practice for the court to use the words of the statute in its findings, the court sufficiently addressed the issue of whether it was possible for the juvenile to be returned home immediately or within the next six months and why it was not in the

- juvenile's best interests to return home. *In re T.R.M.*, 188 N.C. App. 773 (2008).
- The fact that the court has made guardianship the permanent plan for a child does not eliminate the requirement that the court address whether it is possible for the child to return home. *In re J.V.*, 198 N.C. App. 108 (2009).
 - The court reversed and remanded where the trial court's order failed to clarify which findings related to which parent and included insufficient findings to support the ultimate finding (or conclusion) that it was contrary to the child's best interest to be returned to respondent. *In re H.J.A.*, ___ N.C. App. ___, 735 S.E.2d 359 (2012).

2. Guardianship or custody. Where the child's placement with a parent is unlikely within six months, the court must consider whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents. G.S. 7B-906.1(e)(2). *See* E. above explaining required findings for custody and guardianship. *See supra* § 7.4 (explaining appointment of guardian and custodian).

- A permanent plan placing a child in guardianship with a half-sibling's grandparents was upheld where the child was bonded with the grandparents and lacked interest in visiting the mother, and the mother failed to undergo ordered psychological evaluation, conquer anger problems, and comply with orders to eliminate contact between her child and her sex offender boyfriend. *In re L.B.*, 181 N.C. App. 174 (2007).
- The trial court erred in failing to consider the biological father as a potential candidate for custody because of his late appearance in the case. *In re Eckard*, 148 N.C. App. 541 (2002) (citing G.S. 7B-907(b)(2), now 906.1(e)(2), for the requirement that the father be considered).
- Where the court ordered in a permanency planning hearing that legal guardianship be placed with relatives, even though the court did not explicitly use the term "permanent" in its order or refer to G.S. 7B-600 related to guardianship, it was reasonable to infer from the findings and other provisions of the order that the court intended to establish guardianship as a permanent plan. *In re P.O.*, 207 N.C. App. 35 (2010).

3. Adoption. Where the child's placement with a parent is unlikely within six months, the court must consider whether adoption should be pursued and, if so, any barriers to adoption. G.S. 7B-906.1(e)(3). *See In re Z.J.T.B.*, 183 N.C. App. 380 (2007) (holding that it was error for the trial court to make no finding as to whether adoption should be pursued).

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

4. Change in current placement. Where the child's placement with a parent is unlikely within six months, the court must consider whether the child should remain in the current placement or be placed in another permanent living arrangement and why. G.S. 7B-906.1(e)(4). *See In re Z.J.T.B.*, 183 N.C. App. 380 (2007) (holding that it was error for the trial court to fail to examine whether the children's placement should change and why); *In re Ledbetter*, 158 N.C.

App. 281 (2003) (holding that it was error for the trial court to change a child's custody without adequately explaining in its findings why the change was being made).

5. Reasonable efforts to implement permanent plan. At hearings after the initial permanency planning hearing, the court must address whether DSS has made reasonable efforts to implement the permanent plan for the child. G.S. 7B-906.1(e)(5). *See supra* § 2.6.E (discussing details on reasonable efforts findings).

6. Other criteria. The court may consider any other criteria it deems necessary. G.S. 7B-906.1(e)(6). *See In re J.M.D.*, 210 N.C. App. 420, 427 (2011) (holding that even if none of the other statutory criteria were relevant the trial court should have made findings as to "other criteria" relevant to the purpose of the permanency planning hearing).

7. Permanent plan. At the conclusion of each permanency planning hearing, the court must make specific findings as to the best plan of care to achieve a safe, permanent home for the child within a reasonable period of time. G.S. 7B-906.1(g). *See also In re J.B.*, 197 N.C. App. 497 (2009) (holding that the trial court erred in failing to specify a permanent plan). *See* § 8.4 below for further explanation of the options for a permanent plan.

8.4. Permanency Outcomes¹

A. Permanency Options

At the conclusion of the permanency planning hearing, the court must make specific findings related to relevant statutory criteria, detailed above in § 8.3. The court also must make determinations related to the best plan of care to achieve a safe, permanent home for the child within a reasonable period of time. The court has the same dispositional alternatives and authority over parents and others that it has at disposition and review hearings. *See supra* § 8.3.A (relating to outcomes at disposition). Permanency options include:

- reunification,
- adoption,
- guardianship with relatives or others,
- assignment of legal custody, or
- another planned permanent living arrangement (APPLA) for youth between the ages of 16 and 18.

Permanent placements can be ordered only in the context of permanency planning hearings that are properly noticed as such. *See supra* § 8.2.B

1. Source for some content in this section: 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201](#) (Dec. 2009).

Permanency Resources: For DSS philosophy, policies, and procedures related to permanency planning, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(VI\)](#) (Dec. 2009).

For descriptions of the five permanent plan options, see 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(VI\)\(E\)](#) (Dec. 2009).

Multiple resources related to permanency plans are accessible through the Child Welfare Information Gateway website. See "[Achieving & Maintaining Permanency](#)" and "[Legal Issues Related to Permanency](#)" on the website for the Child Welfare Information Gateway, U.S. Department of Health and Human Services.

B. Finality and Modification of Permanent Placement Options

For children who cannot return home, placement options have varying degrees of finality or "permanence." The combination of TPR and a subsequent adoption is the permanency option with the greatest degree of legal finality. Yet adoption is not always possible or preferred as the permanent plan for a child. Other options include custody, guardianship, and in the case of older youth, another planned permanent living arrangement (APPLA). (See *infra* Chapter 9 for details on TPR; *infra* §§ 10.1 and 10.3 for details on post-TPR; *supra* § 7.4.C, E, & F for details on custody; *supra* § 7.4.G for details on guardianship. APPLA is described below.)

1. Custody. A permanent plan of custody will be evaluated at permanency planning hearings and can be modified by the court based on changed circumstances and the best interest of the child. See G.S. 7B-1000. If criteria for waiving review hearings are met, a custody order in a juvenile case can remain in place with little court oversight. Even when reviews are not required, any party may file a motion for review. See G.S. 7B-906.1(n), 7B-1000. However, a custody order entered in a juvenile case is effective only while the court continues to exercise jurisdiction in the juvenile case. See G.S. 7B-201.

If the need for intervention through a juvenile court action has ended, but an order placing custody with a parent or other person needs to remain in effect, the court may provide for custody in a civil custody order and terminate jurisdiction in the juvenile case. G.S. 7B-911 requires that whenever the court places custody with a parent or other appropriate person, the court must determine whether conversion to civil custody is appropriate. It allows the court, at a disposition or subsequent hearing, to create or modify a civil custody order under Chapter 50 of the General Statutes and terminate jurisdiction in the juvenile proceeding. See *supra* § 7.7 (detailing requirements for creating or modifying a civil custody order in juvenile court). A civil custody order can be modified in civil domestic court pursuant to Chapter 50, upon a showing of a substantial change of circumstances affecting the welfare of the child. A civil custody action continues until the child reaches age 18 or is otherwise emancipated.

The standard for modifying a custody order is less stringent than that for modifying guardianship (described below). Legal custody and legal guardianship do not differ greatly,

but the rights and responsibilities of a legal custodian are less well defined by statute than are those of a legal guardian.

See supra § 7.4.C (relating to the meaning and impact of custody and placement).

2. Guardianship. The court may appoint a guardian of the person for the juvenile at any stage of the proceeding. *See* G.S. 7B-600.

When the court orders guardianship but does not specify that it is the permanent plan for the child, the court may modify the order based on changed circumstances and the best interest of the child. *See* G.S. 7B-1000. However, when the court orders guardianship as a permanent plan for the child and appoints a guardian under G.S. 7B-600, the guardian becomes a party to the proceeding and guardianship may not be terminated unless the court finds that:

- the relationship between the guardian and the juvenile is no longer in the juvenile's best interest;
- the guardian is unfit;
- the guardian has neglected his or her duties; or
- the guardian is unwilling or unable to continue to perform those duties.

G.S. 7B-600(b). *See also In re J.D.C.*, 174 N.C. App. 157 (2005) (holding that it was error for the court to require the mother to prove the above criteria where guardianship had never been found by the court to be the permanent plan).

If a party files a motion for review under G.S. 7B-906.1 or G.S. 7B-1000 when a permanent plan of guardianship is in place, before conducting a review hearing the court may do one or more of the following:

- order DSS to conduct an investigation and file a written report and give testimony regarding the performance of the guardian;
- utilize the community resources in behavioral sciences and other professionals in the investigation and study of the guardian;
- ensure that a GAL has been appointed pursuant to G.S. 7B-601 and has been notified of the pending motion; and
- take any other action necessary to make a determination.

G.S. 7B-600(b).

Thus, the circumstances under which guardianship that is a permanent plan may terminate are more restrictive than the circumstances under which custody or a guardianship that is not a permanent plan may be modified.

See supra § 7.4.G (discussing guardianship, including the role and duties of the guardian).

3. APPLA. APPLA means Another Planned Permanent Living Arrangement. It is a term that arose from the federal Adoption and Safe Families Act (ASFA), and the ASFA regulations

define the term as “any permanent living arrangement that is not enumerated in statute.” 65 Fed. Reg. 4036 (Jan. 25, 2000). The term does not appear in the Juvenile Code and is not included there as a dispositional alternative or permanent plan. APPLA is a permanent living arrangement for a youth 16 years of age or older that exists when

- the youth resides in a family setting that has been maintained for at least the previous six consecutive months; and
- the youth and caregiver have made a mutual commitment of emotional support; and
- the youth has been integrated into the family; and
- the youth and caregiver are requesting that the arrangement be made permanent; and
- the arrangement is approved after other permanency options, including adoption, guardianship, and custody, have been determined to be inappropriate due to the youth’s long-term needs.

1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(VD\)\(E\)\(5\)](#) (Dec. 2009).

APPLA must be approved initially by the DSS Permanency Planning Action Team/Child and Family Team (CFT) and by the court before becoming the permanent plan. It must be reviewed at least every six months at CFT meetings and periodically by the court. When feasible, the youth should participate actively in the reviews, through either direct testimony or written statements, to assure that the court knows the youth’s preferences. DSS retains legal custody of the youth for the period of the APPLA. *Id.* An APPLA arrangement may be modified by the court at any time.

8.5 Dispositional Orders

A. Timing

Orders from disposition, review, or permanency planning hearings must be reduced to writing, signed, and filed with the clerk within 30 days of the completion of the hearing. G.S. 7B-905(a); 7B-906.1(h). *See supra* § 4.9.C (discussing what constitutes entry of the order); § 4.9.D (discussing the effect and the remedy for delay).

If the order is not entered within 30 days, the juvenile clerk must schedule a hearing at the next juvenile session of court for a determination and explanation of the reason for the delay and for any needed clarification as to the contents of the order. The order must then be entered within 10 days of this follow-up hearing. G.S. 7B-905(a); 7B-906.1(h).

B. General Requirements

Tool: AOC Form AOC-J-154, “[Juvenile Disposition Order \(Abuse, Neglect, Dependency\)](#)” (Apr. 2006).

See supra § 4.9 for more information on judgments and orders.

The Juvenile Code has specific requirements for any dispositional order:

1. Findings and conclusions. The order must contain appropriate findings of fact and conclusions of law. G.S. 7B-905(a). *See supra* § 4.9.B and *infra* § 12.8.B (relating to defining and separating findings and conclusions as well as the standard of review for findings of fact and conclusions of law).

(a) Findings of fact. The Code specifies certain required findings in dispositional orders, depending on the outcomes ordered and the type of dispositional hearing. Failure to include required findings in an order has been found by appellate courts to be reversible error. *See, e.g., In re M.M.*, __ N.C. App. __, 750 S.E.2d 50 (2013); *In re H.J.A.*, __ N.C. App. __, 735 S.E.2d 359 (2012). However, the North Carolina Supreme Court has held that while the better practice is to include statutory language, an order need not recite the exact language of a statute but must address the substance of the concerns contained in the statute. *In re L.M.T.*, __ N.C. __, 752 S.E.2d 453 (2013) (affirming an order ceasing reunification efforts under G.S. 7B-507). Requirements for findings related to specific dispositional outcomes are detailed in Chapter 7. Specific required findings that must be made at hearings in the dispositional phase are detailed *supra* § 8.3.

See hearing checklists summarizing the requirements for dispositional orders at the end of this manual.

(b) Conclusions of law. Determinations of reasonable efforts and best interests are conclusions of law because they require an exercise of judgment. *In re Helms*, 127 N.C. App. 505 (1997). Both determinations must be supported by specific findings.

(c) Incorporation of Reports. The court cannot simply adopt DSS, GAL, or other reports as its only findings or substitute reports for the court's independent determination. *See In re M.M.*, __ N.C. App. __, 750 S.E.2d 50 (2013); *In re Harton*, 156 N.C. App. 655 (2003). Written reports may be incorporated and findings may be based on those reports so long as the court does its own independent review. *See In re C.M.*, 183 N.C. App. 207 (2007) (holding that psychological evaluations and a GAL report were properly incorporated because the court made extensive findings showing that the court made its own determinations with respect to the facts); *In re J.S.*, 165 N.C. App. 509 (2004) (holding that the trial court erred by entering a two-page order that broadly incorporated written reports from DSS and a mental health expert as its findings of fact). *See also In re H.J.A.*, __ N.C. App. __, 735 S.E.2d 359 (2012) (noting that recitation of testimony and incorporation of reports without specific findings were insufficient). It is error for the court to generally find statements in reports to be true without specifying the statements in the reports upon which the court is relying. *In re A.S.*, 190 N.C. App. 679 (2008), *aff'd per curiam*, 363 N.C. 254 (2009); *see also In re S.J.M.*, 184 N.C. App. 42 (2007), *aff'd per curiam*, 362 N.C. 230 (2008); *In re Ivey*, 156 N.C. App. 398 (2003). *See supra* § 4.9.B.2 (discussing reports and documents in an order); *supra* § 8.1.D.4 (discussing the court's use of reports).

(d) Recitation of testimony. Recitations of the testimony of witnesses do not constitute findings of fact. *In re L.B.*, 184 N.C. App. 442 (2007) (finding no prejudice, however, when the trial court's conclusions were supported by other proper findings). *See also In re M.M.*, ___ N.C. App. ___, 750 S.E.2d 50 (2013). *See supra* § 4.9.B.2 (discussing recitation of allegations or testimony).

(e) Arguments of counsel not evidence. Arguments of counsel may not be considered as evidence. *In re K.S.*, 183 N.C. App. 315 (2007); *In re D.L.*, 166 N.C. App. 574 (2004).

2. Precise terms. The order must state with particularity, both orally and in the written order, the precise terms of the disposition. It must include the type of disposition, the duration, and the person responsible for carrying out whatever the disposition requires, as well as the person or agency in whom custody is vested. G.S. 7B-905(a).

3. Set next hearing. When custody is removed from a parent, guardian, or custodian and a review hearing is required, the order must set the date of the review hearing if practicable. G.S. 7B-905(b).

If the court orders that reunification efforts should cease at a hearing that was not noticed as a permanency planning hearing, the court must direct that a permanency planning hearing be held within 30 days and should set the date for the hearing if practicable. G.S. 7B-507(c).

4. Findings required if child is in DSS custody. If the court places or continues placement of a child with DSS, the order must comply with the requirements of G.S. 7B-507. *See* G.S. 7B-905(c), 7B-906.1(l). In addition to addressing reasonable efforts, the court must make a finding that the juvenile's continuation in or return to his or her own home would be contrary to the juvenile's best interest and must state that the child's placement and care are the responsibility of DSS. *See supra* § 2.6.E (relating to detailed requirements under G.S. 7B-507, including findings that must be made in order to cease reunification efforts).

The court may order that efforts to eliminate the need for placement be made concurrently with efforts to plan for another permanent placement for the child. G.S. 7B-507(d). *See In re J.J.L.*, 170 N.C. App. 368 (2005) (holding that concurrent planning under this provision did not conflict with the requirement to obtain a permanent placement within a reasonable period of time).

5. Visitation.

(a) Order must address visitation in specific terms. Anytime custody is removed from a parent, guardian, or custodian, or placement outside the home is continued, the order must address appropriate visitation that is in the child's best interest and consistent with the child's health and safety. G.S. 7B-905.1(a). Visitation orders must indicate the minimum frequency and length of visits and whether the visits must be supervised. G.S. 7B-905.1(b), (c). The court may authorize additional visitation agreed upon by the respondent and custodian or guardian. G.S. 7B-905.1(c). Determination of visitation rights by the court is a judicial function that cannot be delegated to the child's custodians. *In re M.M.*,

___ N.C. App. ___, 750 S.E.2d 50 (2013); *In re L.B.*, 181 N.C. App. 174 (2007); *In re T.T.*, 182 N.C. App. 145 (2007); *In re E.C.*, 174 N.C. App. 517 (2005). The court's order concerning visitation may specify conditions under which visitation may be suspended. G.S. 7B-905.1(a). All parties must be informed of the right to file a motion for review of any visitation plan. G.S. 7B-905.1(d).

See supra § 7.4.D, addressing visitation, including case law, in detail.

(b) DSS responsibility; court approval. If DSS has custody or placement responsibility for the child, the court may order DSS to arrange, facilitate, and supervise a *court-approved* visitation plan consistent with the best interests of the child. The plan must indicate the minimum frequency and length of visits and whether the visits must be supervised. G.S. 7B-905.1(b). Unless the court orders otherwise, DSS has the discretion to do the following:

- determine who will supervise visits when supervision is required;
- determine the location of visits;
- change the day and time of visits in response to scheduling conflicts, illness of the child or party, or extraordinary circumstances. Limited and temporary changes must be communicated promptly to the affected party, and ongoing changes must be communicated in writing to the party, stating the reason for the change.

G.S. 7B-905.1(b).

6. Missing parent, paternity, relatives. At the initial disposition hearing, the court is required to inquire about any missing parents, paternity issues, and relatives, and the order should include relevant findings. The court may provide in its order for specific efforts aimed at locating, serving, or establishing the paternity of a parent. G.S. 7B-901. See § 8.3.B above for further explanation of this requirement.

7. Waiver or continuance. Court orders that continue disposition hearings or continue or waive review or permanency planning hearings must make specific findings as to the circumstances warranting that action. *See supra* § 4.5 (discussing continuances and delay); § 8.2.A.4 (relating to special requirements for waiving or delaying review and permanency planning hearings).

8. Compliance with UCCJEA, ICPC, MEPA, and ICWA. All dispositional orders must comply with:

- UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), ensuring that the court has subject matter jurisdiction. [See *supra* § 3.3 for details on UCCJEA.]
- ICPC (Interstate Compact on the Placement of Children), which ensures an appropriate process of placing children across state lines. [See *supra* § 7.8 for details on ICPC.]
- MEPA (Multiethnic Placement Act), which prohibits the use of a child's or prospective parent's race, color, or origin to delay or deny placement. [See *infra* § 13.7 for details on MEPA.]

- ICWA (Indian Child Welfare Act), ensuring that where Indian children are involved, the tribe receives notice and an opportunity to be involved with placement, and the child is not unnecessarily placed in a non-Indian home. [See *infra* § 13.6 for details on ICWA.]

C. Consent Orders

Some aspects of disposition, review, and permanency planning orders may be resolved in a preadjudication conference (addressed § 5.7 *supra*) or in less formal ways.

True consent orders, however, are permitted only when:

- all parties are present or represented by counsel who is present and authorized to consent,
- the child is represented by counsel, and
- the court makes sufficient findings of fact.

G.S. 7B-801(b1). See *supra* § 6.5 (providing more detail on consent orders).

D. Status of Jurisdiction

The Juvenile Code states that one purpose of disposition is to “achieve the objectives of the State in exercising jurisdiction.” G.S. 7B-900. The Code provides that once jurisdiction is obtained in a juvenile case, it continues until terminated by the court or until the juvenile reaches age 18 or is otherwise emancipated, whichever occurs first. G.S. 7B-201(a). For a full discussion of continuing or ending jurisdiction, including the effect of terminating jurisdiction and why the term “closing” a case is problematic, see § 3.1.C *supra*.

The court has jurisdiction to modify any disposition made in the juvenile case until jurisdiction is terminated. G.S. 7B-1000(b). See also *In re H.S.F.*, 177 N.C. App. 193 (2006); *In re J.S.*, 165 N.C. App. 509 (2004).

During an appeal of a dispositional order, the court continues to have jurisdiction to conduct review hearings. *But see infra* §§ 12.4 and 12.10 (providing details and limitations on what disposition orders may be appealed and how disposition orders and the court’s jurisdiction are affected by appeals).

8.6 Voluntary Placements

A. Introduction

Some DSSs occasionally enter into voluntary placement agreements (as opposed to court ordered placement) with a child’s parent or guardian. Placement of a child under a voluntary placement agreement is in a licensed foster home. The placements are time limited and must be reviewed by the court if the child does not return to the parent or guardian within 90 days. The juvenile court has exclusive, original jurisdiction over such reviews. G.S. 7B-200(a)(5). DSS policy is to *not* utilize voluntary placements as a substitute for filing a petition alleging

abuse or neglect. The policy considers a voluntary placement appropriate for a family in a crisis situation or when the court orders the parent to arrange for placement of a child adjudicated delinquent or undisciplined. *See* “Legal Authority for Placement In Foster Care,” 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(IV\)\(C\)](#) (Dec. 2009).

B. Timing and Duration

Within 90 days of a voluntary placement, the court must conduct a review. An additional review must take place within the next 90 days, and any other review hearings may be conducted on the court’s own motion or by motion of the parents, guardian, foster parents, or DSS director. A child may not remain in a voluntary placement for more than six months without DSS’s filing of a petition alleging abuse, neglect, or dependency. G.S. 7B-910(c).

Practice Note: The requirement that a child not remain in a voluntary placement unless a petition is filed does not also require that the child be adjudicated abused, neglected, or dependent. If the petition is dismissed because the evidence does not establish abuse, neglect, or dependency, the voluntary placement will not automatically terminate.

C. Purpose and Requirements of Hearing

At the review hearing for a voluntary placement, the court determines whether to approve the placement, disapprove the placement, or direct DSS to petition for custody if the placement is to continue. The court must make findings as to:

- the voluntariness of the placement;
- the appropriateness of the placement;
- whether the placement is in the best interests of the child; and
- services that have been or should be provided to the parents, caretakers, or child either to improve the placement or eliminate the need for the placement.

G.S. 7B-910.

The clerk must provide at least 15 days’ advance written notice of these hearings to the parent or guardian, the juvenile if 12 or older, DSS, and any other person the court may specify.

Practice Note: At a review of a voluntary placement, the court does not have jurisdiction to direct orders to the parents, caregivers, or DSS; an indigent parent is not entitled to appointed counsel; and the child is not represented by a GAL. The voluntary nature of the placement means that the parent or guardian may reassume custody of the child at any time, unless DSS has filed a petition and obtained a nonsecure custody order.

Chapter 9

Termination of Parental Rights¹

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

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9.1 Purpose and Overview of Termination of Parental Rights**A. Overview of Termination of Parental Rights**

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

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

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

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

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

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

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

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

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

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

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

9.2 Jurisdiction and Procedure

A. Subject Matter Jurisdiction

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

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

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

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

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

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

B. Personal Jurisdiction

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

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

C. Applicability of the Rules of Civil Procedure

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

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

9.3 Initiation of Proceedings and Standing

A. Initiation of TPR

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

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

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

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

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

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

B. Standing to File Petition or Motion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9.4 Counsel and Guardians ad Litem for Parent and Child

A. Counsel for Parent

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Guardian ad Litem for Child

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

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

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

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

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

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

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

D. Payment of Counsel and Guardians ad Litem

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

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

3. Reimbursement for fees.

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

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

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

9.5 Contents of Petition or Motion

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

A. Identifying Information

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

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

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

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

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

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

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

B. Addressing the UCCJEA

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

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

C. Facts to Support Grounds for Termination

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

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

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

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

D. Verification

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

E. Request for Relief

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

9.6 Hearing for Unknown Parent

A. Preliminary Hearing to Determine Identity of Unknown Parent

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

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

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

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

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

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

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

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

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

B. Service on Unknown Parent

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

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

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

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

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

9.7 Summons and Notice

A. Introduction

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

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

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

B. Summons for Proceeding Initiated by Petition

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

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

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

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

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

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

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

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

(b) Notice. The summons must give notice:

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

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

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

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

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

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

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

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

C. Notice for Proceeding Initiated by Motion in the Cause

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

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

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

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

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

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

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

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

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

orders otherwise;

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

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

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

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

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

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

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

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

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

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

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

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

9.8 Answer or Response

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

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

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

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

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

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

9.9 Pretrial and Adjudication Hearing Requirements

A. Pretrial Hearing

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

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

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

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

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

G.S. 7B-1108.1.

B. Adjudication Hearing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Where the court of appeals found that "justice was impaired" by the trial court's denial of a continuance, an order terminating parental rights was reversed. *In re D.W.*, 202 N.C. App. 624 (2010) (citing uncertainty as to whether the mother had notice of the hearing; the mother's diminished capacity, which could have made her absence involuntary; her attendance at all prior hearings; external time constraints that negatively affected the hearing; and the trial court's failure to ascertain the nature of the proceeding before ruling on the motion for a continuance).

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

9.10 Evidence and Proof

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

A. Evidentiary Requirements and Standards

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

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

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

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

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

B. Evidence from Earlier Proceedings

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

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

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

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

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

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

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

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

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

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

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

C. Events between Filing of Petition or Motion and Hearing

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

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

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

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

D. Specific Types of Evidence

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

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

9.11 Grounds for Termination of Parental Rights

A. Abuse or Neglect

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

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

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

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

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

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

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

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

Other cases involving prior neglect adjudications include:

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

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

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

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

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

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

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

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

- (c) **Nonfeasance as neglect.** Parent's nonfeasance, as well as malfeasance, can constitute neglect. *In re Adcock*, 69 N.C. App. 222 (1984) (holding that mother's failure to intervene or protect child from another person's physical abuse was neglect). *See also In re D.A.H.-C.*, __ N.C. App. __, 742 S.E.2d 836 (2013) (finding sufficient evidence of neglect where despite mother's participation in classes, she continued to cohabit and associate with people violent toward her and her children, failing to protect them from abuse and neglect and creating a substantial risk of future neglect).
- (d) **Participation in previous action.** It was error to admit evidence of father's failure to participate in the underlying neglect proceeding when there was no evidence that he was served in that action. *In re Mills*, 152 N.C. App. 1 (2002).
- (e) **Abandonment as neglect.** Neglect in the form of abandonment does not require findings regarding the six-month period immediately preceding the filing of the petition as does the separate ground of abandonment. The court may examine the parent's conduct over an extended period of time. *In re Humphrey*, 156 N.C. App. 533 (2003); *see also In re Apa*, 59 N.C. App. 322 (1982) (affirming the determination that the father's willful failure to support or visit the child for an eleven-year period constituted neglect in the form of abandonment); *In re T.J.F.*, __ N.C. App. __, 750 S.E.2d 568 (2013) (affirming abandonment as neglect where the father had limited contact with the child despite consistently available opportunities for involvement; failure to contact the child in the six months preceding the TPR petition; failure to provide a reasonable amount for the cost and care of the child).
- (f) **Relinquishment of another child.** The trial court did not err in admitting evidence of mother's surrender of her rights to another child, since the way another child in the same home was treated and that child's status clearly were relevant to whether there could be an adjudication of the neglect ground. *In re Johnston*, 151 N.C. App. 728 (2002); *see also In re Allred*, 122 N.C. App. 561 (1996).
- (g) **Munchausen Syndrome (the DSM V has replaced this diagnosis with Factitious Disorder).** Evidence was sufficient to establish the abuse ground (creation of substantial risk of serious non-accidental physical injury and probability of repeated abuse if child returned home) where court found that pediatricians diagnosed Munchausen Syndrome by Proxy, the mother had violated various court orders and had not benefited from treatment, and the child's recurring need for medical attention ended when the child was removed from the mother's custody. *In re Greene*, 152 N.C. App. 410 (2002).
- (h) **Ongoing domestic violence.** Evidence was sufficient to establish an environment injurious to the children's safety where the children witnessed numerous episodes of domestic violence between the parents over the course of several years; after the children were

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

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

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

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

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

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

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

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

- (b) Parent's ability.** For willfulness to attach, evidence must show a parent's ability (or capacity to acquire the ability) to overcome the factors that resulted in the child's placement. *See In re C.C.*, 173 N.C. App. 375 (2005) (holding that the evidence and findings were not sufficient to establish that respondent "willfully" left the children in care); *In re Baker*, 158 N.C. App. 491 (2003) (affirming the termination of parental rights where the evidence of willfulness included parents' refusal to inquire about or complete parenting classes, sign a reunification plan, or use mental health services). Whether a parent is in a position to actually regain custody of the child at the time of the TPR hearing is not relevant in determining whether the parent has made reasonable progress to correct the conditions that led to removal. *In re L.C.R.*, __ N.C. App. __, 739 S.E.2d 596 (2013) (where a neglect order had been converted to a civil custody order and current custodians were the petitioners for TPR).
- (c) Minor parent.** In the case of a minor parent, the court must make specific findings showing that the parent's age-related limitations have been adequately considered in relation to willfulness. *In re J.G.B.*, 177 N.C. App. 375 (2006); *In re Matherly*, 149 N.C. App. 452 (2002).
- (d) Incarcerated parent.** A parent's incarceration, standing alone, neither requires nor precludes a finding that the parent willfully left the child in foster care. The parent's failure to contact DSS or the child is evidence of willfulness. *In re Harris*, 87 N.C. App. 179 (1987); *see also In re Shermer*, 156 N.C. App. 281 (2003) (holding that evidence was insufficient to find willfulness where the incarcerated father wrote to his sons while in prison and informed DSS that he did not want his rights terminated); *Whittington v. Hendren*, 156 N.C. App. 364 (2003) (affirming the termination of parental rights where the court found that "[e]ven though the respondent was incarcerated, he could have made more of an effort to maintain contact with his child," and respondent had foregone the opportunity to attend the termination hearing). In the case *In re D.L.W.*, __ N.C. App. __, __ S.E.2d __ (May 19, 2015), the trial court's findings to support this ground related to the mother's failure to be employed or support her children. However, the mother lost her employment due to weather and incarceration, and the trial court's failure to make findings related to willfulness led to a reversal on this ground.
- (e) Some effort does not preclude willfulness.** The fact that a parent makes some efforts does not preclude a finding of willfulness. *See, e.g., In re A.W.*, __ N.C. App. __, 765 S.E.2d 111 (2014) (upholding TPR on this ground where although the father did visit the child seven times in six months, the father made almost no efforts to get the child placed in his custody despite repeated efforts from DSS to engage and assist him in doing so); *In re D.C.* __ N.C. App. __, 737 S.E.2d 182 (2013) (upholding TPR where a three-year-old had been removed from the home due to serious injuries sustained by a dog attack in the home, the dog was immediately destroyed and the mother's home had no dogs and was deemed "clean and tidy," but the mother still did not understand the nature of the child's

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

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

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

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

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

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

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

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

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

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

D. Failure to Pay Child Support to Other Parent

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

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

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

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

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

E. Failure to Establish Paternity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other cases addressing the constitutionality of this ground but unrelated to the issue of knowledge of the child’s existence, are discussed in subsection 8, below.

5. Birth certificate creates rebuttable presumption. The appearance of the father’s name on the child’s birth certificate may create a presumption of paternity. In a case in which the respondent father was not married to the child’s mother but his name appeared on the child’s birth certificate, the court of appeals affirmed the trial court’s order concluding that the ground had not been established, holding that the father’s name on the child’s birth certificate created a rebuttable presumption that his paternity had been established by affidavit or court

order. *In re J.K.C.*, 218 N.C. App. 22 (2012). The court reasoned that the unmarried father could not have been listed as the father on the child's birth certificate unless his name was placed there in accordance with either G.S. 130A-101(f) or G.S. 130A-118(b). See *supra* § 5.4.B.7 for more discussion of paternity, putative fathers, and birth certificates.

6. Adoption cases. For adoption cases dealing with a similar ground for determining that a parent's consent to adoption is not required, see *In re Adoption of Anderson*, 360 N.C. 271 (2006), and *In re Adoption of Byrd*, 354 N.C. 188 (2001). For a case decided under the same wording in a former adoption statute, holding that the putative father's consent to adoption was required because he had filed a petition for legitimation, see *In re Adoption of Clark*, 327 N.C. 61 (1990).

7. Admissibility of paternity test. Even if paternity test results show a high likelihood that the respondent is not the child's father, the court may consider those results only if they are properly introduced into evidence. The results at most create a rebuttable presumption, and respondent must be allowed an opportunity to rebut the presumption. *In re L.D.B.*, 168 N.C. App. 206 (2005). When paternity is at issue and paternity testing is sought, the court must order paternity testing. See *In re J.S.L.*, __ N.C. App. __, 723 S.E.2d 542 (2012) (a private TPR case in which the court applied G.S. 8-50.1(b1), the evidence statute requiring paternity testing when requested at "the trial of any civil action in which the question of parentage arises," to reverse the trial court's adjudication of this ground, where the father had denied paternity and requested testing, and the court denied his request).

8. Constitutionality. The court of appeals, in *In re A.C.V.*, 203 N.C. App. 473 (2010), affirmed an order terminating a father's rights to his newborn child based on this ground. The court expressed concerns about the constitutionality of applying this ground to the facts of the case. Noting that none of the trial court's 123 findings indicated that the father was unfit to parent the child or that his home was unsuitable, the court said, "It is difficult, under the circumstances of this case, to conclude that [the father's] constitutional rights were assured through the application of section 7B-1111(a)(5)." *Id.* at 165. The court affirmed the termination order on the basis that it was bound by cases such as *Owenby v. Young*, 357 N.C. 142 (2003) (stating that a finding of any ground for termination under G.S. 7B-1111 will result in forfeiture of a parent's constitutionally protected status), and *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006). See also the discussion of constitutional issues related to this ground above in subsection 5.

F. Dependency

Where the parent is incapable of providing for the proper care and supervision of the child, there is a reasonable probability that the parent's incapability will continue for the foreseeable future, and the parent does not have an appropriate alternative child care arrangement, a ground for termination of parental rights exists. The parent's incapability may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the child. G.S. 7B-1111(a)(6).

1. Constitutional challenge. This ground does not violate the equal protection clause or deny due process. *In re Montgomery*, 311 N.C. 101 (1984) (decided under an earlier version of the Juvenile Code).

2. Lack of alternative child care required. This ground cannot be established without findings supporting a conclusion that the parent lacks an appropriate alternative child care arrangement. *In re N.B.*, 200 N.C. App. 773 (2009); *see also In re C.N.C.B.*, 197 N.C. App. 553 (2009). In order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives; it is not enough that the parent merely goes along with a plan created by DSS. *In re L.H.*, 210 N.C. App. 355 (2011). *See also In re K.O.*, ___ N.C. App. ___, 735 S.E.2d 369 (2012) (holding that mother could not claim she had an alternative child care arrangement with an unrelated acquaintance where this acquaintance had been awarded permanent custody of the child by the court, the acquaintance did not have custody at the respondent's request, and the mother had no ability to decide custody).

Alternative child care arrangements suggested by the parent are not "appropriate" if they cannot be approved by DSS. In the case of *In re N.T.U.*, ___ N.C. App. ___, 760 S.E.2d 49 (2014), three alternative placements were provided to DSS by an incarcerated respondent mother, but none could be approved by DSS: one was incarcerated, one physically disciplined another child in front of DSS, and another demonstrated a lack of interest in the child. *See also In re L.R.S.*, ___ N.C. App. ___, 764 S.E.2d 908 (2014) (child care arrangement suggested by mother was not shown to be viable).

3. Evidence of incapability. The parent's incapability must be proved by clear and convincing evidence. *See, e.g., In re Scott*, 95 N.C. App. 760 (1989) (holding that the physician's testimony about a mother with a personality disorder did not provide clear and convincing evidence to support the trial court's findings and termination order); *see also In re Clark*, 151 N.C. App. 286 (2002) (holding that the ground was not established where the father was incarcerated, his release date was 17 months away, there was no proof that he was incapable of arranging for the child's care, and he testified that he had told DSS about several relatives whom DSS had not contacted); *In re Small*, 138 N.C. App. 474 (2000) (holding that the finding that the respondent was incapable of providing proper care to her children was not supported by clear and convincing evidence).

Termination under this ground does not require that the parent's incapability be permanent or that its precise duration known, only that there is a reasonable probability that such incapability will continue for the foreseeable future. *In re N.T.U.*, ___ N.C. App. ___, 760 S.E.2d 49 (2014) (trial court's order terminating the parental rights of respondent were upheld on this ground where the respondent mother had been incarcerated for three years on charges relating to homicide and bank robbery and had not received a trial date, the child had been in DSS custody for two-thirds of his life, and none of the alternative child care arrangements suggested by respondent could be approved for placement); *see also In re L.R.S.*, ___ N.C. App. ___, 764 S.E.2d 908 (2014) (where child had been in DSS custody since the age of two months due to mother's pretrial incarceration and subsequent conviction on federal charges

resulting in a sentence of 38 months, the trial court properly found there was a reasonable probability that the incapability would continue for the foreseeable future).

In the case *In re J.K.C.* 218 N.C. App. 22 (2012), the court of appeals cited *Clark* (above), in holding that this ground was not established where there was no evidence that the father, who was incarcerated, was incapable of providing care and supervision due to a condition specified in the statute or any other similar cause or condition. To the extent the court relied on *Clark*, that reliance was misplaced. *Clark* was decided under a previous version of this ground that said “incapability. . . may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or *any other similar cause or condition*.” The version in effect now and at the time of the *J.K.C.* case says that “incapability . . . may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or *any other cause or condition that renders the parent unable or unavailable to parent the juvenile*.” The significance of this change in the statutory language related to the *Clark* and *J.K.C.* case was discussed in *In re L.R.S.*, __ N.C. App. __, 764 S.E.2d 908 (2014), where the court of appeals held that respondent mother’s “extended incarceration is clearly sufficient to constitute a condition that rendered her unable or unavailable to parent [her child].”

In the case of a minor parent, the court must adequately address “capacity” in light of the parent’s youth. *In re Matherly*, 149 N.C. App. 452 (2002).

4. Diligent efforts not a prerequisite. The court will not read into this ground a requirement that DSS make “diligent efforts” to provide services to parents before proceeding to seek termination; any such requirement must come from the legislature. *In re Guynn*, 113 N.C. App. 114 (1993).

Note: Before a 2005 amendment, the trial court was required to appoint a guardian ad litem for the parent when this ground for termination was alleged, and a number of cases were reversed because the court failed to appoint a guardian ad litem. Under current law, appointment of a guardian ad litem for the parent is discretionary, except when the parent is a minor. G.S. 7B-1101.1. *See supra* § 9.4.B (relating to GAL appointments for parents).

G. Abandonment

Where the parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition or motion, a ground for termination of parental rights exists. G.S. 7B-1111(a)(7).

1. Six-month time period. The critical period for a finding of abandonment is at least six consecutive months immediately preceding the filing of a petition or motion to terminate parental rights. *See In re Young*, 346 N.C. 244 (1997) (reversing termination order on the basis that the mother’s conduct during the relevant six-month period did not manifest “a willful determination to forego all parental duties and relinquish all parental claims to the child”). However, the trial court may consider the respondent’s conduct outside this six month window for the purpose of evaluating the respondent’s credibility and intentions. *See In re C.J.H.*, __ N.C. App. __, __ S.E.2d __ (April 21, 2015) (citation omitted) (it was appropriate

for the trial court to examine the respondent's history of sporadic contact with the child outside the six-month period in order to evaluate whether his requests for visitation within the six-month period were made in good faith).

This six month time period may be affected by the expiration of a summons. Under Rule 4(e) of the Rules of Civil Procedure, if a summons expires and there is no endorsement or issuance of an alias and pluries summons within the required time, the action discontinues. If later there is an endorsement or issuance of a new or alias and pluries summons, the action will be deemed to have been filed on the date of the endorsement or of issuance of the new or alias and pluries summons. *See, e.g., In re Adoption of Searle*, 74 N.C. App. 61 (1985) (since the summons in an adoption case was endorsed 102 days after it was issued, the action commenced as to respondent on the day of endorsement); *see also supra* § 4.3.B (discussing expiration of a summons).

2. Defining abandonment. The state supreme court, in an adoption case, defined abandonment essentially as follows: A parent's willful or intentional conduct evincing a settled purpose to forego all parental duties and relinquish all parental claims. *Pratt v. Bishop*, 257 N.C. 486 (1962). Willful intent, an integral part of abandonment, is a question of fact. Abandonment also has been defined as willful neglect and refusal to perform natural and legal parental obligations of care and support. If a parent withholds the parent's presence, love, care, and opportunity to display filial affection, and willfully neglects to lend support and maintenance, the parent relinquishes all parental claims and abandons the child. *Id.*

3. Evidence of abandonment.

- The trial court's order terminating parental rights for willful abandonment was affirmed where: during the six months in question, the respondent did not provide timely and consistent financial support for the child; before the six month period in question, the respondent did not pay sufficient support until ordered to do so and then did not pay consistently; and the respondent failed to make a good faith effort to visit the child or to maintain or reestablish a relationship with the child. The respondent's last minute efforts at financial support and visitation did not undermine the trial court's conclusion of abandonment. *In re C.J.H.*, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015).
- The trial court's conclusion of willful abandonment was supported by its findings showing that during the six month determinative period the father made no effort to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support. The father's single phone call during the six month period could not be deemed material enough to potentially change the outcome. Although the father had been jailed and then deported during that time, the court of appeals analyzed deportation similarly to incarceration, stating that like incarceration, deportation should serve as "neither a sword nor a shield in a termination of parental rights decision." *In re B.S.O.*, ___ N.C. App. ___, 760 S.E.2d 59 (2014) (*quoting In re P.L.P.*, 173 N.C. App. 1, 10 (2005)). In comparing deportation and incarceration, the court of appeals stated that a deported parent has more opportunities than an incarcerated parent to support a child: a deported parent can communicate with a child, earn money that is sent to support a child, and even pursue legal action to attempt to have the child returned to his or her custody.

- In a private TPR case, the trial court's finding of willful abandonment during the six months immediately preceding the filing of the termination petition was not supported by the evidence because the respondent was under a court order not to have contact with the children during the six-month period, and he filed a civil action seeking visitation, which showed he did not intend to forego his role as a parent. *In re D.T.L.*, 219 N.C. App. 219 (2012).
- Evidence was not sufficient to establish the abandonment ground where the court's findings did not "clearly show that the parent's actions [were] wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. 79, 87 (2009) (finding that the mother had visited 11 times during the relevant six-month period); *see also In re F.G.J.*, 200 N.C. App. 681 (2009) (finding that the parents visited the child at least monthly).
- Although the father had not visited or asked for visits during the relevant six months and had not regularly sent cards or gifts, the appellate court held that findings did not support willful abandonment because the father had been instructed by his attorney in the criminal case not to contact the child or mother, the DSS protection plan provided for no contact, and he had been making support payments during the relevant six-month period. *In re T.C.B.*, 166 N.C. App. 482 (2004).
- Neither a parent's history of alcohol abuse nor a parent's incarceration, standing alone, necessarily negates a finding of willfulness for purposes of abandonment. *In re McLemore*, 139 N.C. App. 426 (2000).
- Failure to pay support, in itself, does not constitute abandonment. *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994). However, the fact that a parent paid some support during the relevant six-month period may not preclude a finding of willful abandonment. *In re Adoption of Searle*, 82 N.C. App. 273 (1986).

4. Safe surrender of infant. Abandonment includes the situation in which the parent has voluntarily abandoned an infant pursuant to the "safe surrender" law, G.S. 7B-500 (abandonment of infant within seven days after child's birth) for at least 60 consecutive days immediately preceding the filing of the petition or motion. G.S. 7B-1111(a)(7).

H. Murder, Voluntary Manslaughter, and Felony Assault of Child or Parent

Grounds for termination of parental rights exist where the parent has:

- committed murder or voluntary manslaughter of another child of the parent or other child residing in the home;
- aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child in the home;
- committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or
- committed murder or voluntary manslaughter of the child's other parent; provided, the court must consider whether the killing was committed in self-defense or in defense of others, or whether there was substantial evidence of other justification.

G.S. 7B-1111(a)(8).

1. Manner of proof. Petitioner has the burden of proving the criminal offense by either (i) proving the elements of the offense or (ii) proving that a court of competent jurisdiction has convicted the parent of the offense, whether by jury verdict or any kind of plea. G.S. 7B-1111(a)(8).

2. Standard of proof. The ground of a parent's commission of voluntary manslaughter of another child requires proof of the elements of the offense by clear and convincing evidence, not beyond a reasonable doubt. *In re J.S.B.*, 183 N.C. App. 192 (2007).

3. Serious bodily injury. To prove that respondent committed a felony assault resulting in serious bodily injury by proving that respondent was convicted of the offense, a petitioner would have to show a conviction under G.S. 14-32.4(a) (assault inflicting serious bodily injury) or perhaps G.S. 14-318.4(a3) (felony child abuse inflicting serious *bodily* injury). A conviction under G.S. 14-318.4(a) (felony child abuse inflicting serious *physical* injury) would not be sufficient. Serious bodily injury, as defined in G.S. 14-318.4(d)(1), (i) creates a substantial risk of death; or (ii) causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ; or (iii) results in prolonged hospitalization. *See In re T.J.D.W.*, 182 N.C. App. 394, *aff'd per curiam*, 362 N.C. 84 (2007); *State v. Downs*, 179 N.C. App. 860 (2006); *State v. Hannah*, 149 N.C. App. 713 (2002).

I. TPR of another Child and Lack of Safe Home

Grounds for termination of parental rights exist where a court of competent jurisdiction has terminated the parent's rights with respect to another child of the parent and the parent lacks the ability or willingness to establish a safe home. G.S. 7B-1111(a)(9). *See In re D.J.E.L.*, 208 N.C. App. 154 (2010) (holding that evidence was sufficient to establish that respondent lacked the ability or willingness to establish a safe home); *In re L.A.B.*, 178 N.C. App. 295 (2006); *In re V.L.B.*, 168 N.C. App. 679 (2005).

J. Relinquishment for Adoption

One ground for TPR addresses situations in which a child is being adopted in another state, the relinquishment or consent to adoption occurred in North Carolina, and the consent or relinquishment is not sufficient under the law of the state in which the adoption is taking place. This ground exists when the child has been relinquished to a county department of social services or licensed child-placing agency or placed for adoption with a prospective adoptive parent, and

- the parent's consent to or relinquishment for adoption is irrevocable (except for fraud, duress, or other circumstances set out in G.S. 48-3-609 and 48-3-707), and
- termination of the parent's rights is required in order for the adoption to occur in another jurisdiction where an adoption proceeding has been or will be filed, and
- the parent does not contest the termination of parental rights.

G.S. 7B-1111(a)(10).

K. Conception Resulting from Rape

A ground for termination exists when the parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the child. G.S. 7B-1111(a)(11). This ground became effective October 1, 2012, and probably is not available when the conviction occurred before that date. See S.L. 2012-40.

Note that in some instances this ground overlaps with other laws, i.e., G.S. 14-27.2(c), 14-27.2A(d), and 14-27.3(c), which provide that a father convicted of rape has no parental rights with respect to a child who is conceived as a result of that rape, and G.S. 7B-1104(3), which states that “[a] person whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the juvenile need not be named in the petition” to terminate parental rights.

9.12 Disposition and Best Interest Determination

A. Overview

After an adjudication that one or more grounds for termination exist, the court is never required automatically to terminate parental rights. Rather, the court must determine whether termination of parental rights is in the child’s best interest. G.S. 7B-1110(a).

If the court concludes that grounds do not exist or that it is not in the child’s best interest to terminate parental rights, the court must dismiss the petition or deny the motion, but only after making appropriate findings of fact and conclusions of law. G.S. 7B-1110(b), (c).

B. Evidentiary Standard

1. No burden of proof; court’s discretion. At disposition, no party has a burden of proof. All parties may present evidence, and the court makes findings of fact and a discretionary determination as to whether it is in the child’s best interest to terminate parental rights. *See In re Mitchell*, 356 N.C. 288 (2002), *rev’g per curiam for the reasons stated in the dissent*, 148 N.C. App. 483 (2002). Although appellate courts refer to the trial court’s discretionary decision as to best interest, they also say that a best interest determination is a conclusion of law. *See, e.g., In re Helms*, 127 N.C. App. 505, 510-511 (1997) (stating that “best interest determinations are conclusions of law because they require the exercise of judgment”).

2. Separate hearings not required. Although the court applies different evidentiary standards at each stage, there is no requirement that adjudicatory and dispositional stages be conducted at two separate hearings. *In re F.G.J.*, 200 N.C. App. 681 (2009); *In re White*, 81 N.C. App. 82 (1986).

3. Rules of evidence. The court may consider any evidence, including hearsay evidence, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. G.S. 7B-1110(a).

C. Considerations for Best Interest Determination

1. Criteria. In making a determination regarding the child’s best interest, the court is required to consider the following criteria and make written findings regarding those that are relevant:

- the child’s age;
- likelihood that the child will be adopted;
- whether termination will help achieve the permanent plan for the child;
- the bond between the child and the parent;
- quality of the relationship between the child and the proposed adoptive parent, guardian, or custodian; and
- any other relevant factor.

G.S. 7B-1110(a). While a best interest determination will be reviewed by appellate courts for abuse of discretion, the trial court must consider and make findings about any of these factors that are relevant. *See In re D.H.*, __ N.C. App. __, 753 S.E.2d 732 (2014); *In re J.L.H.* __ N.C. App. __, 741 S.E.2d 333 (2012) (remanding the disposition portion of the trial court’s order for failing to make the specific findings required by G.S. 7B-1110(a)). The court is not required to make findings on all six factors, only those that are relevant. *In re D.H.*, 753 S.E.2d 732 (rejecting the mother’s argument that the court erred in making no findings regarding four of the factors, holding that two of the factors were not relevant—age because it was not raised as relevant *in this case*, and quality of a relationship with proposed placement because there was no proposed placement—and that the court did in fact make findings on the other two factors). *See also In re H.D. and K.R.*, __ N.C. App. __, 768 S.E.2d 860 (2015) (quoting *In re D.H.* and stating that one of the statutorily enumerated factors is relevant if there is conflicting evidence concerning that factor); *In re D.L.W.*, __ N.C. App. __, __ S.E.2d __ (May 19, 2015) (rejecting the father’s argument that the court had to make specific findings regarding the juveniles’ need for ongoing contact with their parents). Some appellate cases addressing whether the trial court handled these criteria appropriately were decided under a previous version of the statute that required the court to consider the criteria but did not require written findings. *J.L.H.*, cited above, specifically stated that such cases (*e.g.*, *In re S.R.*, 207 N.C. App. 102 (2010); *In re S.C.H.*, 199 N.C. App. 658 (2009)) are superseded by the new version of the statute requiring written findings.

Although written findings on the relevant statutory criteria are required, recitation of the statutory language is not required where findings indicate the criteria were considered. In the case *In re D.C.*, __ N.C. App. __, 763 S.E.2d 314 (2014), the respondent mother challenged the court’s finding of best interest, arguing that factors 3, 4, and 5 of G.S. 7B-1110(a) were not properly considered by the court. The court of appeals rejected this argument, in part noting that although the trial court did not use the word “bond” that is contained in factor 4, it did find that the child was over five years old and had been in foster care for over two years, which indicated that he did not have a strong bond with his mother since he would barely, if at all, have remembered her. Best interest was also supported by the findings related to the child’s positive relationship with his prospective adoptive family and their desire to adopt him.

2. Child's interests are paramount to parents' rights. The child's best interests, not the rights of the parents, are paramount. When the child's and parents' interests conflict, the child's best interests control. G.S. 7B-1100(3). *See also In re Montgomery*, 311 N.C. 101 (1984); *In re Tate*, 67 N.C. App. 89 (1984).

3. Relevant factors.

- (a) Availability of relatives.** The court may, but is not required to, consider the availability of placement with a relative. *In re M.M.*, 200 N.C. App. 248 (2009).
- (b) GAL information and opinion.** A primary function of the child's GAL is to provide the court with information relevant to the child's best interest. In carrying out his or her duties under G.S. 7B-601, the GAL may offer evidence and/or a report at this stage of a TPR proceeding. The GAL's opinion about the child's best interest, however, may not be a proper consideration for the court. In the case of *In re Wheeler*, 87 N.C. App. 189 (1987), respondent asserted as error the admission of a GAL's lay opinion that termination was in the children's best interest. The appellate court stated that the proper analysis of the admissibility of an opinion by a lay or expert witness is whether it is helpful to the trier of fact, and found that the helpfulness of the guardian ad litem's lay opinion was questionable. Although the court found error in the admission, in view of the abundance of other evidence supporting the trial court's decision and remarks of the judge indicating that he did not rely on this testimony, the admission was not prejudicial.
- (c) Parents' religion.** Questions and testimony about the parents' religious beliefs and practices are not necessarily constitutional error. *In re Huff*, 140 N.C. App. 288 (2000) (finding no error where the inquiry was brief, related primarily to practices that might affect the child and not to the parents' beliefs, was directed to the father rather than to an expert or minister, and did not result in any findings by the court).
- (d) Adoptability of child, but not financial benefits from adoption.** While the statute now requires the court to consider the child's adoptability (G.S. 7B-1110(a)(2)), the court is not required to find that the child is adoptable before terminating parental rights. *See In re Norris*, 65 N.C. App. 269 (1983) (decided under an earlier version of the Juvenile Code). Consideration of the child's adjustment in a foster or preadoptive home is appropriate. *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re V.L.B.*, 168 N.C. App. 679 (2005); *see also In re H.D. and K.R.*, ___ N.C. App. ___, 768 S.E.2d 860 (2015) (finding that the trial court had properly considered the factor of adoptability in concluding that TPR was in the child's best interest).

In the case *In re A.B. and J.B.*, ___ N.C. App. ___, 768 S.E.2d 573 (2015), the court of appeals interpreted the trial court's order as improperly "tipping the best interest scales" in favor of TPR instead of guardianship or custody based on the availability of financial benefits conferred on the potential adoptive parents. The court of appeals noted that while the financial circumstances of potential adoptive parents could be relevant in determining the likelihood of adoption, therefore making it a "relevant factor" in analyzing best interest, in this particular case the factor of financial assistance to the potential adoptive

parents was used to outweigh the close emotional bonds between the children and their mother and her efforts to regain custody, raising questions about the internal consistencies of the order.

If adoption is a remote possibility, termination may be an abuse of discretion. *In re J.A.O.*, 166 N.C. App. 222 (2004) (holding that termination was an abuse of discretion where the chance of a troubled teen's being adopted was remote and there was possible benefit to the child from a continued relationship with his mother and relatives).

When a child who is 12 or older is being adopted, G.S. 48-3-601(1) requires the child's consent to his or her own adoption, unless the court waives that requirement. Thus, the child's desire to be adopted, especially when the child is age 12 or older, is relevant to whether the child is likely to be adopted.

- (e) **Efforts of DSS.** A finding that DSS made diligent efforts to provide services to a parent is not a condition precedent to terminating a parent's rights. *In re J.W.J.*, 165 N.C. App. 696 (2004); *In re Frasher*, 147 N.C. App. 513 (2001).
- (f) **Failure to comply with review requirements.** Where evidence established neglect, the petitioner's failure to comply with the periodic review requirements of [former] G.S. 7A-657 did not bar termination. *In re Swisher*, 74 N.C. App. 239 (1985).
- (g) **Compliance with case plan not relevant.** Where the parent argued that the trial court abused its discretion in finding best interest to terminate parental rights since he had complied with the case plan, the court of appeals disagreed, stating that "compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination." *In re Y.Y.E.T.*, 205 N.C. App. 120, 131 (2010). Although parents had completed substantial parts of their case plan, they had not accepted responsibility for or explained the child's injuries, supporting the conclusion that the child would be at risk if returned home. *Id.*

4. Examples of best interest evidence and findings. Following are some of the facts cited in cases in which the trial court's determination that termination of parental rights was in the child's best interest was affirmed.

- It was not abuse of discretion for the trial court to conclude that TPR was in the children's best interest where there was extensive evidence regarding domestic violence, lack of necessary medical care for the children, drug abuse and criminal activity by respondent, neglect of the children during visits with respondent involving lack of feeding and bathing, respondent's failure to obtain a job and pay child support, and respondent's struggle with mental illness. The trial court also found that the respondent had not made progress correcting conditions leading to removal, that the children would be subject to irreparable harm if returned to respondents, and that the children were likely to be adopted. *In re L.M.T.*, ___ N.C. ___, 752 S.E.2d 453 (2013).
- The trial court's conclusion in a private case that TPR was in the child's best interest was upheld where the findings were that the respondent father had failed to maintain contact

with the child despite the child's desire to have a relationship with him, the child had a close and loving relationship with her mother and maternal grandparents, and the maternal grandparents desired to adopt the child and the mother agreed. *In re T.J.F.*, ___ N.C. App. ___, 750 S.E.2d 568 (2013).

- It was not an abuse of discretion for the court to determine that TPR was in the child's best interest where the trial court found that the eight-year-old child was living with a foster family that wanted to adopt him as soon as possible; TPR would accomplish the permanent plan of adoption; although the child had a bond with his mother he told the therapist he did not wish to return to her custody; and the child had bonded with his foster family who had been meeting his needs and providing love and support. *In re D.J.E.L.*, 208 N.C. App. 154 (2010).
- Although the mother had made progress in doing what the trial court ordered and emphasized her bond with the children, she stated repeatedly that she could not handle the responsibility of parenting the children. *In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).
- The child had been in DSS custody over six years, the foster parents planned to adopt the child, and evidence supporting the ground for termination was strong. *In re Howell*, 161 N.C. App. 650 (2003).
- Although there was some improvement in the mental condition of a mother diagnosed with borderline personality disorder, after almost two years of DSS efforts, she could not demonstrate that she was capable of providing adequately for the child's needs. One expert testified about the negative effect of further delay in obtaining a permanent placement for the child given his age and close bond with the foster family. *In re Brim*, 139 N.C. App. 733 (2000).

5. Examples of best interest evidence and findings where appellate court found abuse of discretion.

- The child was 14 years old and had mental and physical health problems and violent tendencies that made adoption very unlikely; the mother had made reasonable attempts to correct conditions that led to filing of a petition; and the reasons she stopped visitation were the child's transfer to a distant hospital, the mother's lack of transportation, and DSS's request to suspend visitation due to an increase in the child's violent behavior. *In re J.A.O.*, 166 N.C. App. 222 (2004).
- The father, a recovering alcoholic, had stopped drinking, attended Alcoholics Anonymous, and was employed; the children were settled in a new family unit with the custodial parent and her financially stable husband; and both the GAL and a court-appointed psychologist expressed the opinion that the father's rights should not be terminated. *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994).

D. Other Dispositional Issues

1. Compliance with ICWA. If the Indian Child Welfare Act applies because of the child's status as a Native American, "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the

child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(f). *See also In re Bluebird*, 105 N.C. App. 42 (1992). However, the U.S. Supreme Court held this requirement to be inapplicable to a case in which the Indian parent never had legal or physical custody of the Indian child. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The Court also held that 25 U.S.C. §1912(d), which requires a showing that active efforts have been made to provide remedial services to prevent the breakup of the Indian family, was not applicable when the Indian parent abandoned the child prior to birth and the child had never been in the parent’s legal or physical custody. *Id.* The Court reasoned that the term “breakup” refers to discontinuing a relationship, and here there was no existing relationship; the “breakup of the Indian family” had long since occurred. Finally, the Supreme Court held that ICWA’s adoption-placement preferences with Indian families were inapplicable in cases in which no alternative party formally sought to adopt the child. Note: there are proposed ICWA regulations that would affect the application of the U.S. Supreme Court’s holding. *See infra* § 13.6 (discussing ICWA and its requirements in detail).

2. ADA not applicable to TPR. The Americans with Disabilities Act did not preclude termination of the respondent’s rights. The North Carolina Court of Appeals reviewed other courts’ treatment of the issue and adopted the rule followed by other states, i.e., termination of parental rights proceedings are not services, programs, or activities within the meaning of Title II of the ADA. At the same time, the court found that the requirements for and the trial court’s findings about reasonable efforts constituted compliance with the ADA. *In re C.M.S.*, 184 N.C. App. 488 (2007).

9.13 Orders in Termination of Parental Rights Cases

See also supra § 4.9 (discussing orders in juvenile cases).

A. Requirements for Order

1. Address grounds. The court must find facts and adjudicate the existence or nonexistence of the grounds alleged in the petition or motion. G.S. 7B-1109(e), 7B-1110(c). The trial court’s failure to address an alleged ground at all constitutes a conclusion that it does not exist. *In re S.R.G.*, 200 N.C. App. 594 (2009).

2. Standard of proof. With respect to the adjudication, the order must recite the clear, cogent, and convincing evidence standard of proof. *In re Matherly*, 149 N.C. App. 452 (2002); *In re Lambert-Stowers*, 146 N.C. App. 438 (2001); *In re Church*, 136 N.C. App. 654 (2000). *See also In re D.R.B.*, 182 N.C. App. 733 (2007) (holding that the termination order was deficient where it did not state the standard of proof and did not indicate which ground(s) the court was adjudicating).

However, there is no requirement as to where or how the standard is recited in the order. *In re J.T.W.*, 178 N.C. App. 678 (2006), *reversed per curiam on other grounds*, 361 N.C. 341

(2007). Also, there is no distinction between “clear, cogent and convincing” and “clear and convincing.” See *In re Belk*, 364 N.C. 114 (2010); *In re Montgomery*, 311 N.C. 101 (1984).

3. Findings and conclusions. The order must include findings of fact and conclusions of law. Findings of fact are determinations from the evidence concerning facts averred by one party and denied by another. Conclusions of law are findings by a court as determined through the application of rules of law. *In re Johnston*, 151 N.C. App. 728 (2002); see also *supra* § 4.9.B (discussing findings of fact and conclusions of law) and *infra* § 12.8.B (discussing the difference between findings and conclusions, including the different standard of review on appeal).

(a) Findings based on clear, cogent, and convincing evidence. Findings in the adjudication order must be based on clear, cogent, and convincing evidence. G.S. 7B-1109(f). See also *In re Young*, 346 N.C. 244 (1997) (reversing termination based on neglect and abandonment grounds on the basis that there was not clear, cogent, and convincing evidence to support trial court’s findings); *In re Montgomery*, 311 N.C. 101 (1984); *In re C.W.*, 182 N.C. App. 214 (2007) (reversing termination where none of the grounds was supported by clear and convincing evidence and a number of findings were supported by no evidence). See also *In re O.J.R.*, ___ N.C. App. ___, 769 S.E.2d 631 (2015) (one factor leading to reversal of trial court’s TPR order in private case was the lack of competent evidence to support some findings).

(b) Sufficiently specific findings. Findings must be sufficiently specific. See *In re T.P.*, 197 N.C. App. 723 (2009) (holding that insufficient findings of fact required reversal where the findings mainly quoted statutory language and were not adequate for meaningful appellate review); *In re Anderson*, 151 N.C. App. 94 (2002) (explaining that findings of fact must do more than merely repeat the allegations in the petition); *In re Locklear*, 151 N.C. App. 573 (2002) (holding that where findings did little more than restate the statutory grounds and discuss DSS’s efforts to reunify, the order was not sufficient to establish a ground for termination).

An order from a case on remand must be an entirely new and complete order, not one that “supplements” the previous order. See *In re A.R.P.*, 218 N.C. App. 185 (2012) (holding that where an order from a case on remand incorporated by reference the transcript of a prior hearing and made “supplemental” findings and conclusions, the recitation of facts could not be considered findings of fact, and the trial court should have entered an entirely new and complete order on remand).

(c) Conclusions. The court’s adjudication of the existence or nonexistence of grounds alleged in the petition or motion is a conclusion of law and must be based on the findings of fact. See, e.g., *In re S.R.G.*, 200 N.C. App. 594 (2009) (holding that failure to address an alleged ground constitutes a conclusion that it does not exist); *In re L.C.*, 181 N.C. App. 278 (2007); *In re T.M.H.*, 186 N.C. App. 451 (2007); see also *In re D.L.W.*, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015) (reversing the trial court’s TPR order as to the mother on the basis of neglect because the findings to support the order did not address the mother’s relationship to or care, visitation, or support of her children but instead addressed the

mother's interactions and relationship with DSS and the father); *In re O.J.R.*, ___ N.C. App. ___, 769 S.E.2d 631 (2015) (TPR order in private case was reversed and remanded in part due to lack of adequate conclusions and findings).

(d) Findings and conclusions on best interest. With respect to best interest, the court is required to consider specific criteria pursuant to G.S. 7B-1110(a) and make specific findings regarding those criteria that are relevant. See *supra* § 9.12.C.

Rule 52 of the Rules of Civil Procedure also requires the court, in any action tried without a jury, to “find the facts specially and state separately its conclusions of law thereon.”

The court's determination that terminating the parent's rights is or is not in the child's best interest is a conclusion of law that must be supported by the findings.

4. Timing. The order must be entered within 30 days following completion of the hearing. If the order is not entered within 30 days, the juvenile clerk is required to schedule a hearing at the first session of juvenile court after the 30-day period, for an explanation of the reason for the delay and to obtain any needed clarification about the contents of the order. The court must enter the order within 10 days after this hearing. G.S. 7B-1109(e). Where the court fails to enter a timely order, the appropriate remedy is mandamus, not a new hearing. *In re T.H.T.*, 362 N.C. 446 (2008); see also *supra* § 4.9.D.3 (discussing mandamus as the remedy). Failure to comply with statutory timelines does not deprive the trial court of jurisdiction. See *In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).

B. Entry of Order

The order is entered when it is reduced to writing, signed by the judge, and filed with the clerk. See G.S. 7B-1109(e), 7B-1110(a); N.C. R. Civ. P. 58.

See *supra* § 4.9.A & C, discussing the following:

- what constitutes entry of order;
- requirement that the presiding judge sign the order;
- judge's authority to direct a party to draft the order, and fact that draft orders should be circulated; and
- service of signed orders on parties.

9.14 Effect of Order and Placement after Termination of Parental Rights

A. Effect of Order on Parent-Child Status

1. Severance of rights and obligations. An order terminating parental rights completely and permanently severs all rights and obligations of the parent to the child and the child to the parent. G.S. 7B-1112.

(a) No constitutionally protected interest. When parental rights have been terminated, parents no longer have any constitutionally protected interest in their children. *In re Montgomery*, 77 N.C. App. 709 (1985).

(b) Limited exception for inheritance and support arrears. The child's right of inheritance does not terminate until a final order of adoption is entered. G.S. 7B-1112. In addition, any child support arrears remain after termination of parental rights, even though the parent is no longer liable for ongoing support obligations. *See* G.S. 48-1-107; G.S. 7B-1112. *See also Michigan v. Pruitt*, 94 N.C. App. 713 (1989) (holding that even though support obligation ceased when adoption became final, support arrears owed prior to adoption were still owed).

(c) When parent continues as party. A parent whose rights have been terminated continues to be a party for purposes of post-termination review hearings only if:

- an appeal of the termination order is pending, and
- a court has stayed the order pending the appeal.

G.S. 7B-908(b)(1).

(d) Not entitled to notice of adoption. After termination, the parent is not entitled to notice of adoption proceedings and may not object to or participate in them. G.S. 7B-1112.

(e) No standing to seek custody. A parent whose rights have been terminated does not have standing to seek custody of the child as an "other person" under G.S. 50-13.1(a). *Krauss v. Wayne County Dep't of Soc. Servs.*, 347 N.C. 371 (1997).

2. Grandparents. When DSS has custody of the child pursuant to termination of one parent's rights and the other parent's relinquishment of the child for adoption, grandparents do not have standing under G.S. 50-13.1 to seek custody or visitation. *Swing v. Garrison*, 112 N.C. App. 818 (1993). *Cf. Smith v. Alleghany County Dep't of Soc. Servs.*, 114 N.C. App. 727 (1994).

Resource: For information about third party custody and visitation actions, see Cheryl Howell, [*Third Party Custody and Visitation Actions: 2010 Update to the State of the Law in North Carolina*](#), FAMILY LAW BULLETIN No. 2011/25 (UNC School of Government, Jan. 2011).

B. Child's Placement upon Termination

The court's authority to order placement of the child after terminating parental rights depends on whether the child was in the custody of DSS or another agency when the petition or motion was filed.

1. When child is in DSS/agency custody. If the child had been placed in the custody of (or released for adoption by one parent to) a county DSS or licensed child-placing agency and is in the custody of that agency when the petition or motion for termination is filed, upon entry of a termination order that agency acquires all rights for placement of the child that the agency would have acquired, including the right to consent to adoption, had the parent relinquished the child to the agency pursuant to G.S. Chapter 48. G.S. 7B-1112(1). *See also In re I.T.P-L.*, 194 N.C. App. 453 (2008) (holding that the trial court did not have subject matter jurisdiction to order the child placed with a relative following termination, because the statute gives DSS exclusive placement authority when the child was in DSS custody when termination petition or motion was filed); *In re Asbury*, 125 N.C. App. 143 (1997). Statutory changes made after these cases were decided create narrow exceptions. At a post-TPR review hearing, if the child has not been placed with prospective adoptive parents as selected according to G.S. 7B-1112.1, after considering the plan and recommendations of the DSS or child-placing agency with custody and making findings of fact, the court may order a placement or a different plan the court finds to be in the juvenile's best interest. G.S. 7B-908(d).

2. When child is not in DSS/agency custody. When the child is not in DSS or another agency's custody when the petition or motion for TPR is filed, the court may place the child in the custody of the petitioner or movant, some other suitable person, a county DSS, or a licensed child-placing agency, as the child's best interests require. G.S. 7B-1112(2).

3. Selection of adoptive parents. The process of selecting adoptive parents is the responsibility of and within the discretion of DSS or the licensed child placing agency. G.S. 7B-1112.1.

(a) Who is considered. Any current placement provider wanting to adopt the child must be considered. G.S. 7B-1112.1.

(b) GAL's role. The GAL may request information from and consult with DSS concerning the selection process. If the GAL requests information, DSS must provide it within five business days. The GAL may move to review the selection and make recommendations at the review hearing (see below). G.S. 7B-1112.1

(c) Notice of selection and motions for review. Once DSS has selected prospective adoptive parents, it must notify the GAL and the foster parents within 10 days and before the filing of the adoption petition. If the GAL disagrees with the selection of adoptive parents or the foster parents want to adopt the child but were not selected, either may file a motion within ten days of receiving DSS's notification and schedule the case for hearing on the next juvenile calendar. DSS must provide a copy of a motion for review of adoption selection to the foster parents not selected. The foster parents do not acquire party status solely based on their right to receive notice and be heard. G.S. 7B-1112.1.

(d) Timing of adoptive placement. DSS may change the juvenile's placement to the prospective adoptive parents only after the time period for filing a motion to review the selection has expired and no motion has been filed. G.S. 7B-1112.1.

- (e) Hearing on a motion.** At a hearing on a motion to review the adoption selection, the court must consider the recommendations of DSS and the GAL and other facts related to the selection of adoptive parents, then determine whether the proposed adoptive placement is in the child's best interests. G.S. 7B-1112.1.

C. Post-TPR Reviews

After termination, the court must conduct review hearings under G.S. 7B-908 at least every six months until the child is the subject of a final order of adoption, if

- a DSS or licensed child-placing agency has custody of the child, and
- the termination petition or motion was filed by someone other than the other parent, the child's guardian ad litem, or a person who has filed a petition to adopt the child.

See infra § 10.1 (discussing post-TPR reviews).

D. Appeals and Modification of Order

See infra chapter 12 discussing TPR appeals; see *supra* § 4.9.E discussing modifying, vacating, and providing relief from orders.

9.15 Reinstatement of Parental Rights

A. Introduction

G.S. 7B-1114 provides a procedure through which the court, in narrowly defined circumstances, may reinstate the parental rights of a parent whose rights have been terminated. Note that the phrase "preliminary hearing" is used in this statute to refer to the first hearing on a motion to reinstate parental rights, and the phrase "interim hearing" is used to refer to subsequent periodic hearings.

B. Circumstances for Reinstatement

Circumstances in which the procedure is available are narrow:

- A motion to reinstate parental rights may be filed only by a child whose parent's rights have been terminated, the child's GAL attorney advocate, or a DSS that has custody of the child.
- The child must be at least 12 years old or, if the child is younger than 12, the motion must allege extraordinary circumstances requiring consideration of the motion.
- The juvenile must not have a legal parent, must not be in an adoptive placement, and must not be likely to be adopted within a reasonable time.
- The order terminating parental rights must have been entered at least three years before

the motion is filed, unless the juvenile's attorney advocate and the DSS with custody stipulate that the child's permanent plan is no longer adoption.

G.S. 7B-1114(a).

Note: Although it is not stated explicitly, the statute read as a whole limits the section's application to children who are in the custody of a county DSS.

C. Hearing Procedures

1. Notification to child and appointment of GAL. If a motion can be filed and a parent contacts DSS or the child's GAL about reinstatement of the parent's rights, DSS or the GAL must notify the child that the child has a right to file a motion for reinstatement of parental rights. G.S. 7B-1114(b). If the child does not have a GAL when a motion to reinstate parental rights is filed, the court must appoint one. The appointment, duties, and payment of the GAL and GAL attorney advocate are the same as in G.S. 7B-601 and 7B-603. G.S. 7B-1114(c).

2. Service of motion. The party filing the motion (the child, DSS, or the attorney advocate) must serve it on each of the following who is not the movant:

- the child,
- the child's guardian ad litem or guardian ad litem attorney advocate,
- the DSS with custody of the child, and
- the former parent whose rights the motion seeks to have reinstated.

G.S. 7B-1114(d).

3. Former parent not entitled to appointment of counsel. Although the former parent must be served, he or she is not a party and is not entitled to appointed counsel if indigent, but may retain counsel at his or her own expense. G.S. 7B-1114(d).

4. Timing. The party filing the motion must ask the clerk to calendar a preliminary hearing on the motion for reinstatement within 60 days of the filing of the motion and must give at least 15 days' notice to those who were required to be served and to the child's placement provider (who is not made a party by virtue of receiving notice). G.S. 7B-1114(e). At the conclusion of the preliminary hearing, the court must either dismiss the motion or order that the child's permanent plan become reinstatement of parental rights. If the motion is not dismissed at the preliminary hearing, the court must conduct interim hearings at least every six months until the motion is granted or dismissed. G.S. 7B-1114(h). The court must grant or dismiss the motion within 12 months from the date the motion was filed unless the court makes written findings about why that cannot occur and specifies a time frame for entering a final order. G.S. 7B-1114(j). After an order reinstating parental rights is entered, the court is not required to conduct further reviews. G.S. 7B-1114(k).

5. Pre-hearing reports. At least seven days before the preliminary hearing, DSS and the child's GAL must provide the court, the other parties, and the former parent with reports that

address a list of factors specified in G.S. 7B-1114(g).

6. Participants. At the preliminary hearing and any subsequent hearing on the motion, the court must consider information from the DSS that has custody of the child, the child, the child's GAL, the child's former parent whose parental rights are the subject of the motion, the child's placement provider, and any other person or agency that may aid the court in its review. G.S. 7B-1114(g).

7. Evidence and standard for review. The court may consider any evidence, including hearsay, that the court finds to be relevant, reliable, and necessary to determine the needs of the child and whether reinstatement is in the child's best interest. G.S. 7B-1114(g).

D. Criteria and Findings

The court must consider the following criteria and make written findings regarding those that are relevant:

- Efforts that were made to achieve adoption or a permanent guardianship.
- Whether the parent whose rights the motion seeks to have reinstated has remedied the conditions that led to the child's removal and termination of the parent's rights.
- Whether the child would receive proper care and supervision in a safe home if placed with the parent.
- The child's age, maturity, and ability to express his or her preference.
- The parent's willingness to resume contact with the child and to have parental rights reinstated.
- The child's willingness to resume contact with the parent and to have parental rights reinstated.
- Services that would be needed by the child and the parent if the parent's rights were reinstated.
- Any other criteria the court deems necessary.

G.S. 7B-1114(g).

E. Interim Hearings and Reasonable Efforts

Interim hearings may be combined with post-TPR review hearings. At each interim hearing the court must assess whether the plan of reinstatement continues to be in the child's best interest and whether DSS has made reasonable efforts to achieve the permanent plan. G.S. 7B-1114(h).

F. Orders

After every hearing, whether preliminary or interim, the court must make findings of fact and conclusions of law and may

- enter an order for visitation under G.S. 7B-905(c), or

- order that the child be placed in the former parent's home and supervised by DSS either directly or, when the former parent lives in a different county, through coordination with the DSS in that county, or by other personnel available to the court, subject to any conditions the court specifies.

G.S. 7B-1114(i).

Orders from any type of reinstatement hearing must be entered within 30 days following the completion of the hearing. If an order is not entered within that time, the clerk must schedule a subsequent hearing at the next session of juvenile court to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order must be entered within ten days of the subsequent hearing. G.S. 7B-1114(l).

G. Effect of Reinstatement

An order reinstating parental rights restores all rights, powers, privileges, immunities, duties, and obligations of the parent to the child, including those relating to custody, control, and support. G.S. 7B-1114(k). A parent whose rights are reinstated is not liable for child support or the cost of services provided to the child after the termination order and before the reinstatement order. G.S. 7B-1114(n). Reinstatement does not vacate or otherwise affect the validity of the original order terminating parental rights. G.S. 7B-1114(m).

Chapter 10

Post-Termination of Parental Rights and Post-Relinquishment Reviews

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10.1 Post-Termination of Parental Rights Review Hearings

A. Circumstances and Purpose

1. Circumstances. Review hearings that take place after termination of parental rights (referred to as “post-TPR review hearings”) are required when:

- parental rights have been terminated pursuant to a petition (or presumably a motion) by one of the following persons or agencies with proper standing under G.S. 7B-1103: (i) a guardian of the person of the child, (ii) DSS or other licensed agency, or (iii) a person with whom the child has lived continuously for at least two years immediately preceding the filing of the action; and
- the child is in the custody of DSS or another licensed child-placing agency.

G.S. 7B-908(b).

2. Purpose. The purpose of post-TPR review hearings is to ensure that every reasonable effort is being made to provide a permanent placement for the child consistent with the child’s best interests. G.S. 7B-908(a). An interim hearing on a motion to reinstate parental rights pursuant to G.S. 7B-1114 may be combined with a post-TPR review hearing. G.S. 7B-1114(h). *See supra* § 9.15 (procedures for reinstatement of parental rights).

B. Timing

The first post-TPR review hearing must be conducted within six months of the date of the hearing at which parental rights were terminated. Thereafter, hearings must be conducted at least every six months until the child is adopted. G.S. 7B-908(b).

Once there is a decree of adoption, any calendared review hearings must be cancelled, and the clerk must provide notice of the cancellation to all persons previously notified of the hearing. G.S. 7B-908(e).

C. Notice

1. Timing and procedure for notice. Notice must be given by the clerk between 15 and 30 days prior to each review hearing. G.S. 7B-908(b)(1). DSS must either provide the clerk with the name and address of the person providing care for the child or file written documentation with the clerk that DSS has sent notice of the hearing to the child’s current care provider. G.S. 7B-908(b)(1).

2. Persons entitled to notice and to participate in hearing. Notice must be given to:

- the child, if the child is 12 years of age or older;
- a legal custodian of the child;
- the person who is caring for the child;
- the child’s guardian ad litem, if there is one;

- a parent whose rights have been terminated, if the parent has appealed the order terminating the parent's rights and a court has stayed the order pending the appeal; and
- any other person or agency the court specifies.

G.S. 7B-908(b)(1). A person is not made a party to the proceeding simply because he or she is entitled to notice and an opportunity to be heard. *Id.*

D. Appointment of GAL

If a GAL was appointed previously to represent the child in the TPR proceeding, the GAL will continue to represent the child for purposes of post-TPR review hearings. If a GAL was not appointed previously or has been relieved, the court has the discretion to appoint a GAL and may continue the case to give the GAL time to prepare. G.S. 7B-908(b)(2).

E. Evidence and Considerations for Hearings

1. Evidence. The court may consider any evidence, including hearsay, that the court finds to be relevant, reliable, and necessary to determine the needs of the child and the most appropriate disposition. G.S. 7B-908(a).

2. Sources of information. The court may consider information from DSS or a licensed child placing agency, from any other participants, and from any other person or agency the court determines is likely to aid in the review. G.S. 7B-908(a).

3. Required considerations. The court must consider the following four factors and make written findings regarding those that are relevant.

(a) Adequacy of the plan. The court must consider the adequacy of the DSS or agency plan for permanent placement relative to the child's best interests and the efforts made to implement that plan. G.S. 7B-908(c)(1).

(b) Adoption listing. The court must consider whether the child has been listed for adoption with the N.C. Adoption Resource Exchange, the N.C. Photo Adoption Listing Service (PALS), or any other specialized adoption agency. G.S. 7B-908(c)(2).

(c) Previous efforts. The court must consider any previous efforts made by DSS or the agency to find a permanent home for the child. G.S. 7B-908(c)(3).

(d) Best interest. The court must consider whether the current placement is in the child's best interest. G.S. 7B-908(c)(4).

Note that the court is not limited to these considerations, but these factors are the minimum the court must consider.

F. Findings and Order

The court must make findings of fact regarding relevant factors and considerations and its order must do one of the following:

- affirm DSS or the agency's plans; or
- if a child is not placed with prospective adoptive parents as selected in G.S. 7B-1112.1, order a placement or different plan the court finds to be in the child's best interest after considering the agency's recommendations.

G.S. 7B-908(d). In either case the court may require specific additional steps that are necessary in order to accomplish a permanent placement that is in the child's best interest. *Id.* For a discussion of the court's authority related to child placement following termination, see *supra* § 9.14.B

Practice Note: The Code does not address circumstances in which, despite diligent efforts, adoption does not occur and ceases to be the planned permanent placement for the child. Presumably periodic hearings to review the child's status and best interests would continue. It is not clear whether the court could waive further hearings upon making the findings set out in G.S. 7B-906.1(n).

Note: Throughout this chapter the word "agency" is used as shorthand for "DSS or licensed child-placing agency." Sometimes the statutes, especially G.S. 7B-1112.1, refer only to DSS when it is clear from the context that a provision applies equally to a licensed child-placing agency. In those instances, the manual uses "agency."

10.2 Post-Relinquishment Review Hearings

A. Circumstances Requiring Review

The Juvenile Code requires the court to conduct periodic reviews of cases in which a child is relinquished for adoption to DSS or a licensed child-placing agency when the child has not become the subject of an adoption decree within six months of a relinquishment by a parent, a guardian, or a guardian ad litem for an incompetent parent. (See § B.1.d below regarding relinquishment when a parent is incompetent). G.S. 7B-909(a).

B. Relinquishment for Adoption

Relinquishment of a child for adoption is governed by G.S. 48-3-701 through 48-3-707. This section is meant to provide general information on relinquishment and does not include comprehensive requirements and procedures for relinquishment.

1. Who may relinquish. A parent may relinquish all parental rights and a guardian may relinquish all guardianship powers, including the right to consent to adoption, to a DSS or

licensed child-placing agency. G.S. 48-3-701(a).

(a) Married parents living together. If the parents are married to each other and living together, the parents must act jointly in relinquishing a child to an agency. G.S. 48-3-701(a).

(b) Mother. The mother of a child may execute a relinquishment at any time after a child is born but not sooner. G.S. 48-3-701(b).

(c) Father or putative father. A child's father or putative father (a man who may or may not be the biological father of the child) may execute a relinquishment for adoption either before or after the child is born. G.S. 48-3-701(b). Note, however, that a father or putative father's *consent* for adoption may or may not be required, depending on whether statutory criteria in G.S. 48-3-601(2)b have been met. For a discussion of cases related to father's consent for adoption and knowledge of child's existence, see § 9.11.E.4.

(d) Incompetent parent. If a parent has been adjudicated incompetent, the court must appoint a GAL for the parent and, unless the child already has a guardian, a GAL for the child to investigate whether the adoption should proceed. The investigation must include an evaluation of the parent's condition and any reasonable likelihood that the parent will be restored to competency, the relationship between the child and the parent, alternatives to adoption, and any other relevant fact or circumstance. If the court determines after a hearing that it will be in the child's best interest for the adoption to proceed, the court is required to order the parent's GAL to execute a consent or relinquishment on behalf of the incompetent parent. G.S. 48-3-602.

(e) Guardian. A child's guardian may execute a relinquishment of guardianship powers, including the right to consent to adoption, at any time. G.S. 48-3-701(c). Note, however, that in the adoption context "guardian" refers only to an individual:

- appointed in a proceeding under G.S. Chapter 35A to exercise the powers conferred by G.S. 35A-1241 (including a standby guardian whose authority has commenced); or
- appointed in another jurisdiction, according to the law of that jurisdiction, who has the power to consent to adoption under the law of that jurisdiction.

G.S. 48-1-101(8).

Practice note: The following forms relating to relinquishment are issued by the state Division of Social Services in the Department of Health and Human Services:

- [“Relinquishment of Minor for Adoption by Parent or Guardian,”](#) DSS-1804 (Nov. 2014).
 - [“Revocation of Relinquishment for Adoption by Parent or Guardian,”](#) DSS-1805 (Nov. 2014).
-

2. Types of relinquishment. A child may be relinquished only to a county DSS or a licensed child-placing agency (not to an individual), and the relinquishment is effective only when accepted by the agency. A relinquishment may be “general,” allowing the agency full discretion to choose the adoptive parent, or “designated,” meaning that the parent consents only to adoption by the person(s) the parent designates in the relinquishment form (often a foster parent or relative). In a designated relinquishment, the parent indicates whether he or she wants to be notified if adoption by the designated person(s) cannot be completed. After a parent is notified that the adoption cannot be completed, the parent has 10 days to revoke the relinquishment. If the parent elects not to be notified or does not revoke after being notified, the designated relinquishment becomes a general one, and the agency may place the child in its discretion. *See* G.S. 48-3-703, 48-3-704.

3. Right to counsel. An indigent parent does not have a right to appointed counsel for purposes of the relinquishment process. However, two cautions are in order:

- A parent who is contemplating relinquishment and is not represented by counsel must be advised that he or she has a right to employ independent legal counsel. G.S. 48-3-703(a)(12).
- If a parent is entitled to appointed counsel in an action related to the relinquishment, such as a pending abuse, neglect, dependency, or TPR proceeding, the right to counsel in that action may carry over to the relinquishment (or to a consent to adoption).

In the case of *In re Maynard*, 116 N.C. App. 616 (1994), respondent was represented by court-appointed counsel as the result of a petition alleging that her children were neglected. During the course of the neglect proceeding, DSS asked respondent to sign a relinquishment for adoption but respondent, after conferring with her attorney, declined. Later, during supervised visitation but without respondent’s attorney present, DSS asked respondent to sign a relinquishment and she did. Because the signing of the relinquishment occurred following and as a consequence of a neglect proceeding in which the respondent was entitled to counsel, the court of appeals held that the signing of the relinquishment was directly related to the neglect proceeding and the respondent was entitled to counsel when she signed the relinquishment forms.

Practice Note: If a DSS or other agency knows or learns that a parent who is considering relinquishment is represented by counsel, the agency should encourage the parent to discuss the relinquishment decision with counsel. In most instances the agency also should involve its own attorney before continuing any discussion with the parent about relinquishment.

4. Revocation, rescission, and voiding of relinquishment. A relinquishment may be revoked within 7 days, except that a second identical relinquishment is irrevocable. A revocation must be in writing and either delivered to the agency that accepted the relinquishment within 7 days or sent to the agency by registered mail or overnight delivery service (as long as the revocation is placed in the mail or with the overnight delivery service by the 7th day). *See* G.S. 48-3-706. For a case in which an attempted revocation given on the eighth day was ineffective, see *In re Adoption of Baby Boy Born April 10, 2012*, __ N.C. App. __, 757 S.E.2d 343 (2014).

A relinquishment may be rescinded at any time by mutual agreement of the parent and the agency to which the child was relinquished, but only if the child has not been placed with a prospective adoptive parent. G.S. 48-3-707(a)(2). After a child has been placed with a prospective adoptive parent but before the entry of the adoption decree, a relinquishment may be rescinded if agreed upon by the agency, the person relinquishing the child, and the prospective adoptive parent. G.S. 48-3-707(a)(3). Before a final adoption decree is entered, a relinquishment becomes void if the parent establishes by clear and convincing evidence that the relinquishment was obtained by fraud or duress. G.S. 48-3-707(a)(1). A relinquishment also can be voided for fraud or duress after a final order of adoption is entered, but only if a parent moves to set aside the adoption within six months of the time the fraud or duress reasonably should have been discovered. G.S. 48-2-607(c).

If the court finds, on motion of DSS or a child placing agency, that a consent or relinquishment that is necessary for the child's adoption cannot be obtained from a parent and that no further steps are being taken to terminate that parent's rights, the court may void the relinquishment by the other parent. Before voiding the relinquishment, the court must require the agency to give at least 15 days' notice to the relinquishing parent whose rights will be restored. That parent then has a right to be heard on whether the relinquishment should be voided and his or her plan to provide for the child if the relinquishment is voided. If the relinquishing parent cannot be located, notice of the hearing must be sent by US mail, return receipt requested, to the address of the parent given in the relinquishment. If a relinquishment is voided, further review hearings are not required. G.S. 7B-909(b1), (c).

5. Consequences of relinquishment. A relinquishment vests legal and physical custody of the child in the agency and empowers the agency to place the child for adoption consistent with the manner specified in the relinquishment (designated or general, discussed in 2, above). A parent who relinquishes a child gives up his or her custodial rights and the right to consent to the child's adoption. A relinquishment does not terminate all parental rights, however, and does not affect the parent's support obligation, which continues until the final decree of adoption. All parental rights and duties terminate when the final decree of adoption is entered. *See* G.S. 48-3-705, G.S. 48-1-106.

C. Timing, Notice, and Petition or Motion

When a child has not been adopted within six months following a relinquishment, the agency must promptly file a petition for post-relinquishment review or, if the court is exercising jurisdiction over the child, a motion for review. The review hearing must be conducted within 30 days following the filing of the petition or motion unless the court directs otherwise. After the first review, the court must continue to conduct reviews at least every six months until a final decree of adoption is entered or the relinquishment is voided or rescinded. G.S. 7B-909(a), (c).

Tool: AOC Form AOC-J-140, “[Motion for Review \(Abuse/Neglect/Dependency\)](#)” (Oct. 2013). If the form is used as a petition for review, the user should change the title from “Motion” to “Petition.”

When a petition or motion for post-relinquishment review is filed and no juvenile record for the child exists in the county, the clerk creates a record and assigns a “J” number (signifying a “juvenile” case). If the clerk already has any juvenile record for the child, the petition or motion is given the “J” number of that record.

A parent who relinquished the child for adoption is not a party to the post-relinquishment review. A parent whose rights have been terminated is considered a party to the review only if an appeal of the order terminating that parent’s rights is pending and a court has stayed the order pending the appeal. G.S. 7B-909(c).

D. Procedure for Hearing

The procedure for post-relinquishment review hearings is the same as for post-TPR hearings. *See supra* § 10.1.

10.3 Relationship between TPR and Adoption Proceedings

A. Introduction

Adoption procedures and requirements are contained in Chapter 48 of the General Statutes. This manual does not attempt to explain adoption law, but seeks to explain the relationship between juvenile court TPR proceedings and adoption.

As explained in Chapter 8 of this manual, adoption is one of five possible permanent plans for a child who is the subject of abuse, neglect, and dependency proceedings. If the court determines that adoption is the permanent plan, DSS has responsibilities related to placing the child for adoption, and the GAL’s responsibilities for protecting and promoting the child’s best interests remain intact during the adoption selection process. A parent whose rights have been terminated, however, has no role in the adoption selection process.

A child may be adopted only after parental rights have been terminated, the child is relinquished for adoption, or a parent has consented to the adoption of the child by a particular adoptive parent. If both parents are living, the rights of both parents (even one whose identity is unknown) must be addressed in one of those ways. An agency may acquire the authority to place a child for adoption and consent to the child’s adoption only by means of a relinquishment or by termination of parental rights when the child is in agency custody. G.S. 48-3-203.

Note also that a child who is age 12 or older must consent to his or her own adoption, even if the parents relinquished the child for adoption, unless the court in the adoption proceeding waives the requirement. G.S. 48-3-601(1).

The statute addressing standing to initiate termination of parental rights proceedings, G.S. 7B-1103(a), allows a person who has filed a petition for adoption to initiate TPR proceedings, so

there are circumstances in which an adoption case and a termination of parental rights case may be proceeding simultaneously. For example, in the case of *In re Baby Boy [Costin]*, the trial court found a mother's relinquishment for adoption of her baby boy void, and the adoptive parents appealed the order. While the appeal was pending, the adoptive parents filed a TPR petition, and the court terminated the mother's parental rights. A trial court may not exercise jurisdiction over a TPR proceeding when there is a pending appeal of an order entered in a juvenile proceeding. See G.S. 7B-1001(a), G.S. 7B-1003. The limitation set forth in G.S. 7B-1003 only applies to appeals of juvenile orders identified in G.S. 7B-1001. The trial court may exercise jurisdiction over a TPR proceeding while an appeal of an adoption order is pending. *In re Baby Boy [Costin]*, __ N.C. App. __, 767 S.E.2d 628 (2014). For a discussion of the court's jurisdiction to proceed with TPR during pendency of appeal in an adoption case or in other cases, see *infra* § 12.10.A.3.

Resources: In addition to Chapter 48 of the General Statutes, resources for adoption information include the following:

- The DHHS policies and procedures related to DSS adoption services, found in 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. VI \(Adoption Services\)](#).
 - Jan Simmons, Cheryl Daniels Howell, [NORTH CAROLINA TRIAL JUDGES' BENCH BOOK DISTRICT COURT: VOLUME ONE, FAMILY LAW](#) (UNC School of Government 2014). (In particular, see Chapter 8 on Adoption.)
 - Subchapter 70M of Title 10A of the N.C. Administrative Code, "Adoption Standards" (sections 10A N.C.A.C. 70M .0101 to 10A N.C.A.C. 70M .0604)
 - Website for the [North American Council on Adoptable Children](#), a resource for publications, training, support, and a wide range of information related to adoption.
 - "[Adoption](#)" on the [Child Welfare Information Gateway website](#), with resources on all aspects of domestic and international adoption.
-

B. District Court Jurisdiction when Adoption Is Filed

Adoption proceedings are special proceedings before the clerk of superior court. However, if a child who is the subject of an adoption petition is also the subject of a pending abuse, neglect, or dependency proceeding, the district court having jurisdiction under Chapter 7B retains jurisdiction until the final order of adoption is entered, unless the court waives jurisdiction for good cause. G.S. 48-2-100(a), 48-2-102(b). See also *In re Asbury*, 125 N.C. App. 143 (1997).

The district court may acquire jurisdiction over the adoption proceeding itself if

- the case is transferred by the clerk pursuant to G.S. 48-2-601 and G.S. 1-301.2 (when an issue of fact, equitable defense, or request of equitable relief is raised before the clerk); or
- a final order entered by the clerk is appealed pursuant to G.S. 48-2-607.

C. Notice Triggered by Adoption Petition, Motion, or Decree

1. Notice of adoption selection. Once a selection of prospective adoptive parents has been made, the agency must notify the GAL and the foster parents within 10 days and before the filing of an adoption petition. G.S. 7B-1112.1. Receipt of notice by the GAL and the foster parents triggers the ten-day time period within which the GAL or foster parents who wanted to adopt but were not selected may file a motion asking the court to review the adoption selection and schedule the motion for hearing on the next juvenile calendar. *Id.* See *infra* § 10.3.E.2.

2. Notice of decree to parties. Within ten days of receiving notice of a final decree of adoption, the agency must file with the court in the juvenile case and serve on the GAL (if any) notice of the adoption. The adoption decree itself should never be filed in the juvenile case. At that point, the clerk must cancel any post-TPR review hearings and provide notice of the cancellation to those required to receive notice of the hearings. G.S. 7B-908(e).

Practice Note: The Juvenile Code requirements that adoption petitions, motions, and decrees should never be filed in the juvenile case likely relate to confidentiality and protecting adoption information from unintended inspection. While certain individuals are permitted access to the juvenile file, the adoption file can be opened only by order of the clerk pursuant to G.S. 48-9-102 and 48-9-105.

D. DSS Responsibility and Discretion for Adoptive Process

DSS (or a licensed child-placing agency) with legal custody of the child has the sole responsibility and discretion for the selection of specific adoptive parents. The agency may, however, consult with the GAL regarding the selection process. If the GAL requests information related to the selection, the agency must provide the information within five days. The agency is required to consider any current placement provider who wants to adopt the child. G.S. 7B-1112.1.

With one important exception, when a child is in DSS custody at the time a TPR petition or motion is filed, entry of a TPR order gives DSS all the rights to adoptive placement of the child that DSS would have if the parents had relinquished the child to DSS. G.S. 7B-1112. Cases based on the law as it read before October 1, 2011, held that the trial court did not have subject matter jurisdiction to order the child placed with a relative following TPR, because the statute gave DSS exclusive placement authority. See, e.g., *In re I.T.P.-L.*, 194 N.C. App. 453 (2008); *In re Asbury*, 125 N.C. App. 143 (1997). That continues to be true once DSS places the child for adoption. However, until the child is placed with prospective adoptive parents, the court at a post-TPR review hearing may order a placement or plan different from the one proposed by DSS, as long as the court considers DSS's recommendations and makes findings of fact to support a conclusion that the court's order is in the child's best interest. G.S. 7B-908(d).

Once an agency places a child for adoption and the adoption petition is filed, physical custody passes to the adoptive parents. Legal custody, however, does not pass to the adoptive

parents until the adoption decree becomes final. Any time before entry of the adoption decree, the agency for cause may petition the court in the adoption proceeding for dismissal of the proceeding and the return of custody to the agency. G.S. 48-3-502.

E. GAL and Foster Parent's Role in Adoptive Process

1. Information and consultation. While the GAL and foster parents have no authority with respect to the selection of adoptive parents, the agency is required to notify the GAL and the foster parents of the adoptive home selection within ten days after the selection is made and before the filing of the adoption petition. G.S. 7B-1112.1. The GAL may request adoption selection information and consult with the agency regarding selection. The GAL is entitled to receive requested information from the agency within five days. *Id.* The GAL's duties to see that the child's interests and needs are being met (*see* G.S. 7B-601) extend to involvement in the child's placement for adoption. *See In re N.C.L.*, 89 N.C. App. 79 (1988) (confirming the GAL's duty and right to inquire into DSS's handling of the child's adoption and the authority of the court to order DSS to turn over information requested by the GAL); *Wilkinson v. Riffel*, 72 N.C. App. 220 (1985) (both decided under former law).

2. Hearing to review selection of adoptive parents. The GAL, or a foster parent who wants to adopt but is not selected as an adoptive placement, has 10 days from the agency's notification to seek review of the agency's selection of an adoptive placement. If the motion is made by the GAL, the agency must provide a copy of the motion to the foster parents not selected. Foster parents do not acquire party status solely based on their right to receive notice and be heard. G.S. 7B-1112.1.

At a hearing on a motion to review the selection, the court must consider the recommendations of the agency and the GAL and other facts related to the selection of adoptive parents, then determine whether the proposed adoptive placement is in the child's best interests. G.S. 7B-1112.1.

The agency may change the juvenile's placement to the prospective adoptive parents only after the time for filing a motion for review of the selection has expired and no motion has been filed. G.S. 7B-1112.1.

Practice Note: In practice, DSS and the GAL often communicate openly throughout the process of selecting an adoptive placement, sharing information and discussing concerns as they arise. Such open communication may avoid a motion for review that could delay and complicate the adoption.

3. GAL's role after adoption petition. Once an adoption petition is filed and the ten-day window for filing a motion for review has passed, the GAL has no statutorily defined responsibilities or authority in the adoption proceeding. Unless the court terminates the GAL's appointment, however, the GAL's role in the juvenile case continues and the GAL remains involved in post-TPR review hearings and in monitoring the child's situation until the final decree of adoption is entered. If the adoption proceeding is contested, the court in that action

may appoint an attorney or a guardian ad litem to represent the child's interests in the adoption proceeding. G.S. 48-2-201(b).

Chapter 11

Evidence¹

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1. This chapter was written by School of Government faculty member John Rubin. This chapter, as well as earlier training materials he prepared on this subject, owe their start to Ilene Nelson, former administrator of North Carolina's Guardian ad Litem program, who many years ago began writing about how evidence principles apply to juvenile cases.

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This chapter addresses common evidence issues that arise in abuse, neglect, dependency, and termination of parental rights proceedings (referred to in this manual as juvenile proceedings or juvenile cases). It is not intended to be a complete guide to all of the evidence issues that the court or parties may need to address. The chapter draws on several sources on evidence, and the reader is encouraged to consult those sources for additional information and legal authority. Sources on North Carolina law include:

- KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE (7th ed. 2011) (hereinafter BRANDIS & BROUN);
- ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS (3d ed. 2014) (hereinafter MOSTELLER); and
- Jessica Smith, [*Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07 (UNC School of Government, Dec. 2008).

General sources on evidence law include:

- KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE (7th ed. 2013) (hereinafter MCCORMICK);
- JOHN E. B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE (5th ed. 2011) (hereinafter MYERS); and
- EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE (5th ed. 2011) (hereinafter IMWINKELRIED).

Other sources are noted where applicable.

11.1 Applicability of Rules of Evidence

A. Adjudication

1. Applicability of rules. This chapter focuses primarily on adjudication hearings in abuse, neglect, and dependency cases and termination of parental rights (TPR) proceedings. In both types of adjudication hearings, the North Carolina Rules of Evidence apply. *See* G.S. 7B-804 (so stating for abuse, neglect, and dependency cases); G.S. 7B-1109(f) (stating that the rules of evidence apply to adjudication hearings in TPR proceedings); *In re A.L.T.*, ___ N.C. App. ___ (June 16, 2015) (recognizing that rules of evidence apply at adjudication hearing on abuse, neglect, and dependency); *In re F.G.J.*, 200 N.C. App. 681 (2009) (applying the rules of evidence in assessing the admissibility of evidence at a TPR adjudication); *see also* N.C. R. EVID. 1101(a) (stating that the rules of evidence apply to all actions and proceedings in the North Carolina courts except as otherwise provided by statute or rule).

The courts have stated that in cases heard by a judge without a jury, it is presumed in the absence of some affirmative indication to the contrary that the trial judge, having knowledge of the law, is able to distinguish between competent and incompetent evidence (that is,

admissible and inadmissible evidence) and base findings on competent evidence only. *See In re F.G.J.*, 200 N.C. App. 681, 686–87 (2009); *In re L.C.*, 181 N.C. App. 278, 284 (2007). This principle may relax the formality of bench trials, but it does not lessen the importance of correctly applying the rules of evidence. The court’s findings still must be based on competent, substantive evidence. *See Little v. Little*, ___ N.C. App. ___, 739 S.E.2d 876 (2013) (holding that although appellate court generally presumes that trial court disregarded incompetent evidence, the only evidence supporting the trial court’s finding in action for domestic violence protective order was inadmissible hearsay; therefore, admission of the inadmissible evidence was not harmless error); *see also In re K.W.*, 192 N.C. App. 646, 651 (2008) (distinguishing between substantive and impeachment evidence). It is therefore critical to recognize not only whether evidence is competent but also whether it is admissible for a substantive or nonsubstantive purpose. *See generally* 1 BRANDIS & BROUN § 3, at 6 (substantive evidence is evidence that “tends, directly or circumstantially, to prove a fact in issue”). The different purposes for which evidence may be offered are noted in this chapter where applicable.

The question of whether evidence is admissible differs from whether the evidence is sufficient to satisfy the petitioner’s burden of proving the allegations by clear and convincing evidence or, in a TPR case, by clear, cogent, and convincing evidence. This chapter does not address the sufficiency, as opposed to the admissibility, of evidence at adjudication.

Note: To preserve questions about evidentiary rulings for appellate review, parties ordinarily must give the trial judge an opportunity to rule correctly by making timely and specific objections—that is, by objecting to inadmissible evidence or, if the evidence is admissible for a limited purpose, by requesting that the evidence be limited to that purpose. 1 BRANDIS & BROUN § 19, at 92. For a further discussion of objections, offers of proof, and other preservation requirements, see *infra* § 11.13.

2. Reliance on criminal cases. A growing body of appellate decisions addresses evidence issues in juvenile proceedings. To fill in gaps, the discussion in this chapter frequently refers to criminal cases, particularly criminal cases involving children. Constitutional requirements for the two types of proceedings differ, but for the most part North Carolina’s evidence rules apply equally to criminal and civil cases. Differences are noted where applicable.

3. Evidence issues involving children. Many of the evidence issues in juvenile proceedings concern children. These issues fall into three basic categories, discussed in the indicated sections of this chapter:

- testimony by children, which may involve questions about their competency as witnesses and accommodations to assist them in testifying (*see infra* § 11.2);
- testimony about statements made by children, which primarily involves questions about the admissibility of hearsay (*see infra* § 11.6) and the permissible use of their statements for nonsubstantive purposes (*see infra* § 11.3); and
- testimony in the form of an opinion about children, primarily expert testimony (*see infra* § 11.10).

4. Local rules affecting evidence. Many districts have local juvenile court rules. Attorneys and judges who participate in juvenile cases should familiarize themselves with those rules. Local rules for each district are available on the [Administrative Office of the Courts website](#).

Some local rules contain evidence provisions not contained in the North Carolina Rules of Evidence. For example, to encourage treatment and other services, Local Rule 7 relating to civil juvenile cases in the Twelfth Judicial District restricts the admission at adjudication of evidence of treatment services provided after the filing of a petition as well as statements made by the respondent when receiving such services. See [Twelfth Judicial District, District Court, Family Court Division, Juvenile Case Management Plan, I. Civil Cases](#) (2014) on the North Carolina Court System website.

Local rules are authorized by G.S. 7A-34 and Rule 2(d) of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, if they are supplementary to, and not inconsistent with, acts of the General Assembly. Few cases have addressed the extent to which local rules may modify evidence and other procedures and, absent additional clarification by the appellate courts, the parties should follow local rules on evidence. See *In re T.M.*, 187 N.C. App. 694, 697–701 & n.2 (2007) (because the respondent father failed to object to medical records by the deadline in the then-applicable Twelfth Judicial District local rules [deleted from the current version of the rules, effective July 1, 2014], the trial court admitted the records at the adjudication hearing over the respondent's objection that DSS had not established a proper foundation; the court of appeals did not specifically decide whether the local rules provided an appropriate basis for overruling the respondent's objection because the respondent could not show prejudice, but noted that the local rule was not intended to be an evidentiary rule but instead was designed to promote the efficient administration of justice); see also *In re J.S.*, 182 N.C. App. 79 (2007) (upholding, in a two-to-one decision, a local administrative discovery order requiring respondents to review DSS records within ten working days after receiving notice that records are available for review).

B. Disposition and Other Proceedings

The Juvenile Code relaxes the rules of evidence for most juvenile hearings other than adjudication. See G.S. 7B-506(b) (relating to nonsecure custody), 7B-901 (relating to disposition), 7B-906.1(c) (relating to review and permanency planning), 7B-1110(a) (relating to disposition in TPR proceedings), 7B-1114(g) (relating to reinstatement of parental rights). For a further discussion of the applicability of the rules of evidence in particular proceedings, consult the applicable section of this manual. See *supra* §§ 5.6.D (nonsecure custody), 8.1.C.1 (disposition, review, and permanency planning), 9.12.B.3 (disposition in termination of parental rights proceeding), 9.15.C.7 (reinstatement of parental rights).

In light of these provisions, some cases have observed that the rules of evidence do not apply in such proceedings. See *In re M.J.G.*, 168 N.C. App. 638, 648 (2005). This means that the rules of evidence do not exclude some evidence that would be inadmissible at adjudication. The rules of evidence still play some role, however.

First, the parties have the right to present and have considered evidence that is competent (i.e., admissible) and relevant under the rules of evidence, subject to the court's discretion to exclude cumulative evidence. *See In re Shue*, 311 N.C. 586, 598 (1984) (error not to hear competent, relevant, non-cumulative evidence); *In re J.S.*, 182 N.C. App. 79, 84–85 (2007) (not error to preclude evidence as cumulative); *In re O'Neal*, 140 N.C. App. 254, 256–57 (2000) (error to refuse to allow respondent to offer evidence).

Second, privileges apply to a limited extent at both adjudication and disposition. *See infra* § 11.11.

Third, while the court may consider hearsay and other evidence that ordinarily would be inadmissible under the rules of evidence, the court may consider only such evidence that it finds to be “relevant, reliable, and necessary.” G.S. 7B-901; *see also In re J.N.S.*, 207 N.C. App. 670, 679–80 (2010) (holding that unsworn testimony was not proper at disposition hearing); *In re P.O.*, 207 N.C. App. 35, 39–41 (2010) (holding that the trial court did not abuse its discretion in excluding certain hearsay evidence at a permanency planning hearing). Although not binding, the rules of evidence remain a helpful guide to determining reliability and relevance. *See State v. Greene*, 351 N.C. 562, 568 (2000) (so noting for criminal sentencing proceedings, at which the rules of evidence do not apply); *State v. Stephens*, 347 N.C. 352, 363–64 (1997) (stating that although the rules of evidence are relaxed at sentencing, the rules should not be totally abandoned). The principal evidence rules that advance reliability and that may provide guidance to the trial court in its consideration of evidence are those limiting hearsay (discussed *infra* in §§ 11.5 and 11.6) and opinion testimony (discussed *infra* in §§ 11.9 and 11.10) and those requiring that witnesses have personal knowledge of the matters to which they testify (discussed *infra* in §§ 11.6.F.3 (business records) and 11.9.A (lay opinion)). On the question of relevance are rules related to admission of character evidence (discussed *infra* in § 11.8) as well as the general requirement of relevance expressed in Evidence Rule 401.

Note: Because the rules of evidence do not bar the introduction of otherwise inadmissible evidence at disposition hearings, questions have arisen over whether orders and other matters from such hearings are admissible at later adjudication hearings, at which the rules of evidence do apply. For a discussion of this issue, see *infra* § 11.7.

11.2 Child Witnesses

The common law imposed a variety of grounds for disqualifying witnesses from testifying. Most of these disabilities have been removed by the current rules of evidence, which allow anyone to be a witness, including a child, who meets the standard of competency. *See* 1 BRANDIS & BROWN § 131, at 492.

A. Competency of Child Witnesses

1. General rule. Evidence Rule 601(a) provides that every person is considered competent to be a witness except as otherwise provided in the rules. *See also State v. DeLeonardo*, 315

N.C. 762, 766 (1986) (recognizing the requirements of Rule 601).

Rule 601(b) disqualifies a person as a witness if the person is incapable of (1) expressing himself or herself so as to be understood or (2) understanding the duty of a witness to tell the truth. *See also State v. Gordon*, 316 N.C. 497, 502 (1986) (stating that Rule 601(b) is consistent with prior North Carolina case law). In jurisdictions such as North Carolina, where every person is considered competent to testify unless shown otherwise, the party challenging a witness's competence likely has the burden of establishing incompetence. *See MYERS* § 2.13[B], at 165.

There is no fixed age under which a person is considered too young to testify. *See, e.g., State v. Eason*, 328 N.C. 409, 426 (1991).

2. Procedure for determining competency. The trial court must determine the competency of a witness when the issue “is raised by a party or by the circumstances.” *Eason*, 328 N.C. at 427. Evidence Rule 104 states that the trial court is not bound by the rules of evidence, except those related to privileges, when determining preliminary questions such as the competency of a person to be a witness. *See State v. Fearing*, 315 N.C. 167, 173 (1985) (recognizing applicability of Rule 104 to competency determinations); *see also infra* § 11.11 (discussing limitations on assertions of privilege in juvenile proceedings).

No particular procedure is required for determining competency, but the trial court must make an adequate inquiry into the issue, which generally must include personal observation of the witness by the trial court. *See State v. Spaugh*, 321 N.C. 550, 553–55 (1988) (explaining that the primary concern is not the particular procedure used by the trial court, but that the trial court exercise independent discretion in deciding competency after observation of the child). A stipulation by the parties is insufficient to support a finding of incompetency. *Fearing*, 315 N.C. at 174 (“[T]here can be no informed exercise of discretion where a trial judge merely adopts the stipulations of counsel that a child is not competent to testify”); *State v. Pugh*, 138 N.C. App. 60, 64–67 (2000) (trial court disqualified a four-year-old from testifying without making an adequate inquiry because the court’s brief questions were not sufficient to determine the competency of the witness). Although statutory changes enacted in 2011 allow judges to rely on stipulations to support adjudicatory findings in abuse, neglect, and dependency proceedings (*see* G.S. 7B-807(a)), this change does not authorize stipulations as to a witness’s competency, a conclusion of law. *See generally State v. Forte*, 206 N.C. App. 699, 707–08 (2010) (stating that trial court’s findings “and its conclusion that [the witness] was competent” established that the court exercised its discretion in declaring the witness competent); *see also In re A.K.D.*, ___ N.C. App. ___, 745 S.E.2d 7 (2013) (holding that trial court could not rely on parties’ stipulation of a ground for TPR, a conclusion of law).

Typically, a voir dire of the witness should be conducted before the witness testifies. *Fearing*, 315 N.C. at 174. The court may hear testimony from parents, teachers, and others familiar with the child, but such testimony is not required. *See State v. Roberts*, 18 N.C. App. 388, 391–92 (1973) (so stating).

The court also may observe the child while the child testifies. *See Spaugh*, 321 N.C. at 553–55 (finding that the trial court’s observation of the witness while she testified was adequate without a separate voir dire). If the court waits until the child begins testifying and then finds the child incompetent, however, the child’s preceding testimony may need to be disregarded. *See generally State v. Reynolds*, 93 N.C. App. 552, 556–57 (1989) (in a case involving a jury trial, stating that the better practice is to determine competency before the witness begins to testify); MYERS § 2.13[D], at 167 (“If, during a child’s testimony, the judge determines that the child is incompetent, the court may order the child’s testimony stricken . . .”).

In criminal cases, the courts have held that the defendant’s Confrontation Clause rights are not violated by being excluded from a voir dire hearing to determine a child’s competency. *See Kentucky v. Stincer*, 482 U.S. 730 (1987) (finding no violation where children were found competent to testify and the defendant had the opportunity to cross-examine at trial); *State v. Jones*, 89 N.C. App. 584 (1988) (finding no violation where the defendant could view the hearing via closed-circuit television and communicate with his attorney), *overruled on other grounds*, *State v. Hinnant*, 351 N.C. 277 (2000). For a further discussion of the issue of excluding a party during a child’s testimony, see *infra* § 11.2.B.1.

If the court finds that a child is incompetent to testify, the party seeking to call the child may need to make an offer of proof about the substance of the child’s testimony to preserve the issue for appeal. *See In re M.G.T.-B.*, 177 N.C. App. 771 (2006) (declining to address the propriety of the trial court’s decision to quash a subpoena for a child based on incompetency because the respondent made no offer of proof and therefore failed to preserve the issue for appellate review); *see generally* 1 BRANDIS & BROUN § 18, at 79–80 (substance of what a witness would say should appear in the record).

3. Application of standard. Most appellate decisions have held that the trial court did not abuse its discretion in finding a child witness competent to testify. Most of these cases involve criminal prosecutions, in which the State called a child who was a witness to or victim of a crime, but the legal principles appear to be equally applicable to juvenile proceedings. For summaries of the facts of several such cases, see Jessica Smith, [Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 5–7 (UNC School of Government, Dec. 2008); *see also In re Clapp*, 137 N.C. App. 14, 19–20 (2000) (upholding the finding of competency of a child witness in a juvenile delinquency case); *In re Quevedo*, 106 N.C. App. 574, 584–85 (1992) (in a termination of parental rights proceeding, it was not error for a ten-year-old child to testify; the trial judge and attorneys questioned her about the duty to tell the truth, and any inability she had to remember all of the events went to the weight, not admissibility, of the testimony).

A witness may be found incompetent if, although able to understand the duty to tell the truth, the witness is incapable of expressing himself or herself so as to be understood. *See State v. Washington*, 131 N.C. App. 156, 159–60 (1998) (upholding the finding of incompetency of a witness with cerebral palsy based on her impaired ability to speak, which made her difficult to understand); *see also* MYERS § 2.05, at 122–25 (suggesting that an interpreter sometimes can be used for child witnesses whose speech is difficult to understand).

4. Unavailability distinguished from incompetency. The standard for incompetency under Rule 601 is not the same as for unavailability under North Carolina's hearsay rules. A person may be found unavailable to testify, based on a physical or mental illness or infirmity, for purposes of admitting a hearsay statement. *See* N.C. R. EVID. 804(a)(4). The potential detriment to the mental health of a child witness from testifying may establish the child's unavailability for purposes of admitting hearsay, but it is not sufficient alone to establish that the child is incapable of expressing himself or herself or understanding the obligation to tell the truth. *See In re Faircloth*, 137 N.C. App. 311 (2000) (explaining the difference between competency and unavailability and holding that the trial court erred in relying on the unavailability standard in disqualifying children from testifying). The court in *Faircloth* noted that other mechanisms are available to protect the mental health of a child witness who is required to testify. For a discussion of such accommodations, see B., below.

Hearsay statements of a child witness found to be incompetent to give live testimony are still admissible if they meet the requirements of a hearsay exception. If the hearsay exception requires that the declarant be unavailable, such as the residual hearsay exception, a child witness who is found to be incompetent would be considered unavailable to testify. Such a finding, however, may raise questions about whether the child's out-of-court statements are sufficiently trustworthy to be admissible under the residual hearsay exception. *See infra* § 11.6.H.2.

5. Quashing of subpoena for child. Some cases, cited below, indicate that trial courts are being asked to quash subpoenas for child witnesses on the ground that the child is incompetent to testify, that testifying would be harmful to the child's mental health, or that the child has no relevant information to offer. The opinions did not resolve the merits of the motions.

Incompetency may be a permissible ground for quashing a subpoena, but the court would need to conduct an adequate inquiry into the child's competency before ruling, including personally observing the child as discussed in 2., above (discussing procedures for assessing competency). The inquiry also would need to be sufficiently close in time to when the child would be expected to testify. *See generally State v. McRae*, 58 N.C. App. 225, 227 (1982) (trial court did not err in denying the defendant's motion to quash a subpoena for two children who were in the car at the time of the alleged kidnapping; motion, in effect, asked the court to declare the children incompetent before they were asked to testify). Potential harm to a child's mental health has been held not to be a ground for finding a child incompetent and precluding the child from testifying; instead, it provides a basis for one or more accommodations during the child's testimony, discussed in B., below. As for the potential relevance of a child witness's testimony, that may be difficult to assess before the child testifies. The improper quashing of a subpoena, if issued by a respondent, may infringe on the respondent's constitutional right to present evidence and call witnesses on his or her behalf, applicable in criminal cases through the Sixth Amendment, in civil cases under the Due Process Clause, and under the corresponding provisions of the North Carolina Constitution. *See Washington v. Texas*, 388 U.S. 14, 18–19 (1967) (right to compel attendance of witnesses is "in plain terms the right to present a defense" under the Sixth Amendment and is a fundamental element of due process of law); *State v. Rankin*, 312 N.C. 592 (1985); *see generally In re L.D.B.*, 168

N.C. App. 206, 208–09 (2005) (respondent’s right to present evidence in a TPR case “is inherent in the protection of due process”).

Cases raising, although not resolving, the merits of motions to quash subpoenas for child witnesses in juvenile cases include:

- *In re M.G.T.-B.*, 177 N.C. App. 771 (2006) (based on a telephone conversation with the child’s therapist and without observing or examining the child, the trial court found the child incompetent and quashed a subpoena for the child; the court of appeals declined to address the propriety of the trial court’s determination of incompetency where the respondent made no offer of proof as to the potential testimony of the child and therefore failed to preserve the issue for appellate review).
- *In re C.N.P.*, 199 N.C. App. 318 (2009) (unpublished) (noting, but not ruling on, the trial court’s decision to quash a subpoena in response to a DSS motion alleging that the children had little information to offer at the termination hearing and that testifying in front of their mother would have a negative impact on their mental health).
- *In re A.A.P.*, 193 N.C. App. 752 (2008) (unpublished) (holding that the trial court abused its discretion in quashing subpoenas for children where its decision was based substantially on the fact that it had already made its disposition decision before hearing evidence).

B. Examination of Child Witnesses

The courts have approved several accommodations for child witnesses who testify. Some are intended to reduce the potential harm to child witnesses from testifying about sensitive matters, others to assist children in communicating information more clearly.

1. Remote testimony. In appropriate cases, a child witness may testify remotely—that is, via closed circuit television or other audio-visual equipment by which the child testifies in one room and the respondent views the testimony from another room. The system can be either “one-way” where the witness is not in the party’s presence and cannot see the party but the party can see the witness, or “two-way” where the witness is not in the party’s presence but the witness and party can see and hear each other over audio-video monitors. Generally, in cases involving child witnesses, the testimony is by one-way closed-circuit television. One-way remote testimony has been permitted in both juvenile proceedings and criminal and delinquency proceedings. The standards differ somewhat, but the two key considerations are (a) the need for remote testimony and (b) the procedure for testifying.

Interest has grown in two-way remote systems for taking witness testimony, without an in-person appearance by the witness, as a possible way to comply with a defendant’s confrontation rights in criminal cases. Whether two-way remote testimony would be permissible for reasons other than those permitted for one-way remote testimony is beyond the scope of this chapter. *See generally* Jessica Smith, [Remote Testimony and Related Procedures Impacting a Criminal Defendant’s Confrontation Rights](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2013/02 (Feb. 2013); *see also* *State v. Seelig*, ___ N.C. App. ___, 738 S.E.2d 427 (2013) (allowing two-way remote testimony for seriously ill witness who lived in

another state); *In re S.H.*, 206 N.C. App. 761 (2010) (unpublished) (finding that trial court did not abuse its discretion in denying respondent mother's motion to testify by telephone where she did not have funds or means to travel from West Virginia to hearing in North Carolina); G.S. 50A-111 (authorizing court in child-custody proceeding, defined as including abuse, neglect, dependency, and TPR proceedings, to take testimony by telephone, audiovisual means, or other electronic means from witness residing in another state).

(a) Showing of need. The showing of need for the taking of remote testimony by a child witness may be lower in juvenile cases than in criminal or delinquency cases. In criminal cases, the Confrontation Clause applies. *See Maryland v. Craig*, 497 U.S. 836 (1990); *see also In re Stradford*, 119 N.C. App. 654 (1995) (applying the Confrontation Clause to remote testimony in a delinquency proceeding and upholding its use on proper findings). The court must find both that the child witness would suffer serious emotional distress by testifying in the defendant's presence and that the ability of the witness to communicate with the trier of fact would be impaired by doing so. G.S. 15A-1225.1, enacted by the General Assembly in 2009, codifies these requirements for remote testimony by child witnesses in criminal and delinquency cases. In *State v. Jackson*, 216 N.C. App. 238 (2011), the court of appeals addressed the permissibility in a criminal case of a child testifying remotely, pursuant to G.S. 15A-1225.1, in light of the U.S. Supreme Court's Confrontation Clause decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The court of appeals held that *Crawford* did not overrule earlier decisions holding that a child may testify remotely in a criminal case when the court finds a sufficient showing of need and uses appropriate procedures for taking the child's testimony. Face-to-face confrontation is not required. *Accord State v. Lanford*, ___ N.C. App. ___, 736 S.E.2d 619 (2013). The U.S. Supreme Court has not yet examined the issue in light of *Crawford*. *See* Jessica Smith, [N.C. App. Holds that Maryland v. Craig Survives Crawford](#), NORTH CAROLINA CRIMINAL LAW: UNC SCHOOL OF GOVERNMENT BLOG (Oct. 13, 2011).

In juvenile cases, the more flexible due process standard applies to remote testimony. *See In re J.B.*, 172 N.C. App. 1, 20–22 (2005). In juvenile proceedings, the cases have looked at whether “the excluded party's presence during testimony might intimidate the witness and influence his answers, due to that party's position of authority over the testifying witness.” *In re J.B.*, 172 N.C. App. at 21 (quoting *In re Barkley*, 61 N.C. App. 267, 270 (1983)). The cases also consider the emotional impact on the child. *See In re J.B.*, 172 N.C. App. at 21–22 (noting a counselor's testimony that testifying in front of the mother would have a very negative impact on the child); *see also* N.C. R. EVID. 616 (authorizing remote testimony by witnesses with developmental disabilities or mental retardation in civil cases if testifying in the presence of a party or in an open forum would cause serious emotional distress and impair the witness's ability to communicate with the trier of fact).

(b) Procedures for testifying. The procedures for taking remote testimony appear to be comparable in civil and criminal cases. The court must ensure that the defendant or respondent has the ability to confer with counsel, to cross-examine the witness fully, and to see and hear the witness while he or she is testifying. *See In re J.B.*, 172 N.C. App. at 22 (finding that these procedures had been followed); G.S. 15A-1225.1 (requiring these procedures in criminal and delinquency cases); *compare Coy v. Iowa*, 487 U.S. 1012

(1988) (holding that placement of a screen obscuring the defendant's view of child sexual assault victims during testimony in a criminal case violated the defendant's Confrontation Clause rights).

May the court in a juvenile proceeding exclude a respondent parent without allowing the parent to view the witness via closed-circuit television or other device? Some cases have found it permissible if the parent's counsel is present and is allowed to question the witness. *See In re Williams*, 149 N.C. App. 951, 960 (2002); *In re Barkley*, 61 N.C. App. 267, 270 (1983). Failing to allow a parent to view a witness's testimony, when the parent is otherwise permitted to participate in the proceedings, may create a risk of error, however. In an unpublished opinion, *In re B.P.*, 183 N.C. App. 154 (2007), the trial court heard testimony of a 17-year-old witness in chambers with the parent's attorney present and able to question the witness, but the parent was not able to view the witness and the testimony was not recorded. Focusing on the lack of recordation, the court of appeals found that the procedure violated the parent's due process rights. *See also In re Nolen*, 117 N.C. App. 693, 696 (1995) (finding no prejudice in the failure to record in-chambers testimony where the respondent failed to argue any error in the unrecorded testimony).

Note: To obtain closed circuit television equipment, contact the AOC Court Services Division.

2. Excluding bystanders during child's testimony. G.S. 7B-801(a) authorizes the court to close to the public any hearing or part of a hearing in a juvenile proceeding after considering the factors listed in the statute. Thus, during a child's testimony the court may have grounds to exclude from the courtroom those not involved in the hearing of the case. *See also* Michael Crowell, [Closing Court Proceedings in North Carolina](#) at 2–3 (UNC School of Government, Nov. 2012) (discussing qualified right of public access under Art. I, § 18 of the N.C. Constitution, which provides that “[a]ll courts shall be open,” and grounds for excluding public). The hearing may not be closed, however, if the juvenile requests that it remain open. *See* G.S. 7B-801(b); *see also supra* §§ 6.2.C, 8.1.B (further discussing the circumstances in which a hearing may be closed to the public).

In criminal cases, the courts have upheld the exclusion of bystanders in rape and sex offense cases during the testimony of the child victim. *See State v. Burney*, 302 N.C. 529 (1981) (holding that it was permissible for the court to exclude everyone from the courtroom during a child victim's testimony except court personnel and those engaged in the trial of the case); *State v. Godley*, ___ N.C. App. ___, 760 S.E.2d 285 (2014) (recognizing that to balance interests of State with defendant's constitutional right to public trial, court must employ four-part test; closing of courtroom during victim's testimony did not violate defendant's rights); *State v. Smith*, 180 N.C. App. 86 (2006) (trial court acted within its discretion in closing the courtroom in a statutory sex offense case; although the trial court did not hold a hearing or make findings on the issue, the defendant did not object to the closing of the courtroom); *see also* G.S. 15-166 (authorizing the trial judge to close the courtroom in such cases); *compare State v. Jenkins*, 115 N.C. App. 520 (1994) (trial court erred in closing the courtroom without making proper findings).

3. Excepting witnesses from sequestration order. Evidence Rule 615 authorizes the judge to exclude potential witnesses during the testimony of other witnesses. It also empowers the judge to permit a person to be present in the interest of justice.

In criminal cases, judges have used this authority to permit the parent of a victim to remain in the courtroom although the parent may later be a witness. *See State v. Dorton*, 172 N.C. App. 759, 765–66 (2005); G.S. 15A-1225 (stating this authority for criminal cases). In juvenile cases, no exception to a sequestration order is necessary to allow a parent to be present because a parent is a party and generally has the right to be present during the testimony of other witnesses. The juvenile court may find it appropriate, however, to except other witnesses from a sequestration order and allow them to be present although they may testify later. *See State v. Stanley*, 310 N.C. 353, 356–57 (1984) (upholding an order allowing a social services worker and juvenile court officer to be present); *State v. Weaver*, 117 N.C. App. 434, 436 (1994) (upholding an order allowing a social worker and a therapist to be present).

4. Oath for child witness. Evidence Rule 603 provides that every witness must testify under oath or affirmation. The commentary states that the wording of the rule is intended to provide flexibility in dealing with, among others, child witnesses. No special verbal formula is required as long as the oath or affirmation is administered to the witness in a way “calculated to awaken his conscience and impress his mind with his duty” to tell the truth. N.C. R. EVID. 603; *see also State v. Beane*, 146 N.C. App. 220, 223–26 (2001) (not plain error for the trial court to permit a child to testify without taking an oath; although the child did not understand the significance of taking an oath, the child promised to tell the truth).

5. Leading questions. Several cases have upheld leading questions of child witnesses. *See State v. Higginbottom*, 312 N.C. 760, 767–68 (1985) (finding leading questions of a child witness to be permissible based on the principle that a party may ask leading questions if the witness has difficulty in understanding questions because of immaturity, age, infirmity, or ignorance or if the inquiry is into a subject of a delicate nature such as sexual matters); *State v. Ammons*, 167 N.C. App. 721, 729 (2005) (finding leading questions of a child witness to be permissible on the ground that a party may ask leading questions if the examiner, without stating the particular matters required, seeks to aid the witness’s recollection or refresh his or her memory when the witness’s memory is exhausted).

6. Written testimony. In addition to allowing leading questions, the court has allowed a child witness to write down particularly sensitive testimony while on the witness stand and the prosecutor to read the statement to the jury. *State v. Earls*, ___ N.C. App. ___, 758 S.E.2d 654 (2014) (testimony was that the defendant had placed his penis in her vagina).

7. Use of anatomical dolls to illustrate testimony. The use of anatomically-correct dolls to illustrate a child’s testimony has been upheld. *See State v. Fletcher*, 322 N.C. 415, 421 (1988); *see also infra* § 11.6.E.10 (discussing the admissibility of statements to medical personnel while using anatomical dolls).

8. Use of own terms for body parts. Child witnesses have been permitted to use terms with which they are familiar when referring to body parts. *See State v. Watkins*, 318 N.C. 498

(1986) (seven-year-old child's testimony that the defendant stuck his finger in her "coodie cat" and her indication of her vaginal area through use of anatomically correct dolls constituted sufficient evidence of penetration to support conviction of first-degree sexual offense).

9. Questioning by court. Evidence Rule 614(b) permits the trial judge to question witnesses, and cases have upheld the trial judge's questioning of a child witness to clarify confusing or contradictory testimony. *See State v. Ramey*, 318 N.C. 457, 463–65 (1986) (not improper for the trial court to ask questions of an eight-year-old witness where the questions were intended to clarify the child's answers on a delicate subject; the questions also did not violate G.S. 15A-1222, applicable to criminal jury trials, as the questions did not express an opinion by the judge).

10. Positioning on witness stand. The physical location or positioning of a child witness may be adapted in aid of the child's testimony. *See State v. Reeves*, 337 N.C. 700, 727 (1994) (permissible for the trial court to allow a child to sit on her stepmother's lap while testifying; the trial court warned the stepmother not to suggest to the child how the child should testify and, after the testimony was completed, made a finding that the stepmother had followed the court's instructions).

11. Recesses. The court may order a recess if a child witness becomes upset while testifying. *See State v. Higginbottom*, 312 N.C. 760, 769–70 (1985); *State v. Hewett*, 93 N.C. App. 1, 14 (1989).

11.3 Out-of-Court Statements to Refresh, Impeach, or Corroborate

A witness's prior out-of-court statements may be used in the circumstances discussed below to refresh the witness's recollection, impeach the witness, or corroborate the witness's testimony.

When an out-of-court statement is offered for one of these purposes, it is not subject to the restrictions on the admission of hearsay, discussed *infra* in §§ 11.5 and 11.6. It also is not considered substantive evidence. *See State v. Williams*, 341 N.C. 1, 9–11 (1995) (holding that prior inconsistent statement offered to impeach is not substantive evidence); *State v. Bartlett*, 77 N.C. App. 747, 752 (1985) (prior inconsistent statement offered to impeach is not substantive evidence and may not be considered in determining whether the State produced sufficient evidence to withstand a motion to dismiss in a criminal case).

A. Refreshing Recollection

A witness may refer to a writing or object during or before testifying to refresh his or her recollection. The writing or object, including a prior statement, is not itself admitted into evidence (except as permitted on cross-examination) and does not establish any particular fact; rather, it is a prompt for testimony that may be admissible. *See 1 BRANDIS & BROWN* § 172, at 639.

If the witness refers to a writing or object during his or her testimony, the adverse party has a right to have the writing or object produced; if the witness refers to a writing before testifying, production is in the judge's discretion. *See* N.C. R. EVID. 612(a), (b). If entitled to have the writing or object produced, an adverse party may cross-examine the witness about it and may offer into evidence those portions that relate to the witness's testimony. *See* N.C. R. EVID. 612(c).

If a writing does not refresh a witness's recollection, it may be admissible under the hearsay exception for past recollection recorded. To be admissible on this ground, the writing must satisfy the criteria in Evidence Rule 803(5). That hearsay exception appears to arise infrequently in juvenile cases and is not discussed here. *See generally* *State v. Harrison*, 218 N.C. App. 546 (2012) (discussing differences between refreshing recollection and past recollection recorded).

B. Impeachment

A witness may be impeached with his or her prior statements that conflict with the witness's testimony. Prior inconsistent statements to impeach are admissible for the purpose of assessing the credibility of the witness about the testimony he or she has given, not as substantive evidence of the facts asserted in the statements. *See* 1 BRANDIS & BROUN § 159, at 568–70 (collecting cases).

A party may impeach his or her own witness with prior inconsistent statements. *See* N.C. R. EVID. 607. It is impermissible, however, to impeach one's own witness as a subterfuge for getting otherwise inadmissible statements before the trier of fact. Thus, a party may not call a witness to the stand, knowing that the witness will not reiterate a prior statement the witness made, for the purpose of impeaching the witness with the prior statement. *Compare* *State v. Hunt*, 324 N.C. 343, 349–51 (1989) (so holding and finding impeachment improper in this case), *with* *State v. Williams*, 341 N.C. 1, 9–11 (1995) (reiterating holding of *Hunt* but finding impeachment permissible in this case).

If the impeachment does not concern a collateral matter, a party also may offer extrinsic evidence of the witness's prior statements—for example, a party may call other witnesses to attest to the prior statements. If the matter is collateral, however, the cross-examiner is bound by the witness's answer. *See, e.g.,* *State v. Gabriel*, 207 N.C. App. 440 (2010); *State v. Riccard*, 142 N.C. App. 298 (2001). Generally, a matter is not collateral if it relates to “material facts in the testimony of the witness”; it is collateral if it relates to immaterial facts. *See* 1 BRANDIS & BROUN § 161, at 574–78. Cases distinguishing between collateral and noncollateral matters are not reviewed here.

C. Corroboration

Under North Carolina law, if a person testifies, a party may offer prior consistent statements of that person to corroborate his or her testimony. The purpose of such evidence is to bolster the credibility of the witness's testimony. As with prior statements to impeach, discussed in B., above, the prior statement itself is not substantive evidence and does not establish the

particular fact or event. 1 BRANDIS & BROUN § 165, at 593–94; *see also State v. Bates*, 140 N.C. App. 743 (2000) (trial court erred in admitting a child’s statements under the medical diagnosis and treatment exception; the statements could not later be treated as mere corroborative evidence because the trial court treated them as substantive and did not limit their use).

North Carolina’s approach to admitting prior consistent statements is considerably more permissive than the approach taken elsewhere. In many jurisdictions, a prior consistent statement of a witness is admissible to corroborate the witness only after the witness’s credibility has been challenged. North Carolina has effectively eliminated the requirement that the witness’s credibility be challenged before a prior consistent statement may be admitted. *See* 1 BRANDIS & BROUN §§ 163–65.

To be admissible to corroborate a witness’s testimony under North Carolina law, the prior consistent statement must be consistent with the witness’s trial testimony. Variations between the prior statement and in-court testimony, including new information if it adds weight or credibility to the testimony, do not necessarily make the prior statements inconsistent and inadmissible as corroboration. *See id.* § 165, at 529–31 & nn.503–04.

A prior consistent statement may be established by examination of the witness and also by extrinsic evidence if the matter is not collateral. *See id.* § 163, at 522; *see also State v. Yearwood*, 147 N.C. App. 662, 667–68 (2001) (permitting a videotape of a therapy session with a child to corroborate the child’s in-court testimony).

Note: The above principles do not justify admission of out-of-court statements of someone other than the witness whose testimony is being corroborated. The prior statements must be those of the witness. *See State v. Freeman*, 93 N.C. App. 380, 387–88 (1989) (determining that a witness’s testimony could not be corroborated by an extrajudicial statement of another person that was not otherwise admissible); 1 BRANDIS & BROUN § 165, at 595 & n.510.

If a witness’s out-of-court statement is admissible as substantive evidence under a hearsay exception, other out-of-court statements by the witness may be admissible to corroborate (or impeach) the hearsay statement under Evidence Rule 806, which states that “[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.” The rule explicitly requires that the credibility of the hearsay declarant be attacked before evidence supporting credibility may be admitted, which may be stricter than North Carolina’s approach to prior statements that corroborate a witness’s live testimony. Some North Carolina cases have allowed out-of-court statements to corroborate statements admitted under a hearsay exception, but they have not specifically referred to Rule 806 or described its requirements. *See State v. Chandler*, 324 N.C. 172, 182 (1989) (without referring to Rule 806, the court finds that a child’s statements to others were admissible to corroborate the child’s testimony from a previous trial, which was admitted as substantive evidence under a hearsay exception); *In re Lucas*, 94 N.C. App. 442, 450 (1989) (court follows *Chandler* in allowing a child’s out-of-court statements to be admitted for the nonsubstantive purpose of corroborating other statements by the child).

admitted under a hearsay exception; note that the analysis of the applicability of the hearsay exception in this case is no longer good law after *State v. Hinnant*, 351 N.C. 277 (2000), discussed *infra* in § 11.6.E).

11.4 Out-of-Court Statements and the Right to Confront Witnesses

A. Applicability of Confrontation Clause to Criminal and Delinquency Cases

1. General rule. The Confrontation Clause of the Sixth Amendment regulates the admissibility of out-of-court statements against the defendant in a criminal trial. In *Crawford v. Washington*, 541 U.S. 36 (2004), the U.S. Supreme Court adopted a stricter interpretation of the Confrontation Clause, holding that the state may not offer into evidence an out-of-court “testimonial” statement except in one of the following circumstances:

- the declarant who made the statement is subject to cross-examination at the current trial,
- the declarant was subject to adequate cross-examination before trial, or
- a narrow exception applies (e.g., the defendant forfeited the right to confront the witness by the defendant’s own wrongdoing).

In light of *Crawford*, for an out-of-court statement to be admitted against the defendant in a criminal case, it must first be determined whether the statement satisfies the constitutional requirements of the Confrontation Clause and then be determined whether the statement satisfies North Carolina’s evidence rules, including North Carolina’s rules on hearsay (discussed *infra* in §§ 11.5 and 11.6). For a discussion of *Crawford* and subsequent case law, see Jessica Smith, [*A Guide to Crawford and the Confrontation Clause*](#), NORTH CAROLINA SUPERIOR COURT JUDGES’ BENCHBOOK (UNC School of Government, Sept. 2014).

The Confrontation Clause, as interpreted in *Crawford*, also applies to juvenile delinquency trials. See *State ex rel. J.A.*, 949 A.2d 790 (N.J. 2008); *In re N.D.C.*, 229 S.W.3d 602 (Mo. 2007); *People ex rel. R.A.S.*, 111 P.3d 487 (Colo. App. 2004); see also *In re Stradford*, 119 N.C. App. 654 (1995) (applying the Confrontation Clause in determining the appropriateness of testimony of child witnesses by closed-circuit television in a delinquency proceeding).

2. Applicability to statements made to law-enforcement personnel, social workers, medical personnel, and others. The courts are continuing to explore the meaning of “testimonial” statements in light of *Crawford*, but some patterns have emerged:

- Statements collected by or generated by law enforcement personnel are ordinarily considered testimonial because, except in emergency situations, they are ordinarily gathered for purposes of prosecution.
- Statements obtained by social workers in child welfare cases have also been found to be testimonial in various circumstances, regardless whether the social workers were formally affiliated with law enforcement.
- For a statement to medical personnel to be considered testimonial, there generally must be a more affirmative showing of a law-enforcement purpose or connection. See also *Ohio v.*

Clark, ___ U.S. ___, 135 S. Ct. 2173 (2015) (holding that statement by child to teacher was not testimonial; in so holding, court relies in part on young age of child and states that mandatory reporting statutes alone do not convert a conversation between a teacher and student into a law enforcement mission).

- Statements to family and friends have usually not been found to be testimonial.

See Jessica Smith, [*Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 14–31 (UNC School of Government, Dec. 2008); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L. J. 917, 944–65 (2007).

B. Inapplicability of Confrontation Clause to Juvenile Cases

Because *Crawford* involved interpretation of the Sixth Amendment Confrontation Clause, which applies only in criminal (and delinquency) cases, the holding in *Crawford* does not apply to juvenile cases (that is, abuse, neglect, dependency, and termination of parental rights proceedings). See *In re D.R.*, 172 N.C. App. 300 (2005) (admission of statements by a child to DSS workers and others did not violate the Sixth Amendment right to confrontation, which does not apply to a proceeding to terminate parental rights, a civil action). Therefore, the admissibility of out-of-court statements in juvenile cases depends primarily on North Carolina’s hearsay rules, discussed *infra* in §§ 11.5 and 11.6.

The Due Process Clause of the Fourteenth Amendment still affords the respondent the right to confront the witnesses against him or her. It is unclear, however, whether the Due Process Clause regulates the admission of out-of-court statements in juvenile proceedings to a greater extent than under North Carolina’s hearsay rules. See generally *In re Pamela A.G.*, 134 P.3d 746, 750 (N.M. 2006) (Confrontation Clause, as interpreted in *Crawford*, does not apply in an abuse and neglect case, but the Due Process Clause requires that “parents be given a reasonable opportunity to confront and cross-examine a witness, including a child witness”; no violation found where the parents failed to show how admission of a hearsay statement of a child and lack of cross-examination increased the risk of erroneous deprivation of their relationship with the child); *Commonwealth v. Given*, 808 N.E.2d 788 (Mass. 2004) (in a proceeding to commit the respondent as a sexually dangerous person, the trial court admitted a police report containing allegations by a victim against the respondent about a prior offense; the court holds that the Confrontation Clause does not apply to civil commitment proceedings and that the constitutional test for admissibility of hearsay is whether the evidence is reliable under the Due Process Clause); *Smallwood v. State Dep’t of Human Resources*, 716 So. 2d 684, 691 (Ala. Civ. App. 1998) (recognizing a due process right to confront witnesses in a civil proceeding to revoke a daycare license on the ground of child abuse and finding that hearsay statements were not admissible where the administrative law judge made no findings that the hearsay had “particularized guarantees of trustworthiness” or were “of a type relied upon by reasonably prudent persons in the conduct of their affairs”); *In re A.S.W.*, 834 P.2d 801 (Alaska 1992) (recognizing a due process right to confront witnesses in a civil child protection proceeding and finding that the hearsay rules adequately protected the parent’s right).

11.5 Out-of-Court Statements and the Hearsay Rule

A. Governing Rules

Evidence Rules 801 through 806 set forth North Carolina's rules on the admissibility of hearsay. These rules apply in both criminal and civil cases, to statements by children and other witnesses, and whether the statement is oral or written. (If the statement is written, the offering party may need to satisfy other requirements, such as the rules on authentication). The North Carolina rules governing hearsay are as follows:

- Rule 801 defines “hearsay” and the terms “statement” and “declarant,” which are components of the definition of hearsay. The rule also excepts admissions of a party-opponent from the restrictions on hearsay.
- Rule 802, entitled the “hearsay rule,” sets forth the basic principle that hearsay is inadmissible except as otherwise provided by statute or rule.
- Rule 803 sets forth numerous exceptions to the hearsay rule, which apply whether the declarant is available or unavailable as a witness.
- Rule 804 sets forth five exceptions to the hearsay rule, which apply only if the declarant is unavailable as a witness. The term “unavailability” is defined in the rule.
- Rule 805 provides that hearsay within hearsay is admissible if each part of the statement is admissible under an exception to the hearsay rule.
- Rule 806 provides for attacking or supporting the credibility of a hearsay declarant when hearsay has been admitted in evidence. *See also supra* § 11.3.C (discussing potential application of this rule to corroborating statements).

B. Rationale for Hearsay Rule

The often-repeated hearsay principle is that an out-of-court statement offered for the truth of the matter asserted is inadmissible unless it satisfies an exception to the hearsay rule. The reason for this phrasing, particularly its focus on whether the statement is offered for its truth, lies primarily in the importance of cross-examination. *See* 2 BRANDIS & BROUN § 193, at 765 (rationale that most fairly explains the hearsay rule and offers a common justification for exceptions to the rule is the importance of cross-examination). The following observations highlight the relationship between the purpose for which a statement is offered and the importance of cross-examination.

- “We are interested in the declarant’s credibility only when the out-of-court statement is being used to prove the truth of the assertion. In that circumstance, the evidence’s value depends on the *credibility of the out-of-court declarant*.” MOSTELLER § 11-1, at 11-5 (emphasis added). The opponent therefore has the need to cross-examine the declarant to inquire into possible problems with the declarant’s perception, memory, or sincerity, which the trier of fact then may weigh in determining whether to accept the declarant’s statement as true. The statement is nevertheless admissible if it satisfies one of a number of hearsay exceptions, discussed *infra* in § 11.6.
- “On the other hand, if the proponent does not offer the out-of-court declaration for its truth, the opponent does not need to cross-examine the declarant. If the declaration is

logically relevant on some other theory, the evidence's value usually depends on the *credibility of the in-court witness*." MOSTELLER § 11-1, at 11-5 (emphasis added). The opponent still needs to cross-examine the in-court witness to determine whether the witness heard and remembered the statement correctly and is telling the truth about what he or she heard. The statement is not considered hearsay, however, and does not require a hearsay exception to justify its admission.

Examples of statements offered for the truth and for other purposes are provided in C.3., below.

C. Components of Hearsay Definition

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. EVID. 801(c). This definition contains three components, discussed in 1. through 3., below.

1. Oral or written assertion of fact. The statement must be an assertion of fact. For example, if a child said to her mother, "Daddy hit me," the child's statement would be an assertion of that fact. In contrast, if the mother overheard the child say, "Ouch" or "Don't" in interacting with the father, the statement might not be an assertion of fact. "Ouch" is an exclamation, "don't" is a command or imperative; neither explicitly asserts a particular fact. But, if offered to elicit an implicit assertion of fact—that is, that the father hit the child, prompting her exclamation or imperative—the statement still might be considered an assertion of fact. *See* MOSTELLER § 11-2(A)(1), at 11-6 to 11-8 (imperative statement is not hearsay unless the proponent's purpose is to elicit an assertion embodied in the statement).

Because the distinction between an assertion of fact and other utterances can be difficult to draw, cases have sometimes assumed that an arguably non-assertive utterance is hearsay and then found an exception. *Compare State v. Mitchell*, 135 N.C. App. 617, 618–19 (1999) (testimony that the inmate told the defendant to "hurry" or "leave" as she was departing from the jail was not inadmissible hearsay; the statement was a directive not offered for the truth of the matter asserted), *with State v. Smith*, 152 N.C. App. 29, 35–36 (2002) (holding that victim's statements to the defendant, "Shut up" and "Hush," were admissible under the present sense impression hearsay exception in Evidence Rule 803(1)).

2. Made outside current proceeding. The hearsay rule is typically thought of as applying to out-of-court statements. This component of the definition actually covers a broader range of statements. Statements that are made other than while the person is testifying at the current trial or hearing, including statements made in previous court proceedings or in previous hearings in the same case, constitute hearsay (assuming they meet the other components of the definition of hearsay) and must meet a hearsay exception to be admissible. *See* N.C. R. EVID. 804(b)(1) (providing a hearsay exception for testimony of a witness at another hearing in the same or a different proceeding); *see also infra* § 11.7.F.2 (discussing this hearsay exception).

3. Offered for truth of assertion. The last and most often considered component of the definition of hearsay is that the statement must be offered for the truth of the matter asserted.

If a child said to her mother, “Daddy hit me”—and the proponent offered that statement to show that the father in fact hit the child—it would be considered as offered for the truth of the matter asserted and would be inadmissible unless within a hearsay exception.

Statements containing a factual assertion are not necessarily offered for their truth, however. Examples are discussed below. If a statement is not offered for its truth, two additional considerations come into play. First, the purpose for which the statement is offered must be relevant to the issues in the case. Second, consideration of the statement is limited to the purpose for which it is offered.

(a) To show resulting state of mind of person who heard statement. One common nonhearsay purpose is to show the state of mind of the person who heard the statements. For example, suppose the mother testifies that shortly before the father allegedly struck the child, she heard the child tell her father, “I broke those things.” If the purpose of offering the mother’s statement was not to show the child actually broke the items but rather to show the father’s resulting state of mind, the statement would not be offered for the truth of the matter asserted—that the child broke the items—and would not constitute hearsay. *See* 2 BRANDIS & BROUN § 195, at 770–75 (declarations of one person may be admitted to prove the state of mind of another person who heard them); *see also In re S.N.*, 180 N.C. App. 169, 174–75 (2006) (social worker’s testimony about what a drug counselor told the respondent about the terms of his case plan was properly allowed to show the respondent’s knowledge of the case plan and was not offered for the truth of matter asserted); *State v. Chapman*, 359 N.C. 328, 354–55 (2005) (where the defendant left the house in response to a phone call, the statements in the phone call were admissible not for their truth but to explain the defendant’s subsequent actions).

(b) To explain why police or DSS undertook investigation. A question that has arisen in both criminal and juvenile cases is whether a statement reciting misconduct of a defendant or respondent is admissible if it is offered not to show the truth of the statement—that is, that the misconduct actually occurred—but rather to show why the police or DSS investigated the matter or took some other action. Decisions have found that when offered for the latter purpose, the statement is not offered for its truth and does not constitute hearsay. *See In re F.G.J.*, 200 N.C. App. 681, 687 n.2 (2009) (noting that statements for this purpose were not hearsay); *In re Mashburn*, 162 N.C. App. 386, 390 (2004) (out-of-court statements of children were admissible to show why DSS initiated an investigation and were not offered for their truth); *see also State v. Treadway*, 208 N.C. App. 286, 290 (2010) (child’s statement to grandparent admissible for nonhearsay purpose of showing why grandparent told parents, who then sought medical treatment).

The cases suggest that when offered for this purpose the statements should be limited in detail because of the potential prejudice of the statements. *See* 1 IMWINKELRIED § 1004, at 10-19 to 10-24; *State v. Harper*, 96 N.C. App. 36, 39–40 (1989) (statements were permissible for the nonhearsay purpose of explaining an officer’s conduct in investigating drug transactions; the substance of the statements by informants who were guiding the officer was limited to telling the officer to wait, to go ahead, and where to go); *cf. State v. Hueto*, 195 N.C. App. 67, 69–71 (2009) (statement that a witness was told that a child had

been sexually assaulted was offered for the nonhearsay purpose of explaining why the witness called the police; the defendant objected on hearsay grounds only and waived any objection that the testimony was irrelevant or, if relevant, that the testimony's probative value was outweighed by its prejudicial effect under Evidence Rule 403).

11.6 Hearsay Exceptions

A. Types of Hearsay Exceptions and Their Rationales

There are three basic categories of exceptions to the hearsay rule, each based on a somewhat different rationale. The discussion in the sections that follow deals with the hearsay exceptions within each category that are most likely to arise in juvenile cases. The three basic categories are:

- Rule 801 admissions of a party-opponent, discussed in B., below;
- Rule 803 exceptions, discussed in C. through H., below; and
- Rule 804 exceptions, discussed in H., below.

The rationale for allowing an admission of a party-opponent is unique. It is not based on considerations of reliability (as with Rule 803 exceptions) or on considerations of need (as with Rule 804 exceptions). Rather, the exception is “a product of the adversary litigation system; the opponent can hardly complain that he or she does not have an opportunity to cross-examine himself or herself.” MOSTELLER § 11-3, at 11-20 to 11-21 (also noting that because of this unique rationale, the Federal Rules of Evidence treat admissions of a party-opponent as nonhearsay).

The hearsay exceptions in Rule 803 are recognized because they deal with statements that carry a greater inference of reliability or sincerity in light of the circumstances in which they were made. MOSTELLER ch. 11 pt. 3, at 11-39. Because the overriding reason for allowing such statements is their greater reliability, they are admissible whether the witness is available or unavailable.

The hearsay exceptions in Rule 804 depend to a greater degree on a showing of necessity for the evidence contained in the statement. MOSTELLER ch. 11 pt. 4, at 11-83. Therefore, in addition to meeting the criteria for a particular exception, the proponent must show that the declarant is unavailable.

B. Rule 801(d): Admissions of a Party-Opponent

1. Criteria. Evidence Rule 801(d) excepts admissions by a party-opponent from the prohibition on hearsay. To satisfy the exception, the statement must have been made by a party to the case, and it must be offered against the party by the party's opponent. *See State v. Rainey*, 198 N.C. App. 427, 432 (2009) (reciting the requirements of Rule 801(d)). Juvenile cases involve various parties to which this exception may apply, discussed in 3., below.

A number of cases state generally that the party's statement also must be against the party's interest. *See, e.g., State v. Lambert*, 341 N.C. 36, 50 (1995) (stating that an admission of a party-opponent is a statement of pertinent facts that, in light of other evidence, is incriminating); *In re J.J.D.L.*, 189 N.C. App. 777, 782 (2008) (stating the same principle in a delinquency case). A showing that the statement is against the party's interest does not appear to be required under this exception, however. *See* 2 BRANDIS & BROUN § 199, at 789–80.

The statement still must be relevant to be admissible. *See* 2 BRANDIS & BROUN § 199, at 793 (observing that the general requirements of relevance and materiality apply to admissions); *State v. Hutchinson*, 139 N.C. App. 132, 135–37 (2000) (defendant's statement that he committed burglaries after the charged offense was admissible; the statement was an admission of a party-opponent, and the subsequent burglaries were admissible under Evidence Rule 404(b) to show the defendant's motive and intent).

2. Potential constitutional, statutory, and other bars. Constitutional and statutory principles may bar the use of statements (as well as other evidence) obtained from a respondent during an investigation of alleged abuse, neglect, and dependency. These issues primarily arise in criminal (and delinquency) cases when the State offers the statement against the defendant (or juvenile respondent). For the statement to be admissible, the State must comply with constitutional as well as hearsay requirements. MOSTELLER § 11-3(A)(2), at 11-23. In civil proceedings, including abuse, neglect, dependency, and termination of parental rights proceedings (juvenile proceedings), constitutional and statutory grounds for exclusion are considerably more limited but still may arise depending on the violation and the nature of the proceeding. The discussion below briefly considers potential grounds, in both criminal and juvenile cases, for excluding statements and other evidence obtained in an investigation of alleged abuse, neglect, and dependency.

(a) Miranda warnings. In criminal cases, a person in custody is entitled to *Miranda* warnings before being questioned by law-enforcement officers or their agents. Ordinarily, a DSS representative is not required to give *Miranda* warnings because DSS is not considered a law enforcement or prosecutorial agency. *See generally State v. Martin*, 195 N.C. App. 43, 48 (2009). If, however, a DSS representative is working so closely with law enforcement as to be considered an agent of law enforcement, the representative must give an in-custody defendant *Miranda* warnings before questioning. *See State v. Morrell*, 108 N.C. App. 465 (1993) (determining that a social worker was acting as a law enforcement agent).

In juvenile cases, *Miranda* violations by law enforcement or their agents ordinarily do not provide grounds for excluding evidence of a statement that was made without the required warnings. *See In re Pittman*, 149 N.C. App. 756 (2002) (holding that because an abuse and neglect proceeding is civil, an alleged *Miranda* violation by a law enforcement officer did not bar the use of the respondent's statements in that proceeding).

(b) Due process and involuntary statements. In criminal cases, a statement is inadmissible as a matter of due process if the statement was involuntary in the totality of the circumstances and the statement was causally related to some official, coercive action by

law enforcement officers, their agents, or other government officials. *See Colorado v. Connelly*, 479 U.S. 157 (1986); *In re Weaver*, 43 N.C. App. 222, 223 (1979) (stating in a delinquency case that although a DSS representative was not required to give *Miranda* warnings to a juvenile before questioning, the juvenile's statement still must have been voluntarily and understandingly made); *see also generally* 2 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 6.2(c), at 643–44 (3d ed. 2007). A threat to take away a person's children may be considered coercive and, in the totality of the circumstances, render a statement involuntary. *See People v. Medina*, 25 P.3d 1216 (Colo. 2001) (detective's threat to have children removed from the defendant's family, in the totality of circumstances, rendered the defendant's statement involuntary and inadmissible in a criminal case); *compare Morrell*, 108 N.C. App. at 474–75 (finding that the defendant made the statements without threats, promises, or duress by the social worker and that the statements were voluntary); *Commonwealth v. Roberts*, 376 N.E.2d 895 (Mass. App. Ct. 1978) (defendant's confession to a social worker was not the product of physical or psychological coercion).

In juvenile cases, involuntary statements in violation of due process also appear to be inadmissible. *See generally Bustos-Torres v. I.N.S.*, 898 F.2d 1053 (5th Cir. 1990) (*Miranda* warnings are not required before questioning of a person about information used to deport him or her because deportation proceedings are civil, not criminal, but deportation proceedings still must conform to due process standards and involuntary statements are inadmissible).

- (c) Fifth Amendment privilege against self-incrimination.** In criminal cases, the Fifth Amendment privilege against self-incrimination bars use of statements if the person was compelled to answer by the threatened loss of rights for refusing to answer. This principle comes from the line of U.S. Supreme Court cases known as the “penalty cases.” *See Debnam v. N.C. Dep’t of Correction*, 334 N.C. 380 (1993) (public employee may be discharged for failing to answer a public employer's questions, but the Fifth Amendment right against self-incrimination bars the use of statements in a criminal case that were obtained from an employee under the threat of discharge for not answering); *State v. Linney*, 138 N.C. App. 169, 177–81 (2000) (holding that an attorney was not compelled to give statements to a State Bar investigator and therefore the attorney's statements were not inadmissible in a later criminal prosecution); *see also Baltimore City Dep’t of Social Services v. Bouknight*, 493 U.S. 549, 562 (1990) (“In a broad range of contexts, the Fifth Amendment limits prosecutors’ ability to use testimony that has been compelled.”); *McKune v. Lile*, 536 U.S. 24 (2002) (plurality finds that adverse consequences faced by a prisoner for refusing to make an admission required for participation in a sexual abuse treatment program were not so severe as to amount to compelled self-incrimination).

For a discussion of the application of the Fifth Amendment privilege in juvenile proceedings, see *infra* § 11.12.

- (d) Right to counsel.** In criminal cases, once a defendant's Sixth Amendment right to counsel attaches, law enforcement agents may not question the defendant, whether he or she is in or out of custody, without a proper waiver. *See generally Montejo v. Louisiana*, 556 U.S.

778 (2009). Questioning by a DSS representative after attachment of the Sixth Amendment right to counsel is not a violation if the representative is not acting as an agent of law enforcement. *See State v. Nations*, 319 N.C. 318, 325 (1987). The filing of a civil abuse and neglect petition does not constitute the initiation of criminal proceedings and so has been held not to trigger the Sixth Amendment right to counsel; therefore, questioning by a law enforcement agent does not make statements inadmissible on that ground in a criminal case. *See State v. Adams*, 345 N.C. 745 (1997) (also finding that the admission of statements in a criminal case did not violate the statutory right to counsel afforded to a defendant in an abuse and neglect case).

In juvenile cases, the respondent does not have a Sixth Amendment right to counsel, but a violation of the respondent's due process and statutory rights to counsel in those proceedings may warrant exclusion in some circumstances. The principal case on this issue is *In re Maynard*, 116 N.C. App. 616, 619–21 (1994), in which the respondent mother had been appointed counsel in a juvenile case and had stipulated through counsel that the children were dependent. During the pendency of review hearings, DSS workers talked with the respondent about surrendering her children for adoption and obtained her written surrender, without notice to or the presence of her appointed counsel. The court found a right-to-counsel violation and nullified the surrenders, analogizing the respondent's right to counsel in a juvenile case to a defendant's right to counsel in a criminal case and stating that once the respondent invokes the right to counsel, he or she has the right to have counsel present during any questioning unless he or she waives the right. It is unclear whether the courts would be willing to extend this principle beyond official concessions by the respondent, as respondents often must coordinate directly with DSS employees about the respondents' children and the issues that led to the court proceeding.

- (e) Fourth Amendment issues.** In criminal cases, searches and seizures in violation of the Fourth Amendment often require exclusion of the evidence obtained. Generally, actions by government officials, whether by law enforcement officers or other government actors, are subject to Fourth Amendment restrictions. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *see generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8(d), at 417–18 (5th ed. 2012). However, if not for law enforcement purposes, actions by child protection workers, such as DSS workers, are subject to relaxed requirements. *See generally* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.3(a) (5th ed. 2012) (discussing the application of the Fourth Amendment to investigations and other actions by child protection agencies); *see also* G.S. 7B-302(h) (regulating entry by DSS workers into private residences for assessment purposes).

In civil cases, violations of the Fourth Amendment or of statutory search and seizure restrictions ordinarily do not require exclusion of the evidence obtained. *See Quick v. N.C. Div. of Motor Vehicles*, 125 N.C. App. 123, 127 n.3 (1997) (holding in a license revocation proceeding that the exclusionary rule did not bar evidence obtained as the result of an allegedly illegal arrest); *but cf. In re Freeman*, 109 N.C. App. 100 (1993) (raising but not specifically resolving the applicability of the exclusionary rule to a search in a teacher dismissal case); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984)

(holding in deportation proceedings, which are considered civil, that the exclusionary rule ordinarily does not bar evidence obtained in violation of the Fourth Amendment, but recognizing that an exception may exist for “egregious violations”); *United States v. Janis*, 428 U.S. 433 (1976) (applying a balancing test to determine whether the exclusionary rule should apply in a civil proceeding).

It does not appear that North Carolina has specifically addressed the issue in juvenile cases, but generally courts have been unwilling to exclude evidence in such cases based on Fourth Amendment violations. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.7(e), at 333–35 (5th ed. 2012) (observing that the application of the Fourth Amendment to civil proceedings varies, but that generally courts are unwilling to exclude evidence for Fourth Amendment violations in child welfare cases); *cf. In re Beck*, 109 N.C. App. 539, 543–44 (1993) (sheriff’s department seized materials from the respondent’s home pursuant to a search warrant in a criminal case and, after the criminal charges were dismissed, transferred the materials to DSS, which later offered the materials as evidence in a TPR case; the court found no violation of the respondent’s rights by the transfer of the materials to DSS, but the propriety of the initial seizure by the sheriff was not at issue).

- (f) **Settlement efforts.** Other bars to admission of a respondent’s statement also may exist. *See* N.C. R. EVID. 408 (stating that evidence of conduct or statements made in compromise negotiations is not admissible); Local Rule 7.3 of [Twelfth Judicial District, District Court, Family Court Division, Juvenile Case Management Plan, I. Civil Cases](#) (2014) (“Statements made by respondents after the filing of the petition about or during treatment or services are inadmissible during the adjudicatory hearing except those made during court ordered assessments and evaluations.”); *see also* Jessica Smith, [Criminal Evidence: Pleas and Plea Discussions](#), NORTH CAROLINA SUPERIOR COURT JUDGES’ BENCHBOOK (UNC School of Government, March 2015) (discussing Evidence Rule 410 and the admissibility of plea discussions).

3. Application of admission exception to common situations in juvenile cases. In criminal cases, the admissibility of a defendant’s statements is complicated by the constitutional issues discussed in 2., above, but application of the exception itself is relatively straightforward because ordinarily there is a single defendant against whom the statement is offered. The reverse is the case in juvenile proceedings. Some common scenarios are as follows:

- (a) **Offered by DSS against respondent.** In juvenile proceedings, a statement of a respondent is admissible as an admission of a party-opponent when offered by DSS against that respondent. *See In re S.W.*, 175 N.C. App. 719, 723 (2006) (“In termination of parental rights proceedings, the party whose rights are sought to be terminated is a party adverse to DSS in the proceeding”; therefore, DSS could offer the statement of the mother against the mother); *In re Hayden*, 96 N.C. App. 77, 80–81 (1989) (mother’s statements to social workers about the father’s conduct were admissions by her that the child was subject to conduct in her presence that could be found to be abusive and neglectful and therefore were admissible against the mother as admissions of a party-opponent); *see also State v. Wade*, 155 N.C. App. 1, 14–15 (2002) (in a criminal sex offense prosecution, the child victim testified that the defendant father said to her it would be her word against his and

no one would believe her; the statement was admissible against the defendant father as an admission of a party-opponent).

- (b) Offered by DSS against different respondent.** The statement of one respondent parent is not necessarily admissible as an admission of a party-opponent when offered by DSS against another respondent parent. *See* 2 BRANDIS & BROUN § 204, at 806 (there is no presumption that spouses are authorized agents for each other and that the statement of one is admissible against the other); *cf. In re F.G.J.*, 200 N.C. App. 681 (2009) (mother's statements were admissible against her, but the father waived objection as to the admission of her statements against him). Grounds may exist, however, for attributing the statement of one respondent to another. *See* 2 BRANDIS & BROUN §§ 200–11 (discussing various theories for admissibility, such as agency); *State v. McLemore*, 343 N.C. 240, 247–48 (1996) (defendant husband told his wife to tell his father and the police that he had shot his mother; the wife was acting as an agent of the defendant husband and the statement was admissible as an admission of a party-opponent). Even if not attributable to other respondents, statements by one respondent may still be relevant to an issue to be decided in the case. For example, a statement by the mother that the father struck the child would be admissible to show the status of the child as abused. *See generally In re M.G.*, 187 N.C. App. 536, 549 (2007) (stating that the issue to be decided is whether abuse occurred, not whether the mother committed the abuse), *rev'd in part on other grounds*, 363 N.C. 570 (2009). In contrast, at a proceeding to terminate the father's rights, at which the father's fault is at issue, the mother's statement would not be admissible against the father as an admission of a party-opponent (unless a ground existed for attributing the mother's statement to the father).
- (c) Offered by one respondent against another respondent.** The statement of one respondent, for example, the statement of a respondent father, is not necessarily admissible as an admission of a party-opponent when offered by another respondent, for example, by a respondent mother. The respondent father's statement would appear to be admissible only when truly offered *against* the respondent father and not for the respondent mother's benefit. *See* 1 IMWINKELRIED § 1102, at 11-2 & n.2 (discussing the issue in the context of one co-defendant offering a statement of another co-defendant).
- (d) Statement of child.** The statement of a child is not admissible as an admission of a party-opponent when offered by either DSS or a respondent. Treating a child's statement as an admission under this exception would effectively negate the prohibition on hearsay for statements by children and render the other hearsay exceptions unnecessary. Although a child is designated as a party to a juvenile case (*see* G.S. 7B-401.1(f); G.S. 7B-1104), the child's statement is generally not offered against the child but rather for the benefit of the offering party. *See generally* 1 IMWINKELRIED § 1102, at 11-2 & n.2; *cf. State v. Shoemaker*, 80 N.C. App. 95, 100 (1986) (statement by a complaining witness is not admissible as an admission of a party-opponent because a complaining witness is not a party to a criminal case).
- (e) Statement of DSS worker.** The statement of a DSS worker is admissible against DSS as an admission of a party-opponent when offered by a respondent against DSS. *See* N.C. R.

EVID. 801(d)(D) (stating that this exception includes a statement by an “agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship”); *State v. Villeda*, 165 N.C. App. 431, 436–37 (2004) (holding that since a law-enforcement officer was an agent of the government, his statements were admissible against the state in a criminal case as an admission of a party-opponent).

In *State v. Phillips*, 365 N.C. 103, 128–29 (2011), the supreme court noted that it had not yet considered whether the statement of a law-enforcement officer is admissible against the State in a criminal case as an admission of a party-opponent. The court did not resolve the issue, finding that any error by the trial court did not constitute plain error. The comment in *Phillips* may signal a willingness by the supreme court to consider the approach taken in some jurisdictions that a law enforcement officer’s statements are not necessarily attributable to the government in a criminal case. *See, e.g., United States v. Kampiles*, 609 F.2d 1233, 1246 (7th Cir. 1979) (“Because the agents of the Government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign, their statements seem less the product of the adversary process and hence less appropriately described as admissions of a party.”) (citations omitted). Such an approach, if adopted in North Carolina, would have less applicability to statements by DSS workers acting on behalf of DSS, the party bringing the case.

C. Rule 803(2): Excited Utterances

1. Criteria. Rule 803(2) excepts from the prohibition on hearsay an excited utterance, defined as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” The courts have recognized that this definition requires that two conditions be satisfied. There must be:

- a sufficiently startling experience suspending reflective thought, and
- a spontaneous reaction, not one resulting from reflection or fabrication.

State v. Fullwood, 323 N.C. 371, 387 (1988) (the defendant’s statement that his girlfriend had stabbed him, when the statement was made in the emergency room one hour after stabbing, was not an excited utterance; the trial court properly could conclude that the defendant had time to manufacture the statement and did not make it spontaneously), *vacated on other grounds*, 494 U.S. 1022 (1990).

Factors to consider in determining whether a statement meets these criteria include:

- the time lapse between the event and statement;
- whether the statement was made at or away from the scene or the event;
- whether the statement was spontaneously uttered or in response to an inquiry;
- the appearance of the declarant;
- the nature of the event and statement; and
- the declarant’s conduct after the event.

2. Statements by children. When considering whether a child’s statement satisfies the spontaneity requirement, the North Carolina courts have been more flexible about the length of time between the event and the child’s statement. In *State v. Smith*, 315 N.C. 76, 86–90 (1985), a rape prosecution, the court held that out-of-court statements by four-year-old and five-year-old victims to their grandmother were excited utterances although made two to three days after the rape. The conversation began when the grandmother visited the home, apparently for the first time after the rape, and one of the children volunteered to the grandmother, “I have something to tell you . . . I want you to come in the room. I am scared . . . I want to tell you what Sylvester done [sic] to me.” The court reviewed several cases and other authorities and noted the special characteristics and circumstances of young children that may prolong stress and spontaneity, which the court stated are the critical factors in evaluating whether a statement qualifies as an excited utterance. The court held that those factors remained present notwithstanding the lapse in time between the event and statements.

Based on this rationale, several North Carolina cases have admitted as excited utterances statements by children that were not contemporaneous with the event but were made within a few days thereafter. In a termination of parental rights case, *In re J.S.B.*, 183 N.C. App. 192, 199–200 (2007), a nine-year-old child’s statement that she saw her mother whip and hit her brother was found to be an excited utterance. Although the statement was made during an interview by a detective at the police station 16 hours after the incident, the court found that the stress and spontaneity were prolonged because of intervening events—the child had watched the mother’s boyfriend attempt CPR on the brother, emergency technicians had come to the house, and the child’s brother died—and because of the child’s demeanor when she made the statements to the detective—the child was teary-eyed and very withdrawn while talking to the detective and was seen in the victim assistance room “basically in a corner in like a ball, like a fetal position.” See also *In re Clapp*, 137 N.C. App. 14, 20–21 (2000) (in a juvenile delinquency case, a three-year-old child’s statement to her mother that the juvenile had licked her private parts was admissible; the child told her mother about the act immediately after the juvenile left the house). But see *State v. Carter*, 216 N.C. App. 453, 462–63 (2011) (statement by child to social worker was not admissible as excited utterance; record contained no evidence of child’s behavior or mental state at time of statement), *rev’d on other grounds*, 366 N.C. 496 (2013); *State v. Thomas*, 119 N.C. App. 708, 712–17 (1995) (statements by the victim to her kindergarten friends four or five days after alleged sexual abuse were excited utterances in the circumstances of the case, but the friends’ statements to their mothers relating the victim’s statements were not excited utterances). For additional summaries of cases applying the excited utterance exception to statements by children, see Jessica Smith, [Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 34–36 (UNC School of Government, Dec. 2008).

D. Rule 803(3): State of Mind

1. Criteria. Rule 803(3) excepts from the hearsay rule “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered” (unless it relates to a will). See *In re Hayden*, 96 N.C. App. 77, 81 (1989) (respondent father offered testimony of his wife

that the child said to her that the child had burned herself on the previous day; statement was inadmissible under this exception because Rule 803(3), by its terms, excludes “a statement of memory or belief to prove the fact remembered or believed”).

The exception does not appear to arise very often in juvenile cases. The exception arises more in criminal cases in which the State seeks to offer a deceased victim’s statements about his or her feelings toward the accused. *See generally* 2 BRANDIS & BROUN § 217, at 854–57; *see also State v. Hipps*, 348 N.C. 377, 392 (1998) (“Evidence tending to show the state of mind of a victim is admissible as long as the declarant’s state of mind is a relevant issue and the potential for unfair prejudice in admitting the evidence does not substantially outweigh its probative value”; the court found that a murder victim’s statement that she feared the defendant was relevant to show the status of the victim’s relationship with the defendant); *State v. Lesane*, 137 N.C. App. 234, 240 (2000) (“[O]ur courts have created a sort of trichotomy in applying Rule 803(3). Statements that recite only emotions are admissible under the exception; statements that recite emotions and the facts underlying those emotions are likewise admissible; but statements that merely recite facts do not fall within the exception.”). *But see State v. Jones*, 137 N.C. App. 221, 227 (2000) (stating, in a case decided the same day as *Lesane*, that “our courts have repeatedly found admissible under Rule 803(3) a declarant’s statements of fact that indicate her state of mind, even if they do not explicitly contain an accompanying statement of the declarant’s state of mind”).

2. Examples. A declaration of intent, such as a threat, is a type of declaration of state of mind. *See* 2 BRANDIS & BROUN §§ 218–19. Threats by a party, when offered against that party, are also admissible as admissions of a party-opponent, discussed *supra* in § 11.6.B. Threats also can be analyzed as non-hearsay evidence of a verbal act. *See State v. Weaver*, 160 N.C. App. 61, 64–66 (2003) (the statement of a bribe was evidence of a verbal act and was not offered for the truth of the matter asserted but rather to prove the statement was made).

Diary entries may or may not be admissible under this exception depending on whether they consist of mere factual recitations or express the writer’s then-existing state of mind. *Compare State v. Hardy*, 339 N.C. 207, 227–30 (1994) (holding that diary entries that consisted of mere factual recitations, written in a calm and detached manner after the events occurred, were inadmissible under the state of mind exception), *with State v. King*, 353 N.C. 457, 474–78 (2001) (holding that diary entries that stated the victim’s frustration with the defendant and her intent to end their marriage were admissible under this exception).

E. Rule 803(4): Medical Diagnosis or Treatment

1. Criteria. Rule 803(4) excepts from the hearsay rule statements made for the purpose of medical diagnosis or treatment. In *State v. Hinnant*, 351 N.C. 277 (2000), the North Carolina Supreme Court reexamined the requirements of this exception. *Hinnant* involved a criminal prosecution for rape and other sexual acts. The state offered the hearsay statements of the defendant’s five-year-old niece, who met with a clinical psychologist specializing in child abuse approximately two weeks after the alleged abuse and initial medical examination. In finding the statements inadmissible, the court held that the proponent of statements under this hearsay exception must establish that:

- the declarant made the statements understanding that they would lead to medical diagnosis or treatment, and
- the statements were reasonably pertinent to diagnosis or treatment.

2. First requirement: declarant's understanding. The *Hinnant* decision modified or at least clarified North Carolina law by emphasizing the importance of the first requirement of the medical diagnosis and treatment exception, which depends on the declarant's motivation for making the statements. The court found that a statement made for purposes of medical diagnosis and treatment is treated as inherently reliable and is excepted from the hearsay rule (assuming the second requirement is also satisfied) when the declarant is motivated "to tell the truth in order to receive proper treatment." *Id.* at 286. The proponent of the statement therefore "must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287.

The discussion in 3. through 5., below, discusses some of the issues raised by this requirement.

3. Child declarants. The requirement of a treatment motive applies to children as well as adult declarants. *Id.* at 287–88. Although acknowledging the occasional difficulties in determining a child's intent, the court found that trial courts could make this determination by considering the objective circumstances surrounding the examination, including whether the purpose of the examination was explained to the child, the person to whom the child was speaking (a medical professional versus another person), the setting of the interview (a child-friendly room versus a doctor's examination room), the nature of the questions (leading versus non-leading), and the time of the examination in relation to the incident (whether medical attention was sought immediately or delayed). The court added, however, that corroborating physical evidence cannot be used to establish the declarant's treatment motive. *Id.*

In *Hinnant*, the court found that the proponent failed to establish that the child declarant had a treatment motive in talking with the clinical psychologist. Although the clinical psychologist testified that she interviewed the child to obtain information for the examining physician, there was no evidence that the purpose of the interview was explained to the child. In addition, the interview was conducted in a "child-friendly" room, not a medical environment, and consisted entirely of leading questions, which in the court's view further undermined the reliability of the child's responses. *Id.* at 289–90.

Note: Because a child's intent for purposes of this exception may be determined from the circumstances surrounding the statements, neither a psychological examination nor a voir dire examination of the child is required. See *State v. Carter*, 153 N.C. App. 756, 760–61 (2002) (so holding in reliance on *Hinnant*).

4. Examination protocols. In a number of cases immediately after *Hinnant*, the court found that examination protocols involving children, particularly for mental health examinations, did not show that the child understood the purpose of the interview and did not meet the requirements for the medical diagnosis and treatment exception. See *State v. Waddell*, 351

N.C. 413 (2000) (holding on facts similar to *Hinnant* that the child's statements to a psychologist were inadmissible under the medical diagnosis and treatment exception); *State v. Bates*, 140 N.C. App. 743 (2000) (to same effect); *State v. Watts*, 141 N.C. App. 104 (2000) (child's statements to nurse, child medical examiner, and child mental health examiner were inadmissible under the medical diagnosis and treatment exception; the nurse, who examined the child shortly after the alleged incident, testified that the child seemed unaware of why she was there, and the examination by the two doctors took place three months later).

The frequency of such cases has declined significantly, as examiners have changed their protocols to communicate the purpose of the examination more clearly to child patients. *See, e.g., State v. Lewis*, 172 N.C. App. 97 (2005) (holding that the *Hinnant* requirements were satisfied where the interviews were at a medical center by a registered nurse, the children signed a form stating they understood that the nurse would share information with the doctor, and the nurse testified that she explained to the children that she would share information with the doctor, who would perform a medical examination).

5. Identity of listener. Cases before *Hinnant* admitted statements by children to family members and others who were not medical personnel if, following the statements, the children received treatment. *See, e.g., In re Lucas*, 94 N.C. App. 442, 446–47 (1989) (in a pre-*Hinnant* case, a child's statements to her mother resulted in medical attention and were therefore found admissible under the medical diagnosis or treatment exception).

Hinnant observed that statements made to a family member or other person who is not a medical professional may still be admissible under the medical diagnosis and treatment exception, but the proponent must affirmatively show that the child made the statement understanding that it would lead to treatment. *See Hinnant*, 351 N.C. at 288. To the extent that pre-*Hinnant* cases did not require such a showing, they are no longer good law. *See also In re T.C.S.*, 148 N.C. App. 297 (2002) (per *Hinnant*, a doctor's testimony about a child's statements to a social worker, which the social worker relayed to the doctor, was inadmissible, even though the statements were used by the doctor for purposes of diagnosis); *State v. McGraw*, 137 N.C. App. 726 (2000) (per *Hinnant*, statements made to a person other than a medical doctor may constitute statements for purposes of medical diagnosis or treatment, but there was nothing to indicate that the child made statements to her mother with the understanding that they would lead to medical diagnosis or treatment); *but see In re Clapp*, 137 N.C. App. 14 (2000) (in a decision issued shortly after *Hinnant*, the court of appeals found that a child's statements to a doctor at an emergency room were for purposes of medical diagnosis and treatment; the court also stated, without explanation, that the medical diagnosis and treatment exception allowed the doctor to testify to the child's statements to her mother prior to the emergency room visit).

The participation in an examination of a person who is not a medical professional does not necessarily remove the child's statement from the coverage of the exception. *See State v. Thornton*, 158 N.C. App. 645 (2003) (statements by a child to a social worker were admissible where the social worker was part of the team conducting the medical and psychological evaluation at a medical center, the interview was the same day as the physical examination, and the social worker explained to the child that she worked with the doctor,

whose office was in the same building and doors apart); *State v. Stancil*, 146 N.C. App. 234 (2001) (child's statements to a physician, nurse, and social worker at a hospital were admissible under the medical diagnosis and treatment exception; the father took the child to the hospital within hours of the incident, the interviews were for the purpose of diagnosis, and the child testified that she went to the hospital because the defendant had "hurt her privacy"), *aff'd as modified on other grounds*, 355 N.C. 266 (2002).

6. Second requirement: pertinence to diagnosis and treatment. North Carolina cases, before and after *Hinnant*, have given the term "diagnosis" a relatively narrow construction. Diagnosis, without the possibility of subsequent treatment, is not covered by the exception. See 2 BRANDIS & BROUN § 217, at 859–60. *Hinnant's* emphasis on the declarant's treatment motivation reinforces the requirement that for the exception to apply, diagnosis must be connected to treatment. See *Hinnant*, 351 N.C. at 289 ("If the declarant's statements are not pertinent to medical diagnosis, the declarant has no treatment-based motivation to be truthful.").

Statements made to a medical professional for the purpose of preparing for trial, although diagnostic, do not meet this treatment requirement and are not admissible under the exception. See *State v. Stafford*, 317 N.C. 568 (1986) (witness's statements to a pediatrician concerning symptoms she had experienced earlier were not made for the purpose of diagnosis or treatment but rather for the purpose of preparing and presenting the State's "rape trauma syndrome" theory at a rape trial; the statements did not qualify under the medical diagnosis and treatment exception); *State v. Reeder*, 105 N.C. App. 343 (1992) (holding that since the examination was for the purpose of determining whether the child was sexually abused and not for purposes of diagnosis or treatment, the child's statements to the doctor were inadmissible under this exception).

The courts also have scrutinized statements, particularly to nonphysicians, after the declarant is no longer in need of immediate medical attention. See *Hinnant*, 351 N.C. at 289–90 (finding that statements to a clinical psychologist two weeks after a medical examination were not pertinent to medical diagnosis and treatment in the circumstances of the case); *State v. Smith*, 315 N.C. 76, 85–86 (1985) (determining that statements to rape task force volunteers after a medical examination were not pertinent to medical diagnosis and treatment); see also *State v. Reeder*, 105 N.C. App. 343, 351–54 (1992) (determining that the statements by the child to the physician at an examination over a year after the incident were not pertinent to diagnosis and treatment and were not admissible); Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 956–57 (2007) (expressing skepticism about the purpose of later examinations in analyzing whether statements are for purposes of treatment or prosecution [although the discussion concerns the Confrontation Clause, which is applicable to criminal cases only, the analysis is similar]).

Statements to psychological professionals for the purposes of mental health treatment are not necessarily excluded from the hearsay exception if the proponent makes an adequate showing of both prongs. Compare *State v. Kidd*, 194 N.C. App. 374 (2008) (unpublished) (upholding admission of child's statement to licensed clinical social worker, which led to mental health

treatment); *In re N.M.H.*, 183 N.C. App. 490 (2007) (unpublished) (upholding admission of statements to child and family therapist for purposes of treatment); *with State v. Carter*, 216 N.C. App. 453 (2011) (excluding statement by child to social worker who conceded that she was not qualified to give medical diagnosis or treatment), *rev'd on other grounds*, 366 N.C. 496 (2013); *State v. Hilton*, 194 N.C. App. 821 (2009) (unpublished) (holding that trial court erred in admitting children's statements to licensed clinical counselor who was providing therapy to children; record failed to show that children had requisite treatment motivation at time of statements).

Additional issues involving this second requirement are discussed in 7. and 8., below.

7. Mixed purpose examinations. Statements made by a patient during an examination with a mixed purpose—for example, for treatment and potentially for use in criminal investigation or other legal proceedings—are still admissible under the medical diagnosis and treatment exception if the requirements of *Hinnant* are satisfied. *See State v. Isenberg*, 148 N.C. App. 29, 36–39 (2001) (determining that, although the child was examined after a request by law enforcement, the examination was for treatment purposes and the child's statements to the pediatric nurse and physician who conducted the physical examination of the child were admissible under the medical diagnosis and treatment exception). *But see State v. Lowery*, 219 N.C. App. 151 (2012) (defendant's statements were not admissible under this exception where his primary objective was to obtain diagnosis of mental illness to use as defense even though defendant may have wanted continued treatment of any diagnosed condition), *remanded on other grounds*, ___ N.C. ___, 748 S.E.2d 527 (2012). When an examination involves mixed purposes, this factor also may bear on whether the statements are admissible in a criminal case under the Confrontation Clause, discussed *supra* in § 11.4.A.

8. Identification of perpetrator. North Carolina cases have allowed under the medical diagnosis and treatment exception a child's statement to a medical professional identifying the perpetrator of sexual abuse. (The same may apply to child victims of physical abuse.) The courts have reasoned that the identification of the perpetrator is pertinent to continued treatment of possible psychological problems and is not merely a statement as to "fault," which ordinarily is not pertinent to diagnosis and treatment. *See State v. Aguallo*, 318 N.C. 590, 596–97 (1986) (allowing statement); *State v. Lewis*, 172 N.C. App. 97 (2005) (allowing statement); *State v. Reeder*, 105 N.C. App. 343, 351–54 (1992) (disallowing statement because the examination was not for the purpose of diagnosis and treatment but rather to determine whether sexual abuse had occurred); *see also In re Mashburn*, 162 N.C. App. 386 (2004) (in a neglect case, the trial court allowed, under the medical diagnosis and treatment exception, a statement by a child to a doctor that her mother did not believe the child about sexual abuse; the dissent argued that the statement was not reasonably pertinent to medical diagnosis and treatment and should not have been admitted); Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, LAW & CONTEMPORARY PROBLEMS, Winter 2002, at 47, 94–95 (supporting the admissibility of such statements under the medical diagnosis and treatment exception when made at initial medical examinations, but expressing skepticism about the treatment purpose when such statements are elicited at later examinations).

9. Videotape of examination. A videotape of a child's statements during an examination is admissible under the medical diagnosis and treatment exception if it satisfies the *Hinnant* requirements. *See State v. Burgess*, 181 N.C. App. 27, 34–35 (2007) and cases cited therein (upholding the admission of a videotape of an interview with a nurse before an examination by a physician; also noting that the trial court had denied admission of a videotape made six days later at which a detective was present). Videotaping of an examination may suggest that the examination has a mixed purpose, discussed in 7., above, and the proponent may need to show that the examination included a substantial treatment purpose. *See Robert P. Mosteller, Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 917, 957 (2007) (formality of videotaping may indicate that an examination is for the purpose of preserving evidence for prosecution, and the proponent should produce firm evidence of a substantial medical purpose).

A videotape also must be adequately authenticated. *See* MOSTELLER § 5-6, at 5-88 to 5-89; § 5-9(B), at 5-107 to 5-108 (authenticity of an audio recording may be established by someone who heard the conversation and indicates the recording is an accurate reproduction of the conversation; authenticity of a video recording may be similarly established by a person who was present when the activity occurred; if such a witness is not available, authenticity may be shown by proof of the circumstances of the recording, such as the operator's qualifications, working condition of the equipment, etc.); *see also* G.S. 8-97 (allowing video tape as substantive evidence with a proper foundation); *State v. Mason*, 144 N.C. App. 20, 24–27 (2001) (assessing adequacy of foundation for admission of videotape in criminal case).

10. Anatomical dolls. Statements by children to medical personnel while employing anatomical dolls have been found admissible in cases alleging sexual abuse. *See State v. Bullock*, 320 N.C. 780, 781–83 (1987). The person who examined the child may use anatomical dolls in his or her testimony to illustrate how the child used the dolls during the examination. *See generally State v. Chandler*, 324 N.C. 172 (1989) (allowing such testimony; note, however, that the substantive use of testimony about the children's statements in this case likely would not qualify under the medical diagnosis and treatment hearsay exception as interpreted in the later *Hinnant* decision).

The improper use of anatomical dolls by an interviewer may undermine the basis for admitting a child's statements under the medical diagnosis and treatment exception. *See Hinnant*, 351 N.C. at 290 (child did not have a treatment motive and her statements were not inherently reliable where the entire interview consisted of a series of leading questions during which the interviewer pointed to anatomically correct dolls and asked whether anyone had or had not performed various acts with the child; "[i]nherent in this type of suggestive questioning is the danger of planting the idea of sexual abuse in the mind of the child" (quoting *State v. Harris*, 808 P.2d 453, 459 (1991))). The proper use of anatomical dolls, in contrast, has been found to bolster the reliability of a child's statements. *See State v. Wagoner*, 131 N.C. App. 285, 290 (1998) (finding that the use of anatomical dolls bolstered the trustworthiness of a child's out-of-court statement, which supported admission of the statement under the residual hearsay exception). (The residual hearsay exception is discussed *infra* in § 11.6.H.)

Statements by a child to a medical professional about sexual abuse while employing anatomical dolls, without adequate physical evidence of abuse, are insufficient to support the admission of expert testimony that the child has been sexually abused. *See State v. Delsanto*, 172 N.C. App. 42 (2005); *State v. Dixon*, 150 N.C. App. 46, 51–54 (2002), *aff'd per curiam*, 356 N.C. 428 (2002). For a further discussion of the admissibility of expert opinion in such cases, see *infra* § 11.10.D.6.

11. Basis of opinion. Statements of children to medical professionals that do not satisfy the medical diagnosis and treatment exception may still be admissible as the basis of an expert's opinion. *See* 2 BRANDIS & BROUN § 217, at 858. If admitted on that ground, the statements are not substantive evidence of the facts asserted in the statement.

F. Rule 803(6): Business Records

1. Criteria. Rule 803(6) excepts from the hearsay rule entries made in the regular course of business. This exception requires inquiry into: (1) the method and circumstances of the preparation of the record; and (2) the information contained within the record. This exception applies to hospital and medical records, among others. The cases also analyze DSS records under this exception.

Note: Pursuant to the statutory requirements for juvenile proceedings, documentary evidence alone is insufficient to support an order terminating parental rights. Some live testimony is required. *In re N.B.*, 195 N.C. App. 113, 118 (2009) (reversing termination order where “petitioner presented no oral testimony to carry its burden of proof”); *In re A.M.*, 192 N.C. App. 538, 541 (2008) (also relying on Rule 43(a) of the N.C. Rules of Civil Procedure in holding in a termination case that one or more witnesses must be “sworn or affirmed and tendered to give testimony”); *see also supra* § 9.10.A. The same principle applies in abuse, neglect, and dependency proceedings. *In re D.Y.*, 202 N.C. App. 140, 141–43 (2010) (reversing a permanency planning order where no witnesses testified and the order was based solely on written reports, prior orders, and attorneys' oral arguments); *In re D.L.*, 166 N.C. App. 574 (2004) (holding that the trial court's findings in a permanency planning order were not supported by competent evidence where DSS offered a written summary but no oral testimony).

2. Method and circumstances of preparation. The requirements as to the method and circumstances of the creation of business records are familiar ones: The record must be made at or near the time of the event, it must be prepared by someone with a business duty to the organization (typically, an employee of the organization), it must have been made in the regular course of business, and the regular practice of the business must have been to make such records. *See generally* 2 BRANDIS & BROUN § 225.

(a) Establishment of foundational requirements. The witness who testifies in court to the method and circumstances of the preparation of a business record is not required to be the maker of the record. The rule requires only that the foundation be shown by the testimony of the custodian of the business's records or other qualified witness. Thus, if the employee who made the record is not available to testify, another employee familiar with the

circumstances of the creation of the record and the business's procedures may testify to the method and circumstances of the record's preparation. *See In re Smith*, 56 N.C. App. 142, 148 (1982) (upholding the admission of a DSS report based on the testimony of a social worker who did not work on the report but who testified that it was made in the regular course of business, etc.).

- (b) Records within records.** DSS records often include records from other organizations, such as records from other county DSS agencies, private drug labs, and police and sheriff departments. *See supra* § 2.7.B.6 (discussing sharing of information with DSS by other agencies). A proper foundation, including authenticity, must be shown for both the DSS record and the records from other organizations within the DSS record. The requirements are relatively easy to satisfy, but the mere sharing of the information with DSS may be insufficient. *See* 2 BRANDIS & BROUN § 243, at 266 & n.39 (“Copies which are neither certified as correct nor authenticated in any other recognized manner are not admissible.”).

The foundation may be established by live testimony of a custodian or employee of the outside organization. If the record of the outside organization is an official record or report, the foundation may be shown, without live testimony, by a proper certification from an official with the outside organization attesting to authenticity and by the court's taking of judicial notice of the legal requirements for preparation of the record. *See* MOSTELLER § 5-4, at 5-77 to 5-78 (authenticity of a public record may be established by an attesting certificate), § 11-5, at 11-44 to 11-46 (court may take judicial notice of the statute, regulation, or custom requiring a public official to prepare the record and, if the attested copy is fair on its face (complete with no erasures), the document's face creates a permissive inference that the official followed the proper procedures in preparing the particular record). The hearsay exception for official records is discussed further in G., below.

In some circumstances, a DSS employee may be able to lay the foundation for an outside organization's records, but the extent to which the courts would allow that possibility is unclear. *See In re S.D.J.*, 192 N.C. App. 478, 482–84 (2008) (permitting a DSS employee to establish the foundation for a drug test report prepared by an outside lab where the DSS employee collected the sample, ordered the report, and filed the results with her office); *see also State v. Sneed*, 210 N.C. App. 622, 628–31 (2011) (not plain error for trial court to admit under Rule 803(6) printout from National Crime Information Center (“NCIC”) about stolen gun; court rejected defendant's argument that State was required to present testimony from a custodian of records for NCIC, finding that adequate foundation was laid through testimony of local police officer who used the database in his regular course of business).

Note: Under North Carolina Rule of Civil Procedure 45(c)(2), when subpoenaed to produce hospital medical records or public records, the custodian of the records may submit an affidavit attesting both to the authenticity of the records and to the requirements for the business or public records hearsay exception. *See In re J.B.*, 172 N.C. App. 1, 17–18 (2005) (relying on the rule to admit mental health records). The party opposing admission may still contest the admissibility of specific information within the

record. The federal rules of evidence allow the use of a certificate to establish the foundation for business records other than hospital medical records and public records. FED. R. EVID. 803(6)(D), 902(11). North Carolina does not have a comparable rule. *See* MOSTELLER § 5-3(G), at 5-75 to 5-76.

- (c) Records prepared in anticipation of litigation.** Exclusion is not automatically required of records prepared in anticipation of litigation. Thus, a DSS record that meets the requirements for admission as a business record is not necessarily inadmissible even though it is prepared in part in anticipation of legal proceedings. A record prepared specially for litigation purposes, however, would likely not satisfy the business record exception because it would not be prepared in the regular course of business. *See generally Palmer v. Hoffman*, 318 U.S. 109 (1943) (holding that a railroad company's preparation of an accident report for use in defending against potential litigation was not made in the regular course of the company's business within the meaning of the exception). Also, if the court finds a record untrustworthy, even though it otherwise satisfies the requirements of the business records exception, the court has the discretion to exclude it. *See* N.C. R. EVID. 803(6) (stating that business records are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness"); *State v. Wood*, 306 N.C. 510, 513–16 (1982) (factor in evaluating the reliability of a business record is whether it was prepared ante litem motam, that is, before a lawsuit was brought); MOSTELLER § 11-4(B), at 11-41 (court may exclude records that otherwise meet the business records exception if they are suspect or unreliable).

Note: By statute, predisposition reports are not admissible at the adjudication hearing in an abuse, neglect, or dependency proceeding. *See* G.S. 7B-808(a); *see also In re Quevedo*, 106 N.C. App. 574, 584 (1992). Such a report would likely not satisfy the business records exception in any event because, by its terms, it is prepared for the court's use and thus likely would not be considered a record prepared in the regular course of business.

3. Observations, statements, and other information within a record. Two basic requirements, described below, apply to information recorded within a record. Both must be satisfied for information within a business record to be admissible.

- (a) Knowledge of fact or event.** First, the entry in a record must be based on information provided by a person with knowledge of the fact or event. The employee who enters the information in the record (or the witness who testifies to the making of the record) need not have personal knowledge of the facts or events in the record, but the person who provided the information must have had personal knowledge. N.C. R. EVID. 803(6) commentary; *Donavant v. Hudspeth*, 318 N.C. 1, 9 (1986) (evidence of practice is sufficient to establish prima facie that a record was prepared from personal knowledge; in this case, however, the record showed that the information in the report was not based on personal knowledge, and the information was therefore not admissible under the business records exception). For example, if a DSS employee's report states, "The respondent had no food in the house on the day of the investigation," the employee must have personal

knowledge, or have received the information from someone with personal knowledge, of that fact.

(b) Business duty. Second, the person who provided the information entered in the record must have a business duty to report the information. Information provided by third parties who do not have a duty to the business is generally inadmissible unless it qualifies under another hearsay exception. For example, in the above example about lack of food in the house, if the DSS employee received the information from the respondent's neighbor, even a neighbor claiming to have personal knowledge of the condition of the respondent's house, the information would not be admissible under the business records exception because the neighbor does not have a business duty to DSS. To be admissible, the neighbor's statement would have to qualify under another hearsay exception. *See* 2 BRANDIS & BROUN § 225, at 884–85 n.481 (stating that “the underlying theory of the exception [is] that the business environment encourages the making of accurate records by those with a duty to the enterprise”); *State v. Reeder*, 105 N.C. App. 343, 351–54 (1992) (statement by a child in a medical report identifying the defendant as the perpetrator was not admissible under the business records exception because it was hearsay within hearsay; the statement did not independently meet the medical diagnosis and treatment exception because the examination was not for that purpose). *But see State v. Scott*, 343 N.C. 313 (1996) (intake form of home for abused women and children, filled out by a resident after she arrived, was properly admitted even though the resident had no business duty in filling out the form; decision criticized by Brandis & Broun, in the above citation, as contrary to the underlying theory of the business records exception).

The obligation to report abuse, neglect, and dependency, in G.S. 7B-301, likely does not constitute a business duty to DSS for the purpose of qualifying a private person's statements to DSS under the business record exception. Reporting by a private person is not in the regular course of the person's responsibilities to DSS, as required by the rule.

4. Opinions within business records. Ordinarily, statements in business records are factual in nature, but Evidence Rule 803(6) also allows appropriate “opinions . . . or diagnoses.” At a minimum, the opinion must meet the requirements for admissibility of opinion testimony, discussed *infra* in §§ 11.9 and 11.10. *See In re J.S.B.*, 183 N.C. App. 192 (2007) (determining that the opinion in an autopsy report as to the cause of death as well as observations were admissible under the public records hearsay exception, which is similar to the business records exception); *State v. Galloway*, 145 N.C. App. 555, 565–66 (2001) (statement by a doctor in a hospital record that the patient had psychiatric problems was not admissible because the sources of information on which the doctor based the opinion were not reliable and the doctor was not qualified to render a psychiatric opinion).

In some circumstances, courts may be reluctant to admit opinions contained in business records even if they satisfy the minimum requirements for admission. According to Imwinkelried, the modern trend is to allow such evidence if the subject matter of the opinion is relatively simple and noncontroversial—for example, an entry in a hospital record listing physical symptoms such as blood pressure. The courts may be reluctant to admit an opinion within a business record if the opponent has a substantial need to cross-examine the declarant

of the opinion, which is a function of two factors. The first factor is the opinion's complexity or subjectivity. When the opinion is highly evaluative, "the policy underlying the hearsay rule mandates that we afford the opponent an opportunity to cross-examine." *IMWINKELRIED* § 1220, at 12-53. The second factor is the importance of the issue in the case. "The more central the issue in the case, the more likely the court is to hold that the opponent is entitled to confront a witness rather than a document." *Id.* at 12-53 to 12-54; *see also* 2 *MCCORMICK* § 293, at 454 (federal version of Rule 803(6) [which is comparable to North Carolina's version] allows opinions and diagnoses within business records, but such statements may be inadmissible if they lack trustworthiness or their probative value outweighs their prejudicial effect under Evidence Rule 403; courts also may be reluctant to enter a verdict based on an opinion in a business record without allowing the opponent the opportunity to cross-examine the person who gave the opinion).

5. Objections to business records. The rules of evidence do not contain any special requirement for objecting to business records. A party may do so before trial by motion in limine or at trial by objection. Some local rules may contain a time limit on objecting, however. *See In re T.M.*, 187 N.C. App. 694, 697–701 & n.2 (2007) (because the respondent father failed to object to medical records by the deadline in the then-applicable Twelfth Judicial District local rules [deleted from the current version of the rules, effective July 1, 2014], the trial court admitted the records at the adjudication hearing over the respondent's objection that DSS had not established a proper foundation; the court of appeals did not specifically decide whether the local rules provided an appropriate basis for overruling the respondent's objection because the respondent could not show prejudice, but noted that the local rule was not intended to be an evidentiary rule but instead was designed to promote the efficient administration of justice); *In re J.S.*, 182 N.C. App. 79 (2007) (upholding, in a two-to-one decision, a local administrative discovery order requiring respondents to review DSS records within ten working days after receiving notice that records are available for review).

If the method and circumstances of preparation of the record do not satisfy the business records exception (for example, the record was not prepared in the regular course of business), the opponent may object to the entire record. It appears, however, that if specific information within a business record is not admissible (for example, the information is hearsay from a person without a business duty to the organization or is inadmissible opinion), the opponent must specifically object to each item of information. Otherwise, the issue may be waived on appeal for failing to bring the objectionable evidence specifically to the attention of the trial court. *See infra* § 11.13.D.

G. Rule 803(8): Official Records and Reports

Rule 803(8) excepts public records and reports from the hearsay rule. The use of the term "public" is somewhat misleading because the record does not need to be public in the sense that members of the public have a right to view it. For that reason, commentators refer to this exception as covering "official" records and reports.

The foundational requirements for official records are similar to those for business records, discussed in F., above. Because of this overlap, the exception has not arisen very often in

juvenile or other North Carolina cases. *See In re J.S.B.*, 183 N.C. App. 192 (2007) (trial court allowed the admission of an autopsy report under the business records exception, while the appellate court upheld admission under the public records exception). For a brief discussion of laying a foundation for the admission of official records, see F.2.b., above (discussing official records contained within other records).

The principal reason for having a separate exception for official records appears to come from criminal cases. The exception prohibits the use of law enforcement reports and other investigative reports by the State against the defendant in a criminal case. *See* N.C. R. EVID. 803(8) & commentary (rule states this limitation and the commentary elaborates that if investigative reports are not admissible under the public records exception, they also are barred under the business records exception); 2 MCCORMICK § 296, at 467–71 (discussing the meaning of the limitation); *see also* Jessica Smith, [Criminal Evidence: Hearsay](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2013/08, at 25 (UNC School of Government, Oct. 2013) (collecting cases); *State v. MacLean*, 205 N.C. App. 247, 250–51 (2010) (holding that ministerial matters, such as fingerprints or photographs, are not subject to this limitation). This limitation does not apply to the use of law enforcement reports in civil proceedings.

As under the business records exception, hearsay within a law enforcement report or other official record still must satisfy another hearsay exception to be admissible. *See Wooten v. Newcon Transportation, Inc.*, 178 N.C. App. 698, 703–04 (2006) (finding a 911 report admissible in a civil workers' compensation proceeding where the report met the public records exception and the statements from a caller within the report met the present sense impression hearsay exception).

H. Rules 803(24) and 804(b)(5): Residual Hearsay

Rules 803(24) and 804(b)(5) create a catch-all or “residual” exception to the hearsay rule, allowing the admission of a statement that does not satisfy an enumerated hearsay exception if the statement meets certain criteria.

1. Comparison of rules. Rules 803(24) and 804(b)(5) each create an exception for residual hearsay. The rules are identical, requiring that the proponent satisfy six requirements (discussed in 3., below), except that Rule 804(b)(5) also requires that the declarant be unavailable to testify for his or her statement to be admissible. Although not explicitly a requirement for admission under Rule 803(24), unavailability is still a factor affecting admissibility under that rule. The cases state that the inquiry into the trustworthiness and probative value of a statement, two of the six requirements for admission under both rules, may be less strenuous under Rule 804 because, if the declarant is unavailable to testify, the need for admitting the evidence may be greater. *See* 2 BRANDIS & BROUN § 241, at 936–37; *State v. Garner*, 330 N.C. 273, 284 (1991); *see also State v. Smith*, 315 N.C. 76, 91–92 (1985) (cautioning that the trial judge must carefully scrutinize evidence when offered under Evidence Rule 803(24)). The cases also indicate that the availability of the witness remains a factor under the other requirements for admissibility. *See State v. Hollingsworth*, 78 N.C. App. 578, 580 (1985) (to be admissible under Rule 803(24) or 804(b)(5), evidence must be

more probative than other evidence reasonably available; the availability of a witness is therefore a crucial factor under either exception because usually live testimony will be more probative on the point for which it is offered); *State v. Nichols*, 321 N.C. 616, 624–25 & n.2 (1988) (reason for the declarant’s unavailability to testify is relevant to whether the statement is sufficiently trustworthy, a key factor under both residual exceptions).

2. Unavailability. Rule 804(a) lists five grounds for a finding of unavailability. Those most likely to arise in cases involving child witnesses in juvenile cases are as follows.

(a) Physical or mental illness or infirmity. Rule 804(a)(4) provides that unavailability includes situations in which the declarant is unable to testify because of a then-existing physical or mental illness or infirmity. Before finding a child witness unavailable on this basis, the court may need to determine whether various accommodations would enable the child to testify (discussed *supra* in § 11.2.B). If a witness is incompetent to testify, then the witness is unavailable within the meaning of Rule 804(a)(4). *In re Clapp*, 137 N.C. App. 14, 20 (2000).

A finding of incompetency to testify may bear on whether the witness’s out-of-court statements are sufficiently trustworthy to be admissible under either residual hearsay exception. *Compare State v. Stutts*, 105 N.C. App. 557 (1992) (holding that a child’s out-of-court statements were inadmissible under the residual hearsay exception where the trial court found the child unavailable as a witness on the ground that the child could not tell truth from fantasy), *with State v. Wagoner*, 131 N.C. App. 285, 290–91 (1998) (determining that the child’s incompetence to testify satisfied the unavailability requirement but did not render her out-of-court statements too untrustworthy to be admitted under the residual hearsay exception).

Other cases addressing unavailability under Rule 804(a)(4) include: *State v. Carter*, 338 N.C. 569, 590–92 (1994) (trial judge did not err in finding the witness unavailable where the witness refused to testify and the witness’s former psychiatrist testified that compelling her to testify would exacerbate her depression for which she had previously been hospitalized and could lead to suicide); *State v. Chandler*, 324 N.C. 172, 178–81 (1989) (four-year-old child victim was unavailable to testify when she was so overcome with fear that she was unable to respond to the prosecutor’s questions even after the court allowed the mother to sit with the child while she attempted to testify).

(b) Refusal to testify. Rule 804(a)(2) provides that a witness is unavailable if he or she persists in not testifying despite being ordered to do so by the court. As with other witnesses, for this ground of unavailability to apply the court must specifically order the child witness to testify and the child must refuse to do so. *See State v. Linton*, 145 N.C. App. 639, 645–47 (2001) (so holding). Hostility to the questions or questioner does not amount to a refusal to testify. *State v. Finney*, 358 N.C. 79, 80–84 (2004) (so holding).

(c) Lack of memory. Rule 804(a)(3) provides that a witness is unavailable if he or she testifies to a lack of memory about the subject matter of the out-of-court statement. This exception contemplates that the witness, including a child witness, take the stand and be

subject to cross-examination. N.C. R. EVID. 804 commentary. If the witness remembers the incident or matter to which the statement refers, a lack of memory as to the details of the incident or matter does not make the witness unavailable. *See State v. Miller*, 330 N.C. 56, 60–62 (1991) (trial court erred in finding witnesses unavailable for lack of memory and admitting their statements under the residual hearsay exception where the witnesses testified that they remembered the incident; the witnesses were not unavailable for not being able to remember all of the details of the incident or for disagreeing with the detective’s account of their out-of-court statements). The rationale for this ground of unavailability is that when the witness does not remember the subject matter of the statement, testimony about that subject is effectively “beyond reach.” N.C. R. EVID. 804 commentary. One case has found that a lack of memory about the details of the out-of-court statement, as opposed to the subject of the statement, rendered the witness unavailable. This approach may not be in accord with the requirements of the rule. *See State v. Brigman*, 178 N.C. App. 78, 87–90 (2006) (holding that it was not an abuse of discretion for the trial court to find the children unavailable and to admit their statements where the children testified on voir dire that they had told their foster parents about the things the defendant had done to them but they could not remember what they said).

3. Notice, trustworthiness, probative value, and other criteria. For a statement to be admitted under Rule 804(b)(5), six conditions must be satisfied (in addition to the declarant’s being unavailable). The six conditions also apply to Rule 803(24) (although unavailability of the declarant is not an explicit requirement, as described in 1., above). Under both rules, the trial judge must make findings on all six requirements. *See State v. Dammons*, 121 N.C. App. 61, 64 (1995) (requiring the trial court to make these six determinations for statements offered under Rule 804(b)(5)); *In re Gallinato*, 106 N.C. App. 376, 377–78 (1992) (error for the court not to make the findings under Rule 803(24); the rationale for this requirement is to ensure that the trial court undertakes serious and careful consideration of admissibility).

(a) Conditions. The six conditions that must be satisfied are:

- The proponent must give the adverse party written notice of intention to offer the statement and its particulars, including the name and address of the declarant, sufficiently in advance of offering the statement to provide a fair opportunity to meet the statement.
- The statement must not be specifically covered by any other hearsay exception.
- The statement must have circumstantial guarantees of trustworthiness equivalent to those of the specifically listed exceptions.
- The statement must be offered as evidence of a material fact.
- The statement must be more probative on the point for which it is offered than any other evidence procurable by reasonable efforts.
- Admission of the statement will best serve the purposes of the rules of evidence and the interests of justice.

See State v. Smith, 315 N.C. 76 (1985) (setting forth the six-part test).

- (b) Notice.** The cases have stressed the importance of proper notice, although they have allowed relatively short notice when the circumstances showed that the adverse party had sufficient time and information to meet the statement. *See State v. Carrigan*, 161 N.C. App. 256, 260–62 (2003) (noting that some North Carolina cases have found notice given at the beginning of trial to be sufficient when notice was effectively given earlier through oral notice or discovery; finding in this case that the proponent did not give sufficient notice when he first notified the other side of his intent to offer evidence under the residual hearsay exception at the beginning of trial); *In re Hayden*, 96 N.C. App. 77, 82 (1989) (holding evidence inadmissible under Rule 803(24) because no notice was given); *see also* 2 BRANDIS & BROUN § 241, at 941 & n.763 (collecting cases).
- (c) Trustworthiness.** In considering whether a statement has sufficient guarantees of trustworthiness, courts consider various factors. *See Idaho v. Wright*, 497 U.S. 805 (1990) (noting that courts have considered the spontaneity of statements, consistent repetition, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of motive to fabricate); *State v. Isenberg*, 148 N.C. App. 29, 35–36 (2001) (court should consider among other factors: “(1) assurances of the declarant’s personal knowledge of the underlying events, (2) the declarant’s motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination” (quoting *State v. Wagoner*, 131 N.C. App. 285, 290 (1998))). (The last factor was interpreted in *State v. Nichols*, 321 N.C. 616, 624–25 & n.2 (1988), as requiring consideration of the reason for the witness’s unavailability.) A finding of trustworthiness is particularly important because it overcomes the presumption of unreliability of statements that are not within a specific hearsay exception. *State v. Dammons*, 121 N.C. App. 61, 65 (1995).

For application of the trustworthiness factor in cases involving child witnesses in North Carolina, see *State v. Deanes*, 323 N.C. 508 (1988) (upholding a finding that statements had sufficient circumstantial guarantees of trustworthiness); *State v. Brigman*, 178 N.C. App. 78 (2006) (to same effect); *State v. Isenberg*, 148 N.C. App. 29, 35–36 (2001) (to same effect); *State v. Wagoner*, 131 N.C. App. 285, 289–90 (1998) (child’s incompetence to testify satisfied the unavailability requirement but did not render her statements to a social worker too untrustworthy to be admitted); *State v. Holden*, 106 N.C. App. 244, 251–52 (1992) (distinguishing *Stutts*, below, and finding that the trial court’s isolated statement that the child seemed unable to understand the consequences of not telling the truth did not undermine the finding that the statements were sufficiently trustworthy to be admissible); *State v. Stutts*, 105 N.C. App. 557 (1992) (holding that the child’s statements were inadmissible under the residual hearsay exception where the trial court found the child unavailable as a witness on the ground that the child could not tell truth from fantasy).

11.7 Prior Orders and Proceedings and Judicial Notice

A. Generally

Numerous North Carolina appellate decisions, discussed in this section, state that the trial court in a juvenile case may take judicial notice of prior proceedings in the same case. As one juvenile case observed, however, the extent to which the trial court actually may rely on prior proceedings is unclear. *See In re S.W.*, 175 N.C. App. 719, 725 (2006). The most troublesome question is the extent to which a trial court at an adjudication hearing, such as an adjudication hearing in a TPR case, may rely on prior abuse, neglect, and dependency proceedings, including disposition and review hearings at which the rules of evidence do not apply. Juvenile decisions on judicial notice have not clearly answered that question. Many decisions, discussed further below, have bypassed close analysis of the permissible reach of judicial notice by relying on the presumption that the trial court disregarded any incompetent evidence in the judicially noticed matters and made an independent determination of the issues in the current proceeding. *See, e.g., In re D.M.R.*, ___ N.C. App. ___, 753 S.E.2d 400 (2013) (unpublished) (stating these principles and finding it immaterial that court copied language from its prior order because there were sufficient, properly supported findings to show grounds for termination); *In re J.W.*, 173 N.C. App. 450, 455–56 (2005) (stating these principles), *aff'd per curiam*, 360 N.C. 361 (2006); *In re J.B.*, 172 N.C. App. 1, 16 (2005) (to same effect). Some recent juvenile decisions, however, suggest that the courts may scrutinize more closely the materials claimed to be the subject of judicial notice.

To determine the extent to which the trial court may rely on prior proceedings, three basic questions must be addressed:

- First, what are the different aspects of prior proceedings that potentially could be considered? Prior proceedings may consist of orders and other entries in the court's records, findings and conclusions by the court, reports and other documentary evidence offered by the parties, and testimony by witnesses.
- Second, what are the appropriate legal principles governing consideration of the different aspects of prior proceedings? While the juvenile cases have relied primarily on the doctrine of judicial notice, other doctrines, such as collateral estoppel and the rules on hearsay, may be more appropriate in some instances.
- Third, what is the impact of the information from prior proceedings? Some information may be binding, other information may be admissible but not binding, and other information may be inadmissible if the opposing party objects.

The discussion below addresses the different aspects of prior proceedings and suggests the appropriate treatment for each. The discussion leans more heavily on decisions outside the juvenile context than in other parts of this chapter because those decisions more closely analyze the requirements for judicial notice and other doctrines regulating reliance on prior proceedings. The discussion also attempts to order the North Carolina decisions according to the categories identified below. The decisions themselves do not always characterize the information in that way. The approach below reflects the author's analysis of the controlling principles under North Carolina law. First, however, the discussion describes the doctrine of

judicial notice because the juvenile decisions so often refer to it in considering prior proceedings.

Note: The discussion in this section concerns whether information from prior proceedings may be considered at adjudication. Because the rules of evidence do not apply at disposition and other non-adjudication hearings, a court at those hearings may have greater latitude in considering prior proceedings, just as it has greater latitude at non-adjudication hearings in considering evidence that would be inadmissible at adjudication. *See, e.g., In re R.A.H.*, 182 N.C. App. 52, 59–60 (2007) (at a permanency planning hearing, the court could take judicial notice of findings from a previous disposition hearing); *In re Isenhour*, 101 N.C. App. 550, 552–53 (1991) (in a custody review hearing under previous Juvenile Code provisions, the court could take judicial notice of matters in the file in considering the history of the case and conducting the current hearing); *see also State v. Smith*, 73 N.C. App. 637, 638–39 (1985) (at resentencing in a criminal case following appeal, at which rules of evidence did not apply, the court could consider evidence offered at the prior sentencing hearing).

B. Definition of Judicial Notice

1. Generally. Evidence Rule 201 contains the general definition of judicial notice. It covers “adjudicative facts,” meaning it allows a court to take judicial notice of a fact for the purpose of adjudicating the issues in the current case. N.C. R. EVID. 201(a) & commentary. The term “adjudicative fact” should not be confused with facts adjudicated in a previous proceeding, which may or may not be the proper subject of judicial notice (discussed in D., below).

For a fact to be subject to judicial notice, it must “be one not subject to reasonable dispute.” N.C. R. EVID. 201(b). A fact is not subject to reasonable dispute if it either is “generally known within the territorial jurisdiction of the trial court” or “is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Id.* For example, a court may take judicial notice of the time that the sun set on a particular date. *See State v. McCormick*, 204 N.C. App. 105 (2010). The fact to be noticed also must be relevant to the issues in the case as provided in Evidence Rule 401.

When a court takes judicial notice of a fact on the ground that it is not subject to reasonable dispute, evidence of the fact need not actually be offered in the current proceeding. Further, in a civil case, the taking of judicial notice of a fact removes the fact “from the realm of dispute,” and evidence to the contrary “will be excluded or disregarded.” 1 BRANDIS & BROUN § 24, at 110; *see also* N.C. R. EVID. 201(g) (“In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed”).

A party is entitled on timely request to be heard about the propriety of the taking of judicial notice. If not notified ahead of time, a request to be heard may be made after judicial notice is taken. N.C. R. EVID. 201(e).

2. Judicial notice of prior proceedings. North Carolina decisions often have observed that a trial court may take judicial notice of its prior proceedings.

In cases outside the juvenile context, judicial notice has usually been limited to matters of record, such as the date of filing of an action (discussed in C., below). These decisions are consistent with the approach to judicial notice in Evidence Rule 201 because they involved facts that were not subject to reasonable dispute and that required no further proof. Isolated decisions outside the juvenile context have departed from this approach, allowing the trial court to consider evidence offered in prior proceedings, but these cases do not appear to reflect the general approach to judicial notice; rather, they appear to have involved an effort by the court to fill inadvertent gaps in the evidence in those cases. The decisions also do not appear to impose the usual consequences of judicial notice because they treat the evidence as competent in the current proceeding but not as beyond dispute. *See, e.g., Long v. Long*, 71 N.C. App. 405, 408 (1984) (court could take judicial notice in an alimony suit of information about the husband's expenses from an order for alimony pendente lite; note that the decision appears to have been superseded by later decisions, discussed in D.2.b, below); *In re Stokes*, 29 N.C. App. 283 (1976) (court could take judicial notice of an order in an earlier delinquency case involving the same juvenile to show his age and the court's jurisdiction over the juvenile); *Mason v. Town of Fletcher*, 149 N.C. App. 636 (2002) (in a case in which the parties disputed the width of a right-of-way, the court could take judicial notice of a prior case involving the same parties and could consider evidence from that case about the width of the right-of-way).

In juvenile cases, the courts also have approved the taking of judicial notice of prior proceedings, relying on Evidence Rule 201. In most instances, however, the decisions do not appear to have used judicial notice in the sense meant under that rule. *See, e.g., In re J.W.*, 173 N.C. App. 450, 455–56 (2005) (referring to Evidence Rule 201 but suggesting that the noticed matters were disputed and subject to further proof by stating that the trial court was presumed to have disregarded any incompetent evidence and had to make an independent determination), *aff'd per curiam*, 360 N.C. 361 (2006). The approach taken in juvenile cases, as applied to different aspects of prior proceedings, is discussed in the following sections.

Note: If the taking of judicial notice of prior proceedings is impermissible only in part, the objecting party may need to specify the objectionable part; an objection to the taking of judicial notice of all of the proceedings may be insufficient. *See generally* 1 BRANDIS & BROUN § 20, at 92 (so noting for objections to testimony or documents that are inadmissible in part). If the judge sustains an objection to the taking of judicial notice of all of the proceedings, the offering party would need to specifically reoffer the unobjectionable parts of the proceedings. *Id.*

C. Orders and Other Court Records

1. Summary. This section addresses information entered or appearing in the court's records, such as the date of filing of a case or an order requiring a party to take certain action. It does not address findings and conclusions within a prior order; nor does it deal with reports or other evidence introduced in prior proceedings, which although they become part of the court file are not record entries in the sense discussed in this section.

A juvenile court may take judicial notice of prior orders by a court and other entries in court records in the sense used here. In a TPR case, for example, it would be appropriate for a trial court to take judicial notice of a prior permanency planning order changing the permanent plan from reunification to adoption. The fact of the prior order and the directives within it are not subject to reasonable dispute and require no further proof to establish them, as contemplated by Evidence Rule 201.

2. Judicial notice of record entries. North Carolina decisions have routinely approved the taking of judicial notice of entries in court records. Decisions have done so, for example, to determine the chronology of litigation, such as the timeliness of a summons or the filing of an appeal. *See, e.g., In re McLean Trucking Co.*, 285 N.C. 552, 557 (1974) (court could determine the chronology of litigation by taking judicial notice of docketed records); *Gaskins v. Hartford Fire Ins. Co.*, 260 N.C. 122, 124 (1963) (court could determine whether a complaint was filed within the time permitted for submitting a claim of loss by taking judicial notice of the filing date of the complaint); *Massenburg v. Fogg*, 256 N.C. 703, 704 (1962) (docketing of appeal); *Harrington v. Comm'rs of Wadesboro*, 153 N.C. 437 (1910) (issuance of summons); *State v. King*, 218 N.C. App. 384 (2012) (court of appeals could take judicial notice of clerk's records showing amount of fine and costs paid by defendant); *Slocum v. Oakley*, 185 N.C. App. 56 (2007) (in determining a motion to dismiss the plaintiffs' lawsuit for failure to prosecute, the court could take judicial notice of the plaintiffs' previous dismissal of a related case and other documents in the court's files showing the failure to prosecute the prior case).

Decisions also have allowed judicial notice of the entry of orders to show the existence of the order and its terms. *See, e.g., State v. McGee*, 66 N.C. App. 369 (1984) (magistrate's contempt order was properly admitted in evidence because the court could have taken judicial notice of the order, without its being offered into evidence, to determine whether the magistrate had the authority to hold the defendant in contempt; contempt order was reversed, however, where the State relied solely on statements in the magistrate's order and offered no independent evidence of acts of contempt).

Juvenile decisions likewise have allowed judicial notice of the entry of orders and other record entries in prior proceedings. These decisions are consistent with North Carolina decisions on judicial notice outside the juvenile context. *See, e.g., In re D.K.*, ___ N.C. App. ___, 745 S.E.2d 374 (2013) (unpublished) (trial court took judicial notice of decretal portions of prior orders and made findings about respondent's failure to comply); *In re D.B.G.*, 222 N.C. App. 854 (2012) (unpublished) (stating that trial judge could take judicial notice of prior orders since it is presumed that judge disregarded incompetent evidence; court found that judge relied on prior orders primarily for procedural history); *In re F.H.*, 209 N.C. App. 470 (2011) (unpublished) (taking judicial notice of terms of prior visitation order); *In re A.S.*, 203 N.C. App. 140 (2010) (court of appeals stated that it could take judicial notice of its prior decision in finding that the trial court on remand relied on a finding that the court of appeals had disavowed); *In re S.W.*, 175 N.C. App. 719, 725–26 (2006) (court could take judicial notice of the entry of prior orders terminating the mother's parental rights to three other children); *In re Stratton*, 159 N.C. App. 461, 462–63 (2003) (court could take judicial notice of a termination order to determine whether the current appeal was moot); *In re Williamson*,

67 N.C. App. 184, 185–86 (1984) (court could take judicial notice of a custody order to determine whether the current appeal was moot).

A number of juvenile decisions state generally that the trial court may take judicial notice of prior orders, but they do not identify the parts of the order being noticed or the purpose for which they could be used. *See, e.g., In re S.D.J.*, 192 N.C. App. 478, 487–88 (2008) (stating generally that a court may take judicial notice of prior orders, but also stating that the court is presumed to have disregarded incompetent evidence within the noticed matters). These decisions provide little guidance on the appropriate scope of judicial notice.

D. Findings and Conclusions by Court

1. Summary. This section deals with findings and conclusions from a prior proceeding, such as a determination at an adjudication hearing that a child is neglected or a finding at a review hearing that a parent is not making progress on certain matters. While judicial notice can establish that a particular record *is* the record of prior proceedings (as discussed in the preceding section), the applicable doctrine for considering findings and conclusions from orders in that record is ordinarily *not* judicial notice. *See generally U.S. v. Zayyad*, 741 F.3d 452, 464 (4th Cir. 2014) (“[f]acts adjudicated in a prior case, or in this instance, a prior trial in the same case, do not meet either test of indisputability in [Federal Evidence] Rule 201(b)”) (citation omitted); 1 STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* § 201.02[3], at 201-8 (10th ed. 2011) (explaining that a court may take judicial notice that a judgment was entered or that findings of fact were made, but “the truth of these . . . findings are not proper subjects of judicial notice”); N.C. R. EVID. 201 commentary (noting that N.C. Evidence Rule 201(b) is substantively the same as Federal Evidence Rule 201(b)).

The applicable doctrines and their impact appear to be as follows:

- The court may consider findings and conclusions from orders in prior proceedings if collateral estoppel applies, in which case the findings and conclusions are binding in a later proceeding. Collateral estoppel applies to findings from prior adjudication hearings but not to findings from non-adjudication hearings.
- If collateral estoppel does not apply, under the rules of evidence prior judgments and orders do not appear to be admissible as evidence of the facts found except in limited circumstances.
- Formal concessions in prior proceedings, such as stipulations of fact, are likely binding in later proceedings against the party who made the concession or entered into the stipulation.

2. Collateral estoppel. The doctrines of res judicata and collateral estoppel permit consideration of findings from prior proceedings because their very purpose is to preclude a party from relitigating claims or issues decided in prior proceedings. Most relevant to juvenile cases is the doctrine of collateral estoppel (or issue preclusion), which bars the parties “from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.” *In re N.G.*, 186 N.C. App. 1, 4 (2007) (quoting *In re Wheeler*, 87 N.C. App. 189, 194 (1987)), *aff’d per curiam*, 362 N.C. 229 (2008).

When applicable, the effect of collateral estoppel is comparable to judicial notice, removing the matter from further dispute, but it is misleading to use the term “judicial notice” because it does not adequately identify the requirements for collateral estoppel. *See generally In re C.D.A.W.*, 175 N.C. App. 680, 686–87 (2006) (respondent objected to the court’s taking of judicial notice of prior findings, but the court observed that the “basis of respondent’s objection is that petitioner should not have the benefit of collateral estoppel with respect to previous findings of fact not determined by the requisite standard of proof required in a termination of parental rights proceeding”; the respondent showed no prejudice in this case), *aff’d per curiam*, 361 N.C. 232 (2007). It would be appropriate, however, for a court to take judicial notice of a prior order for the purpose of establishing the prerequisites of collateral estoppel. *See Eagle v. Johnson*, 159 N.C. App. 701 (2003) (so holding for related doctrine of res judicata).

(a) Prior adjudication findings and conclusions. Juvenile cases have recognized that the trial court may rely on a prior determination of abuse or neglect in a later TPR case to show the occurrence of prior abuse or neglect. The prior finding or determination is conclusive as to the condition of the child at that time (although it is not conclusive on the question of whether the parents’ rights should be terminated because the court still must consider the circumstances since the time of the adjudication as well as the relevant actions or inactions of each parent). *See In re N.G.*, 186 N.C. App. 1, 4–5 (2007), *aff’d per curiam*, 362 N.C. 229 (2008); *In re A.K.*, 178 N.C. App. 727 (2006) (based on collateral estoppel, the court could rely on a prior adjudication of neglect of one child of the parents in determining in a later case whether another child of the same parents was neglected; the prior adjudication was insufficient alone, however, to establish that the second child was neglected); *see also In re G.N.*, 217 N.C. App. 399 (2011) (unpublished) (father was estopped from contesting adjudication of neglect based on consent order; father’s counsel signed order and did not object to order when offered at later proceeding).

The above cases explicitly refer to the doctrine of collateral estoppel, while others state that a determination of abuse or neglect is admissible in a later proceeding. *See, e.g., In re Ballard*, 311 N.C. 708, 713–14 (1984); *In re J.H.K.*, 215 N.C. App. 364, 368 (2011); *In re Brim*, 139 N.C. App. 733, 742 (2000); *In re Byrd*, 72 N.C. App. 277, 279 (1985). The result appears to be the same. The prior determination at adjudication establishes the matter found for purposes of the subsequent proceeding. *See In re Wheeler*, 87 N.C. App. 189, 194 (1987) (noting similarities in the two approaches).

When collateral estoppel applies, a court may rely on the ultimate conclusion reached in the prior proceeding (for example, that a child was abused) as well as subsidiary findings (for example, that a parent had engaged in a sexual act with the child). *See id.* (prior finding of sexual abuse of children by father had been fully litigated and was necessary to adjudication of abuse).

(b) Prior findings and conclusions from non-adjudication proceedings. Recent juvenile decisions have clarified that collateral estoppel applies to findings from a prior proceeding only if the findings were based on clear and convincing evidence, the standard applicable to findings at adjudication. *See In re N.G.*, 186 N.C. App. 1, 9 (2007), *aff’d per curiam*,

362 N.C. 229 (2008) (holding that the doctrine of collateral estoppel permits trial courts to rely only on those findings of fact from prior orders that were established by clear and convincing evidence); *In re A.K.*, 178 N.C. App. 727, 731–32 (2006) (to same effect). Collateral estoppel therefore would not apply to findings from non-adjudication hearings, at which the clear and convincing evidence standard does not apply. *See also In re K.A.*, ___ N.C. App. ___, 756 S.E.2d 837, 841–43 & n.4 (2014) (trial court erred in abuse, neglect, and dependency proceeding by applying doctrine of collateral estoppel to prior civil custody proceedings because proceedings involved different burdens of proof—preponderance of the evidence in civil custody case versus clear and convincing evidence at adjudication in abuse, neglect, and dependency case; court also rejected argument that juvenile decisions allow trial judge to take judicial notice of facts in prior disposition orders subject to lower evidentiary standard, stating that taking judicial notice of the existence of an order or a disposition in an order “is not the same thing as taking judicial notice of each of the facts resolved in that order”); *In re J.S.B.*, 183 N.C. App. 192, 202–03 (2007) (judgment in a civil action is not admissible in subsequent criminal prosecution although exactly the same questions are in dispute because, among other reasons, the standard of proof in the civil action is lower).

Some juvenile decisions have suggested that a court may take judicial notice of findings not subject to the clear and convincing evidence standard, but these decisions appear to be superseded by the above decisions applying collateral estoppel principles. *See In re M.N.C.*, 176 N.C. App. 114, 120–21 (2006) (in a TPR case, permitting the court to take judicial notice of prior findings on the respondent’s progress in completing remedial efforts ordered at prior review hearings); *see also In re Johnson*, 70 N.C. App. 383, 388 (1984) (in a TPR case, noting that the trial court reviewed prior orders detailing the parents’ lack of progress between the initial juvenile petition and TPR order).

Note: The cases do not distinguish between TPR proceedings by petition, which initiates a new case, and TPR proceedings by a motion in the cause, which is part of an ongoing case; however, the result would appear to be the same. In both instances the findings from prior non-adjudication hearings would not appear to be binding in later proceedings because they would not have been subject to the clear and convincing evidence standard. *See also* 18 JAMES WM. MOORE ET. AL., MOORE’S FEDERAL PRACTICE § 134.20[1], at 134-52 (3d ed. 2015) (collateral estoppel limits relitigation of an issue after final judgment; doctrine of the law of the case is similar in limiting relitigation of issues decided at various stages of the same litigation).

Collateral estoppel likely would not apply even if the trial court at a non-adjudication hearing stated that clear and convincing evidence supported its findings. The court’s decisions in *In re N.G.* and *In re A.K.*, cited above, reflect an unwillingness to accord collateral estoppel effect—that is, to bar a party from litigating an issue—based on findings from non-adjudication hearings. In addition, collateral estoppel principles do not apply to bar a party from litigating an issue unless he or she had a full and fair opportunity to litigate that issue in a prior proceeding. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980) (recognizing that “the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a ‘full and fair opportunity’ to litigate

that issue in the earlier case”); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (recognizing due process basis for the requirement); *In re N.G.*, 186 N.C. App. at 4, *aff’d per curiam*, 362 N.C. 229 (2008) (recognizing that doctrine of collateral estoppel operates to preclude parties from retrying “fully litigated issues”) (citation omitted). Because of the reduced procedural protections at non-adjudication hearings, collateral estoppel may not apply to findings from non-adjudication hearings for that reason as well. *See generally Wells v. Wells*, 132 N.C. App. 401, 409–15 (1999) (in an alimony case, collateral estoppel did not preclude wife from relitigating at the final alimony hearing issues ruled on in interim postseparation support hearing in the same case; the court notes the relaxed rules of evidence, the lack of a right to appeal, and other characteristics distinguishing the interim and final hearings); *accord Langdon v. Langdon*, 183 N.C. App. 471, 474 (2007).

- (c) Hearsay restrictions.** If collateral estoppel does not apply, findings and conclusions within a prior judgment are ordinarily inadmissible in a later proceeding because they are a form of hearsay—statements made outside the current proceeding, offered as evidence of the truth of those statements. *See generally supra* § 11.5.C (discussing the definition of hearsay). “It is chiefly on this ground that, except where the principle of *res judicata* [or the related principle of collateral estoppel] is involved, the judgment or finding of a court cannot be used in another case as evidence of the fact found.” 2 BRANDIS & BROWN § 197, at 781–82; *see also Reliable Props., Inc. v. McAllister*, 77 N.C. App. 783, 787 (1985) (“North Carolina law has long prohibited the use of a previous finding of a court as evidence of the fact found in another tribunal. This practice remains the same under the new evidence code.”) (citation omitted); *cf. Bumgarner v. Bumgarner*, 231 N.C. 600, 601 (1950) (facts found on a motion for alimony pendente lite, a preliminary proceeding in an alimony action, “are not binding on the parties nor receivable in evidence on the trial of the issues”).

Findings from a previous judgment are admissible in a later proceeding if the judgment comes within a hearsay exception. *See generally* N.C. R. EVID. 802 (“Hearsay is not admissible except as provided by statute or by these rules.”). North Carolina’s evidence rules contain one hearsay exception for prior judgments, and ordinarily it would not apply in juvenile cases. *See* N.C. R. EVID. 803(23) & commentary (exception applies to “[j]udgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation”; the commentary notes the need for having an exception because judgments generally cannot be used to prove facts essential to a judgment except where the principle of *res judicata* applies).²

2. When it enacted the rules of evidence, North Carolina chose not to include a second hearsay exception, patterned after Federal Rule of Evidence 803(22), for criminal convictions. The federal hearsay exception allows use of a judgment of conviction to prove “any fact essential to sustain the judgment” in the circumstances described in the exception. Because North Carolina omitted this exception, a criminal conviction is generally not admissible in a later case to establish the facts of the offense underlying the conviction unless principles of *res judicata* or collateral estoppel apply. *See* N.C. R. EVID. 803 commentary (noting that exception (22) is reserved for future codification because North Carolina did not adopt the equivalent of the federal hearsay exception for judgments of conviction); *Carawan v. Tate*, 53 N.C. App. 161, 164 (1981) (holding that evidence of conviction of assault was not admissible in a civil action to establish the commission of the assault), *aff’d as modified on other grounds*, 304 N.C. 696

Juvenile cases have not specifically addressed the applicability of hearsay restrictions to prior findings from non-adjudicatory hearings, such as nonsecure custody or disposition hearings. If collateral estoppel and hearsay principles apply, findings from a non-adjudicatory hearing ordinarily would be inadmissible at an adjudicatory hearing. This result would not preclude a party from offering testimony or other admissible evidence on the issues that were the subject of non-adjudicatory findings—for example, evidence of the condition of a parent’s home or evidence that a parent had or had not taken certain steps directed by the court. If the rules of evidence do not preclude a party from introducing non-adjudicatory findings at an adjudicatory hearing in a juvenile case, the findings at most would be admissible but not binding (because the findings would not satisfy collateral estoppel requirements). The North Carolina courts have not articulated a rationale, however, for such an approach under the rules of evidence, which apply to adjudicatory hearings. *Cf. In re Ballard*, 63 N.C. App. 580, 590 (1983) (Wells, J., dissenting) (dissent suggests that under due process requirements, a party might be permitted to offer prior findings as some evidence of issues previously heard, subject to rebuttal or refutation; dissent does not address impact of rules of evidence, and it is also unclear whether the prior findings in question were made at an adjudicatory or non-adjudicatory hearing), *rev’d on other grounds*, 311 N.C. 708 (1984).

3. Formal concessions; stipulations of fact. Formal concessions of a party during litigation, such as stipulations of fact, are considered “judicial admissions.” *See In re I.S.*, 170 N.C. App. 78, 86 (2005); *see also* G.S. 7B-807(a) (allowing court to find from evidence, including stipulations, that allegations in abuse, neglect, and dependency proceeding have been proven by clear and convincing evidence). They remain in effect for the duration of the case, ordinarily “preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish the stipulated fact.” *Id.* (quoting *Thomas v. Poole*, 54 N.C. App. 239, 241 (1981)); *see also* 2 BRANDIS & BROUN § 198, at 784–87 (describing effect of formal concessions and stipulations and circumstances in which they may not be binding); *In re A.K.D.*, ___ N.C. App. ___, 745 S.E.2d 7 (2013) (stipulation is judicial admission and binding, but stipulation as to question of law is generally “invalid and ineffective”).

(1982); *see also* 2 BRANDIS & BROUN § 197, at 781 n.74 (collecting cases). *But cf. Little v. Little*, ___ N.C. App. ___, 739 S.E.2d 876 (2013) (finding it unnecessary to determine whether plaintiff in action for domestic violence protective order could rely on non-mutual offensive collateral estoppel as basis for using defendant’s prior assault conviction to establish that defendant engaged in acts of domestic violence against her; judge in criminal case entered prayer for judgment continued, which was not final judgment); *Burton v. City of Durham*, 118 N.C. App. 676 (1995) (allowing defendant city in civil rights action to rely on non-mutual defensive collateral estoppel as basis for using plaintiff’s prior conviction of assault on officer to preclude plaintiff from relitigating certain issues).

Other grounds may still allow use of a criminal conviction or aspects of it. For example, the fact of conviction, as opposed to the facts underlying the conviction, may be used to impeach a witness or, in juvenile cases, to show a basis for abuse designated in the Juvenile Code. *See infra* § 11.8.D.3 (discussing this basis of admissibility of a prior conviction). A guilty plea, being an admission, generally would be admissible in a later civil action against the party who entered the plea. *See supra* § 11.6.B (discussing hearsay exception for admissions of party-opponent); *see also* Michael G. Okun & John Rubin, [Employment Consequences of a Criminal Conviction in North Carolina](#), POPULAR GOV’T, Winter 1998, at nn.64–66 and accompanying text (1998) (discussing the admissibility of a guilty plea as opposed to a conviction). *But see infra* § 11.8.D.3 (explaining that when a party is relying on Evidence Rule 404(b) to show another crime, wrong, or act, the proponent generally may not rely on a criminal conviction).

If a stipulation is from a previous case, it may not preclude a party from litigating the issue in a subsequent case. For purposes of this discussion, however, whether an abuse, neglect, and dependency proceeding is considered a part of or separate from a later TPR proceeding may be inconsequential. In *In re Johnson*, 70 N.C. App. 383, 387–88 (1984), the court considered a prior abuse, neglect, and dependency case to be part of the same “controversy” as a later TPR case and held that a stipulation from the prior proceeding was a binding judicial admission in the later proceeding. If an abuse, neglect, and dependency case should be considered separate from a TPR case, a stipulation from the prior case may still bar relitigation of the issue in the subsequent case based on the principle of “judicial estoppel.” See, e.g., *Bioletti v. Bioletti*, 204 N.C. App. 270, 275 (2010) (doctrine of judicial estoppel, which applies to the same or related litigation, prevents a party from asserting a legal position inconsistent with one taken earlier in litigation). At the least, a stipulation from a prior case may constitute an “evidential admission,” which is not conclusive in a later case but is still admissible. See 2 BRANDIS & BROUN § 203, at 803–04; *UNCC Props., Inc. v. Greene*, 111 N.C. App. 391, 395 (1993) (statement contained in an answer from another proceeding was evidential, not judicial, admission).

E. Documentary Evidence, Court Reports, and Other Exhibits

1. Summary. This section deals with evidence offered in prior proceedings, including reports presented to the court. No established doctrine allows the trial court in one proceeding to take judicial notice of documentary evidence and other exhibits received in prior proceedings. The documentary evidence must satisfy the rules of evidence applicable to the current proceeding. Juvenile decisions, however, appear to allow the trial court to consider documentary evidence from prior proceedings, if admissible in the current proceeding, without the evidence being physically reoffered.

2. Juvenile cases on documentary evidence. Juvenile cases have stated that the trial court may take judicial notice of the underlying case file, including reports submitted to the court in prior disposition hearings. See, e.g., *In re W.L.M.*, 181 N.C. App. 518 (2007). It does not appear, however, that the decisions mean that the information in the reports is conclusively established, as under the traditional approach to judicial notice, or even that the information is admissible in the later proceeding. See *id.* (relying on the presumption that the trial court disregarded incompetent evidence in the files). Rather, it appears that the decisions mean that reports and other evidence received in a prior proceeding do not necessarily have to be physically reoffered into evidence to be considered by the trial court. See generally *In re J.M.*, 190 N.C. App. 379 (2008) (unpublished) (stating that the court at an adjudication hearing may consider prior proceedings but must evaluate the proceedings in accordance with the rules of evidence).

If this construction is correct, a party still may object to a court report and other documents that were received in a prior proceeding. Thus, a party may object to a document on the ground that the document does not meet the requirements for admission under the hearsay exception for business records or another hearsay exception. See *supra* § 11.6.F.2 (discussing the requirements for business records and observing that reports to the court likely do not satisfy the requirements). If the document is admissible, a party also may have grounds to

object to information within the document. *See supra* § 11.6.F.3 (discussing admissibility of information within a business record).

F. Testimony

1. Summary. This section addresses testimony from prior proceedings, including testimony from adjudication and nonadjudication hearings. Testimony from prior proceedings is hearsay if offered for the truth of the matter asserted in the testimony. It is improper for a trial court to admit testimony from a prior proceeding unless the testimony satisfies a hearsay exception or is offered for a purpose other than its truth, such as impeachment of a witness's current testimony by his or her prior inconsistent testimony.

2. Hearsay nature of prior testimony. A witness's testimony from a prior proceeding, if offered for its truth, is a form of hearsay because it consists of statements made outside the current proceeding. *See generally supra* § 11.5.C (discussing the definition of hearsay). Even when the testimony is admissible at the prior proceeding—for example, the testimony recounted the witness's own observations and did not consist of hearsay statements—the prior testimony itself is hearsay when offered for its truth and is inadmissible at a later proceeding unless it satisfies a hearsay exception.

Evidence Rule 804(b)(1) governs “former testimony” and applies to testimony given “at another hearing of the same or a different proceeding.” The rule creates an exception for former testimony if two basic conditions are satisfied. First, the witness must be unavailable at the current proceeding. *See* N.C. R. EVID. 804(a) (stating the definition of unavailability); *see generally supra* § 11.6.H.2 (discussing unavailability). Second, the party against whom the former testimony is now offered must have had an opportunity and similar motive to develop the testimony at the prior proceeding. Testimony from a prior nonadjudication hearing, such as a review hearing, may not satisfy this second requirement because the rules of evidence do not apply at such hearings, limiting the opposing party's ability to address the testimony, and because the purposes of review hearings and adjudications differ, which may bear on the opposing party's incentive to address the testimony.

If the testimony at the prior proceeding was given by a person who is a party in a later proceeding—for example, a parent—the testimony would be admissible against that party as an admission of a party-opponent. *See In re K.G.*, 198 N.C. App. 405 (2009) (unpublished) (holding that statements made by respondent-parents at a prior hearing on a domestic violence protective order were admissible as admissions of party-opponents at adjudication in a neglect case). This exception would not permit a party to offer the party's own prior testimony at a later proceeding—for example, DSS could not rely on this exception to offer the prior testimony of one of its employees. *See generally supra* § 11.6.B.3 (discussing the application of the exception to admissions).

Decisions recognize that judicial notice is not a proper device for considering prior testimony. *See Hensey v. Hennessy*, 201 N.C. App. 56, 68–69 (2009) (in a case involving a domestic violence protective order, the trial court could not take judicial notice of testimony from prior criminal proceedings; the facts that were the subject of the testimony must not reasonably be

in dispute); *In re J.M.*, 190 N.C. App. 379 (2008) (unpublished) (testimony from a previous proceeding, when offered for the truth of the matter asserted, is hearsay and is not admissible at a proceeding at which the rules of evidence apply unless it satisfies a hearsay exception; judicial notice may not be used as a substitute for complying with hearsay restrictions on the admissibility of former testimony).

11.8 Character and Prior Conduct

A. Generally

“Character comprises the actual qualities and characteristics of an individual.” 1 BRANDIS & BROUN § 86, at 272. Thus, a person may have a violent character or a law-abiding character or a truthful one.

Three basic types of evidence are potentially admissible to show a person’s character:

- specific acts by the person,
- opinion about the person, and
- the person’s reputation in the community.

The admissibility of these different types of character evidence depends on the theory under which the evidence is offered. The theory of admissibility also controls other rules regulating character evidence, such as whether a party may elicit character evidence on cross-examination only or may offer extrinsic evidence as well. For a chart identifying the basic theories for offering character evidence and the rules governing the admissibility of such evidence for each theory, see John Rubin, [*What’s Your Theory of Admissibility: Character Evidence, Habit, and Prior Conduct*](#) (UNC School of Government, April 2010).

The rules on character evidence rarely have been addressed in appellate decisions in juvenile proceedings, perhaps because evidence of a type similar to character evidence is admitted for noncharacter purposes. The discussion below first addresses the different theories of admissibility for character evidence and then discusses the theories of admissibility that potentially apply in juvenile proceedings. The discussion also addresses (in D., below) the admissibility of prior conduct for noncharacter purposes under Evidence Rule 404(b).

B. Theories of Admissibility of Character Evidence

1. Character directly in issue. One theory of admissibility of character evidence is that a person’s character is directly in issue. This theory applies in a narrow range of cases, “as in litigation to determine the custody of children when the fitness of one or both parents is in issue, or when the issue is the good moral character of an applicant for admission to the bar.” 1 BRANDIS & BROUN § 86, at 273. When character is directly in issue, specific acts, lay opinion, and reputation are admissible. *See* N.C. R. EVID. 405(a), (b).

Evidence about character is still subject to general evidence requirements. Thus, the evidence must be relevant to the character issue to be decided—for example, marijuana use in high school may be considered irrelevant to fitness to practice law. *See generally* 1 BRANDIS & BROUN § 100, at 349 (observing that evidence of specific instances of conduct should be confined to those relevant to the trait at issue). The witness also must be qualified to testify about the matter. To testify to specific acts, the witness must have personal knowledge of the acts. To give an opinion about a person’s character, the witness must know the person. To testify to reputation, the witness must know the person’s reputation in the community. (Note that reputation testimony is a form of hearsay, excepted from the hearsay rule by Evidence Rule 803(21), because the witness is testifying to what others in the community think about the person. *See id.* § 96.) Opinion and reputation testimony also must be about matters of character, not factual information about a person’s conduct. *See State v. Collins*, 345 N.C. 170, 173–74 (1996); *State v. Moreno*, 98 N.C. App. 642, 645–46 (1990) (explaining that “not using drugs” is a character trait akin to “sobriety,” but “not dealing in drugs” is evidence of a fact and is not a character trait); *see also* JOHN RUBIN, *THE ENTRAPMENT DEFENSE IN NORTH CAROLINA* 70–71 & n.46 (UNC School of Government, 2001) (discussing the admissibility of opinion and reputation testimony). Testimony on character is subject to exclusion under Evidence Rule 403 if its probative value is substantially outweighed by the danger of prejudice, confusion of the issues, or considerations of undue delay or needless presentation of cumulative evidence. *See also* 1 MCCORMICK § 186, at 1016 (observing that the “pungency and persuasiveness” of character evidence declines as one moves from the specific to the general).

2. Character to show conduct. A second theory of admissibility is when character evidence is offered to show a person’s conduct on a particular occasion. Ordinarily, character is inadmissible to prove conduct. *See* N.C. R. EVID. 404(a) (“Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion” except as otherwise provided). Narrow exceptions exist. In a criminal case, the defendant may offer evidence of a pertinent trait of his or her own character or of the victim, and in rebuttal the State may offer evidence of that person’s character. *See* N.C. R. EVID. 404(a)(1), (2) (describing this ground for admitting character evidence); N.C. R. EVID. 405(a) (describing the method of proving character for this purpose); *see also State v. Walston*, 367 N.C. 721 (2014) (holding in criminal case that trial court did not err in excluding opinion testimony about defendant’s respectful attitude toward children because it was not sufficiently tailored to charges of unlawful sex acts; cites other decisions), *rev’g* ___ N.C. App. ___, 747 S.E.2d 720 (2013); *State v. Wagoner*, 131 N.C. App. 285, 292–93 (1998) (holding that evidence of the defendant’s general psychological makeup was not a pertinent character trait in a prosecution for sexual assault). In either a civil or criminal case, a party also may offer evidence of a habit or routine practice of a person or organization to prove that the person or organization acted in conformity with that habit or practice. *See* N.C. R. EVID. 406.

3. Credibility. A third theory of admissibility is when character evidence is offered on a witness’s credibility. *See* N.C. R. EVID. 404(a)(3). This theory is also an exception to the general rule that character may not be offered to prove conduct. In this instance, character evidence bears on the witness’s conduct on the stand—that is, whether the witness is telling

the truth. Under this theory, evidence is limited to the witness's character for truthfulness or untruthfulness. *See* N.C. R. EVID. 405(a), 607, 608, 609. Under these rules, a lay witness may give an opinion about the character for truthfulness of another person, including a child, if the person's character for truthfulness has been attacked, but neither a lay nor an expert witness may testify that a person is telling or told the truth. *Compare infra* §§ 11.9.B.4, § 11.10.D.1 (discussing this limit on opinion testimony).

4. Opening the door. Last, character evidence may be offered when a party opens the door through the testimony he or she offers. The admissibility of evidence under this theory depends on the circumstances of the case. *See, e.g., State v. Garner*, 330 N.C. 273, 287–90 (1991).

C. Is Character Directly at Issue in Juvenile Cases?

It does not appear that any North Carolina cases have addressed the issue in juvenile cases, but character is likely directly at issue at disposition in both abuse, neglect, and dependency cases and termination of parental rights cases. *See generally* MYERS § 8.02[B], at 911. The focus of the dispositional phase is the best interest of the child, which necessarily is bound up with a determination of the parent's fitness. *See Adoption of Katharine*, 674 N.E.2d 256, 258 (Mass. App. Ct. 1997).

One writer posits that the character of the parent also could be considered at issue at adjudication because the petitioner is seeking to prove what happened in the past to protect the child in the future and evidence of parental character is relevant in this regard. *See* MYERS § 8.02[B], at 911–12. The argument is not an exact fit, however, with the issues to be resolved at adjudication in North Carolina juvenile cases.

When the basis of alleged abuse is a discrete incident—for example, that a parent inflicted serious physical injury or committed a criminal act of a sexual nature—the issue to be decided is whether the incident occurred. In that kind of case, the rules prohibit evidence of the parent's character to show that the incident occurred (although evidence of the parent's past conduct may be admissible for a noncharacter purpose under Evidence Rule 404(b), discussed in D., below).

When the allegations involve a broader inquiry into a parent's conduct—for example, when the basis of alleged neglect is that the juvenile has not received proper care or supervision or lives in an environment injurious to the juvenile's welfare—the question is closer. *See In re Mark C.*, 8 Cal. Rptr. 2d 856, 861–62 (Ct. App. 1992) (observing that the legislature intended to place character at issue “to some extent” when the allegation is that a caretaker's abuse of one child endangers another child). The North Carolina courts have permitted evidence of a parent's past conduct and behavior in a number of such cases, but they have not specifically analyzed whether the evidence is permissible because the parent's character is directly “in issue” or because the conduct is simply relevant evidence of the alleged abuse or neglect. *See supra* § 6.3 (collecting cases showing evidence that may support a finding of abuse or neglect). The North Carolina courts may be reluctant to premise the admission of evidence of prior conduct on the theory that the parent's character is directly in issue because such an

approach would permit a broad range of opinion and reputation testimony (discussed in B.1., above) as well as evidence of specific conduct and behavior. If the basis of admissibility is relevance, evidence of past conduct would be admissible to the extent relevant to the type of abuse or neglect alleged. This would not necessarily be true for opinion or reputation testimony unless admissible on another ground.

D. Rule 404(b) and “Bad Act” Evidence

1. Applicability of rule. Evidence Rule 404(b) prohibits evidence of a person’s crimes, wrongs, or acts when offered “to prove the character of a person in order to show that he acted in conformity therewith.” In other words, it prohibits evidence of other “bad acts” to show that a person had a propensity to commit the current act and therefore committed the act. Rule 404(b) permits evidence of other acts, however, if offered for a noncharacter purpose—that is, if the act is offered for a purpose other than the person’s propensity to commit the current act. In juvenile cases, Rule 404(b) comes into play primarily when the basis of abuse or neglect is a person’s alleged commission of a particular act, such as the infliction of serious injury or commission of a sex act against a child, and the issue is whether other acts by that person are admissible.

Rule 404(b) may not be the correct vehicle for analyzing “bad act” evidence when the alleged basis of abuse or neglect necessarily involves a broader inquiry into the parent’s conduct. In such cases, a parent’s prior conduct may be admissible without regard to Rule 404(b), either because the prior acts themselves are relevant evidence of abuse or neglect or because the parent’s character is directly in issue, as discussed in C., above. *See In re Deantye P.-B.*, 643 N.W.2d 194, 198–99 (Wis. Ct. App. 2002) (court observes that the “other acts” evidence statute in Wisconsin [which is similar to North Carolina’s Rule 404(b)] prevents “fact finders from unnecessary exposure to character and propensity evidence in the context of determining whether a party committed an alleged act”; that concern is not applicable when a fact finder must determine “whether ‘there is a substantial likelihood’ that a parent will not meet conditions for the return of his or her children,” which necessarily involves consideration of a “parent’s relevant character traits and patterns of behavior”); *In re Allred*, 122 N.C. App. 561, 563–65 (1996) (respondent argued that Rule 404(b) barred evidence of prior orders finding neglect of her other four children; the court found that the evidence was relevant and admissible without determining whether the evidence needed to satisfy the other relevant purpose requirement of Rule 404(b)). If Rule 404(b) does apply, evidence of other acts would be admissible if offered for a noncharacter purpose relevant to the alleged basis of abuse or neglect. *See In re Termination of Parental Rights to Teyon D.*, 655 N.W.2d 752, 759–60 (Wis. Ct. App. 2002).

2. Basic requirements for admission of other acts under Rule 404(b). Numerous criminal cases have addressed the applicability of Rule 404(b). Review of those cases is beyond the scope of this discussion. Certain basic principles have emerged, however, which presumably would apply to juvenile cases.

Rule 404(b) is considered a rule of inclusion in North Carolina, allowing evidence of other acts if offered for a relevant purpose and excluding the acts if their only probative value is to

show the defendant's propensity to commit the act in question. *State v. Coffey*, 326 N.C. 268, 278–79 (1990). This formulation means that the list of possible relevant purposes in Rule 404(b)—motive, identity, knowledge, and the like—is not exhaustive. The proponent may offer evidence of other acts for purposes not specifically listed in Rule 404(b) as long as the purpose is relevant to an issue to be decided in the case and is not to show the defendant's character.

- The courts have set an outer limit on relevance, excluding other acts that are too dissimilar or too remote in time in relation to the current act. *See, e.g., State v. Al-Bayyinah*, 356 N.C. 150, 154–55 (2002).
- In prosecutions for sexual offenses, the courts have been “markedly liberal” in finding evidence of other sex acts to be for a relevant noncharacter purpose. *Coffey*, 326 N.C. at 279 (citation omitted). For a discussion of such cases, see Jeff Welty, [*Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2009/04 (UNC School of Government, Aug. 2009).
- Evidence of other acts may be excluded if the probative value of the evidence is substantially outweighed by its prejudicial effect under Evidence Rule 403. *See State v. Smith*, 152 N.C. App. 514, 528 (2002) (trial court must engage in Rule 403 balancing in determining whether to admit evidence under Rule 404(b)); *see also State v. Hembree*, ___ N.C. ___, 770 S.E.2d 77 (2015) (cautioning trial courts to subject 404(b) evidence to strict scrutiny because of its dangerous tendency to mislead and raise spurious presumption of guilt; conviction reversed).

3. Form of proof: prior criminal proceedings. A proponent must show the commission of other acts by admissible evidence. Thus, the proponent must offer live testimony by a person with personal knowledge of the acts or by hearsay within an exception, such as an admission by a party-opponent. *See* 1 IMWINKELRIED § 903, at 9-3. The other act need not have been the subject of a criminal proceeding. By its terms, Rule 404(b) applies to other “crimes, wrongs, or acts.” When the other act has been the subject of criminal proceedings, however, the cases have limited the evidence that may be offered about the proceedings.

Thus, the other act may not be established by an arrest, indictment, or other charge. *See* 1 BRANDIS & BROUN § 98, at 343–44 (discussing this bar in the context of impeachment of a witness). Nor may the other act ordinarily be shown by the bare fact of conviction. *See id.* § 94, at 295–96; *State v. Wilkerson*, 356 N.C. 418 (2002), *rev’g per curiam for the reasons stated in the dissent*, 148 N.C. App. 310 (2002) (dissent, adopted by the supreme court, states this rule and notes exceptions); *State v. Bowman*, 188 N.C. App. 635 (2008) (discussing exceptions but finding them inapplicable in the circumstances of the case). The proponent ordinarily must prove the acts underlying the charge or conviction through admissible evidence (as well as show that the acts are relevant to an issue to be decided in the case and not for character).

The existence of a criminal conviction is admissible, however, when the fact of the conviction itself is a basis for a finding of abuse or a ground for termination of parental rights. *See* G.S. 7B-101(1)d. (providing that the commission of a violation of specified statutes, such as first-

degree rape under G.S. 14-27.2, is abuse); G.S. 7B-1111(a)(1) (providing that a juvenile is deemed abused for the purpose of a termination of parental rights proceeding if the court finds the juvenile to be abused within the meaning of G.S. 7B-101); *Curtis v. Curtis*, 104 N.C. App. 625, 628 (1991) (holding that the father's conviction of first-degree sexual offense against the minor child provided a basis for a finding of abuse).

An arrest or conviction also may be admissible if not offered to show commission of an act but for another purpose, such as why a parent was physically unable to care for a child. See *In re Termination of Parental Rights to Teyon D.*, 655 N.W.2d 752, 759–60 (Wis. Ct. App. 2002) (offenses and sentences were admissible to show why the mother had been unable to take responsibility for her children). A conviction also may be used to impeach a witness's testimony under Evidence Rule 609.

For a further discussion of the admissibility of prior proceedings, see *supra* § 11.7.

E. Rape Shield Law

Evidence Rule 412 modifies the customary rules on character evidence and evidence offered for noncharacter purposes in rape and sex offense cases, barring evidence of opinion and reputation testimony on character and allowing specific act evidence in limited instances only. By its terms, the rule applies only to criminal cases, but the North Carolina courts have held that a trial court may (although apparently is not required to) apply the rule's restrictions to juvenile cases. *In re K.W.*, 192 N.C. App. 646, 648–49 (2008). Asking questions about matters covered by the rape shield law, without following the procedures in the law, could result in sanctions. *State v. Okwara*, 223 N.C. App. 166 (2012) (upholding finding of contempt against defense counsel).

For a discussion of North Carolina's rape shield law, see Jeff Welty, [*Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2009/04 (UNC School of Government, Aug. 2009).

11.9 Lay Opinion

A. Lay and Expert Testimony Distinguished

Two evidence rules distinguish the scope of lay and expert testimony.

1. Rule 602 and the requirement of personal knowledge. Evidence Rule 602 provides that a witness, other than an expert witness, may not testify to a matter unless the witness has personal knowledge of the matter. If a lay witness purports to describe facts that he or she observed, but the description actually rests on statements of others, the testimony is objectionable on the ground that the witness lacks personal knowledge of those matters. If the lay witness testifies directly to the statements of others, the admissibility of the testimony is then assessed in accordance with the rules on hearsay. 1 MCCORMICK § 10, at 62. An expert

witness, in contrast, may base an opinion on facts or data that are not within his or her personal knowledge and are not admissible in evidence, if of a type reasonably relied on by experts in the field.

2. Rule 701 and the allowance of inferences if rationally based on perception and helpful.

Evidence Rule 701 provides that a lay witness's testimony in the form of an opinion or inference is permitted if it is:

- rationally based on the perception of the witness and
- helpful to a clear understanding of the witness's testimony or a determination of a fact in issue.

These requirements both loosen and limit the scope of lay opinion testimony, allowing lay testimony in the form of an opinion but subject to greater restrictions than applicable to experts. The requirement that the opinion be based on the witness's "perception" reiterates that the testimony must be based on firsthand knowledge or observation. N.C. R. EVID. 701 commentary (so stating); *Duncan v. Cuna Mut. Ins. Soc'y*, 171 N.C. App. 403, 407–08 (2005) (generalized observations and opinions about methadone use and abuse by a licensed social worker and substance abuse counselor were not admissible because they were not based on personal knowledge and not offered as expert opinion). The rule loosens the distinction between fact and opinion, allowing the latter if "rationally" based on the witness's perception, but it does not permit opinion testimony that goes beyond rational inferences and requires special expertise. The requirement that the opinion be "helpful" does away with any notion that the opinion must be "necessary" to be admissible, while giving the court discretion to exclude opinion testimony that is unhelpful. *See* N.C. R. EVID. 701 commentary (so stating); *see generally* 2 BRANDIS & BROUN § 175, at 656; *see also In re Wheeler*, 87 N.C. App. 189, 195–97 (1987) (in a case involving termination of a father's parental rights, the court questioned the helpfulness and therefore the admissibility of the mother's opinion that adoption would be best for the children and the GAL's opinion that termination was in the children's best interest [for a discussion of the inadmissibility of opinions in the form of a legal conclusion, see *infra* § 11.10.D.2]).

B. Examples of Permissible and Impermissible Lay Opinion

1. Shorthand statements of fact, including statements about mental and emotional condition.

Many cases recognize that lay witnesses may testify in the form of a "shorthand expression of fact." *See generally* MOSTELLER § 10-2(A), at 10-2 (testimony under "the collective fact or shorthand rendition doctrine" is permissible because there are certain sorts of opinions and inferences that lay witnesses commonly draw, and it would be impractical to require that they describe in detail the subsidiary facts supporting their opinion).

Among other matters, a lay witness may testify about the mental or physical state of another person based on the witness's observations. *See, e.g., State v. Dills*, 204 N.C. 33 (1933) (finding it permissible for a witness to testify that the defendant was "drunk"); *State v. Wade*, 155 N.C. App. 1, 13–14 (2002) (witness could testify to the "instantaneous conclusions of the mind" as to the defendant's mental state, "derived from observation of a variety of facts

presented to the senses at one and the same time’”; included in the witness’s testimony was an opinion that the defendant was a “molester at heart,” which gave the court “pause,” but in light of other evidence the court found that the jury would probably not have reached a different result absent this testimony) (quoting *State v. Brown*, 350 N.C. 193, 203 (1999)); *State v. Pace*, ___ N.C. App. ___, 770 S.E.2d 677 (2015) (allowing as shorthand statement of fact testimony by victim’s mother about changes she observed in her daughter after assault); *State v. Kelly*, 118 N.C. App. 589, 594–97 (1995) (lay opinion on the emotional state of another is permissible and, in a case involving allegations of sexual abuse, parents could testify that their children seemed embarrassed or frightened, or displayed other emotions); *see also State v. Waddell*, 130 N.C. App. 488, 500–502 (1998) (assuming the witness was not testifying in the capacity of an expert, she could give lay opinion that the child demonstrated oral and anal intercourse by manipulations of anatomical dolls; her testimony was a shorthand statement of fact), *aff’d as modified*, 351 N.C. 413 (2000) (child’s statements to the witness were not admissible under the medical diagnosis and treatment exception, discussed *supra* in § 11.6.E).

2. Lay opinion requiring special expertise. Lay opinion about another’s mental or emotional state (or other matters) may not cross into areas requiring scientific knowledge or other special expertise. *See State v. Storm*, ___ N.C. App. ___, 743 S.E.2d 713 (2013) (licensed clinical social worker could testify to her observations of defendant, but could not testify as lay witness that he “appeared noticeably depressed with flat affect,” which was psychiatric diagnosis for which witness was not offered as expert); *State v. Kelly*, 118 N.C. App. at 594–97 (parents could not testify to behavioral patterns and characteristics of sexually abused children, which went beyond the perception of a non-expert); *State v. Hutchens*, 110 N.C. App. 455, 459–61 (1993) (family counselor who was not qualified as an expert could not give an opinion about the behavioral patterns of sexually abused children); *State v. Bowman*, 84 N.C. App. 238 (1987) (police officer, who had not been qualified as an expert, could not give an opinion that an eight-year-old child did not have sufficient information about sexuality to fantasize allegations of sexual abuse); *cf. State v. King*, ___ N.C. App. ___, 760 S.E.2d 377 (2014) (although trial court did not formally qualify witness as expert in pediatric medicine and evaluation and treatment of child sex abuse, qualification was implicit in trial court’s admission of witness’s testimony about common behaviors of children who have suffered sexual abuse).

The North Carolina courts have stated that if a lay witness, “‘by reason of opportunities for observation . . . is in a position to judge . . . the facts more accurately than those who have not had such opportunities,’” the witness’s testimony may be admitted as lay opinion. *State v. Lindley*, 286 N.C. 255, 257–58 (1974) (citations omitted). Under this rationale, a witness may give what has been termed “skilled lay observer testimony.” MOSTELLER, § 10-2(B), at 10-5 to 10-6. For example, by virtue of previous opportunities for observation, a witness who has become familiar with a person’s voice or handwriting may give an opinion identifying the voice or handwriting. *Id.*

North Carolina courts have sometimes taken this principle further and have allowed, as lay opinion, testimony by someone with special training and experience in the subject. *See State v. Smith*, 357 N.C. 604, 610–13 (2003) (in a case in which a nurse did not have sufficient

knowledge, training, or experience to testify as an expert about the effects of valium, it was nevertheless permissible for her to give a lay opinion about the typical effect of valium and her observation about whether the defendant exhibited those effects); *State v. Wallace*, 179 N.C. App. 710, 714–15 (2006) (based on his experience and training, a detective could give as lay opinion that if a child gives the same exact story each time, the child has been coached but in most cases the story will not be exactly the same each time; the court also found this testimony did not amount to improper opinion on the victim’s credibility, discussed in 4., below); *State v. Friend*, 164 N.C. App. 430, 437 (2004) (in a case in which an officer was not proffered as an expert witness, it was permissible for the officer to give a lay opinion about fingerprinting techniques and why it is rare to find useful prints); *see also State v. Houser*, ___ N.C. App. ___, 768 S.E.2d 626 (2015) (in child abuse case, allowing opinion testimony by detective about hairs found on wall, which led officers to return to home to collect hair samples; court found testimony was based on perception of detective and helpful to jury in understanding investigative process).

Note: Opinion testimony based on special training and experience may be more appropriately assessed under the standards applicable to expert testimony, which ensures that the opinion conforms with the reliability requirements for such testimony and that the proponent of the testimony complies with discovery requirements for experts. *See* MOSTELLER § 10-2(B), at 10-6 to 10-8; *see also* Jeff Welty, [*Discovery and Testimony about an Expert’s Experience with Sexual Abuse Victims*](#), NORTH CAROLINA CRIMINAL LAW: UNC SCHOOL OF GOVERNMENT BLOG (Mar. 25, 2015) (questioning decision by court of appeals, in *State v. Davis*, ___ N.C. App. ___, 768 S.E.2d 903 (2015), which held that State was not required to disclose in discovery opinions by psychologist and mental health counselor; court said that opinions were based on own observations and experiences of witnesses and did not constitute expert opinion that had to be disclosed before trial).

To prevent parties from avoiding the reliability requirements for experts and from offering expert testimony “in lay witness clothing,” Federal Rule of Evidence 701 was amended to limit lay opinion testimony to opinions “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” *See* MOSTELLER § 10-2(B), at 10-6. North Carolina Evidence Rule 701 does not contain this restriction explicitly, but North Carolina Evidence Rule 702, like its federal counterpart, regulates the admission of expert opinion based on scientific, technical, or other specialized knowledge. *See also State v. Armstrong*, 203 N.C. App. 399, 411–15 (2010) (defendant argued that testimony by witness who was head of the Forensic Test for Alcohol Branch of the North Carolina Department of Health and Human Services was expert testimony “masquerading” as lay testimony and was inadmissible; while court found that defendant overstated its holdings, court agreed that witness provided expert testimony and that testimony was inadmissible because State did not comply with discovery requirements governing expert testimony); *State v. Moncree*, 188 N.C. App. 221, 225–27 (2008) (SBI agent’s “extensive education and training in forensic analysis makes it difficult to imagine how he was able to separate his education, training, and experience” from his determination about the substance found in the defendant’s shoe; court concludes that the agent testified as an expert, not a lay, witness and that the State violated criminal discovery requirements by failing to notify the defendant of its intent to offer expert testimony); MOSTELLER § 10-2(B), at 10-6 to 10-8 (noting that dividing line between lay and

expert testimony has grown in importance in North Carolina criminal cases because of expanded discovery requirements for experts and Confrontation Clause restrictions on use of reports by absent witnesses).

3. Guilt of another person. Neither a lay nor an expert witness may testify that a person is guilty of a particular act. *See State v. Martinez*, 212 N.C. App. 661 (2011) (holding that trial court improperly admitted testimony by DSS social worker that DSS had substantiated claim that sex offense occurred); *State v. Giddens*, 199 N.C. App. 115 (2009) (child protective services investigator improperly testified that DSS had substantiated that abuse had occurred and that the defendant was the perpetrator), *aff'd per curiam*, 363 N.C. 826 (2010); *State v. Kelly*, 118 N.C. App. at 596 (stating general principles); *see also* 2 BRANDIS & BROUN § 190, at 754–55. *But cf. State v. Black*, 223 N.C. App. 137 (2012) (where defendant cross-examined children about their testimony at prior DSS hearing, it was permissible for State to ask DSS worker to explain what prior hearing was and why it took place).

4. Truthfulness of another person's statements. Neither a lay nor an expert witness may testify that a witness is telling the truth. *See State v. Robinson*, 355 N.C. 320, 334–35 (2002) (witness may not give an opinion vouching for the veracity of another witness); *Giddens*, 199 N.C. App. 115 (witness may not vouch for the credibility of the victim); *State v. Gobal*, 186 N.C. App. 308, 318–19 (2007) (detective could testify that a witness became less nervous during an interview but not that the witness was therefore telling the truth; vouching for the veracity of a witness is not opinion that is helpful under Evidence Rule 701), *aff'd per curiam*, 362 N.C. 342 (2008); *State v. Owen*, 130 N.C. App. 505, 515–16 (1998) (finding exclusion proper for this reason); *see also* N.C. R. EVID. 701 commentary (explaining that if testimony amounts “to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule”).

Opinion testimony about another person's statements may be admissible if it does not amount to a comment on the person's credibility, but the line may be difficult to draw. *See, e.g., State v. O'Hanlan*, 153 N.C. App. 546, 562–63 (2002) (permitting the testimony of a detective who was not offering an opinion that the victim had been assaulted, kidnapped, and raped, but was explaining why he did not pursue as much scientific testing in a case in which the victim survived and was able to identify the assailant); *State v. Love*, 100 N.C. App. 226, 231–32 (1990) (mother permitted to testify that she believed her child when the mother had testified that at first she did not believe the child and that the child had lied to her in the past; in this context, the testimony was helpful to the jury in understanding the mother's testimony), *dismissal of habeas corpus rev'd on other grounds sub nom., Love v. Freeman*, 188 F.3d 502 (4th Cir. 1999) (unpublished); *State v. Murphy*, 100 N.C. App. 33, 40–41 (1990) (upholding as permissible lay opinion the testimony of a school guidance counselor that a child's statements to others about sexual abuse were consistent with statements to the counselor). *But see, e.g., State v. Ramey*, 318 N.C. 457, 467 (1986) (improper for a detective to give opinion that a child did not make any inconsistent statements to her; the opinion was not helpful and not admissible as lay opinion); *State v. Carter*, 216 N.C. App. 453 (2011) (upholding exclusion of testimony of social worker that victim was “overly dramatic,” “manipulative,” and exhibited “attention seeking behavior,” which court found to be inadmissible commentary on child's credibility), *rev'd on other grounds*, 366 N.C. 496 (2013).

When character evidence is admissible, a lay witness (but generally not an expert witness) may give an opinion on a witness's character, including character for truthfulness. *See supra* § 11.8.B.3.

11.10 Expert Testimony

The requirements for expert testimony can be broken into two basic categories. One category, discussed in B., below, concerns the reliability of the theory or principle on which the expert relies. *See generally* MOSTELLER § 10-3(B), at 10-19. The second category, discussed in C., below, concerns the work the expert has done and the opinion the expert gives in the case. *See generally id.* § 10-3(C), at 10-46; § 10.3(D), at 10-53. Expert testimony specifically about children and parents is discussed in D. and E., below. First, however, the discussion addresses the impact of recent changes to the North Carolina Rules of Evidence on expert testimony.

A. Revised Evidence Rule 702(a)

In 2011, as part of limitations on civil tort actions, the North Carolina General Assembly revised North Carolina Rule of Evidence 702(a), one of the key rules governing the admissibility of expert testimony. In essence, North Carolina adopted the federal *Daubert* test for evaluating the admissibility of expert testimony, adopted by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later incorporated into Federal Rule of Evidence 702(a). The North Carolina General Assembly's adoption of this approach may require greater scrutiny of expert testimony by North Carolina courts and possibly reconsideration of subjects of expert testimony previously considered to be admissible.

The revision applies to criminal and civil actions arising on or after October 1, 2011. No cases to date have addressed the applicability of the revised rule in juvenile cases. In felony criminal cases, the courts have construed the effective-date language as making the change applicable to cases in which the indictment was filed on or after October 1, 2011. *State v. Gamez*, ___ N.C. App. ___, 745 S.E.2d 876 (2013). Thus, the revised rule applies to acts underlying an indictment issued on or after October 1, 2011, even if the acts occurred before October 1, 2011.

In *State v. McGrady*, ___ N.C. App. ___, 753 S.E.2d 361 (2014), *rev. granted*, 367 N.C. 505 (2014), the court considered the requirements of revised Rule 702(a), which states:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

The earlier version of the rule did not include the criteria in (1) through (3), above, although it was otherwise the same. The court in *McGrady* recognized that the additional language incorporates the federal *Daubert* standards on admission of expert testimony. *McGrady*, 753 S.E.2d at 367; accord *Pope v. Bridge Broom, Inc.*, ___ N.C. App. ___, 770 S.E.2d 702 (2015) (civil wrongful death action). As of this writing, no other appellate decisions have analyzed how the new requirements apply to expert testimony. (In *State v. Perry*, ___ N.C. App. ___, 750 S.E.2d 521 (2013), the court cited the revised rule but found that the defendant did not present sufficient information at trial for the court to evaluate his claim that the expert's testimony was unreliable and inadmissible; however, the revised rule did not apply because the defendant was indicted before the effective date of the rule change.)

The discussion below describes North Carolina's previous approach to expert testimony and compares it to the general *Daubert* requirements. Because of the lack of case law, the extent to which revised Rule 702(a) alters North Carolina's approach to expert testimony in juvenile cases is not yet clear.

B. Theory or Principle on Which Expert Relies

1. Generally. The first step in evaluating the admissibility of expert testimony, under both North Carolina's previous approach to expert testimony and the approach under the revised rule, involves an assessment of the theory or principle on which the expert's testimony depends.

In *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004), the North Carolina Supreme Court rejected the test for determining the reliability of expert testimony in federal cases, adopted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Reaffirming the test set forth in *State v. Goode*, 341 N.C. 513 (1995), *habeas corpus granted in part on other grounds sub nom.*, *Goode v. Branker*, No. 5:07-HC-2192-H, 2009 WL 8545584 (E.D.N.C. 2009), our supreme court stated that trial courts must conduct a three-step inquiry to determine the reliability of expert testimony, considering: (1) whether the expert's proffered method of proof is sufficiently reliable as an area for expert testimony; (2) whether the witness is qualified as an expert in that area of testimony; and (3) whether the expert's testimony is relevant. The general thrust of *Howerton* was that trial courts, although still charged with assessing the reliability of expert testimony, need not be as exacting as under federal evidence rules in assessing the validity of an expert's methodology. See *Howerton*, 358 N.C. at 464 (noting that North Carolina's approach is "less mechanistic and rigorous" than federal approach).

The *Daubert* test involves similar factors, discussed below, but requires greater attention by the trial court to the soundness of the theory or principle on which an expert bases an opinion.

2. Reliability of expert's method of proof or area of expertise. *Howerton* states that in determining reliability, trial courts may, among other things, look to the expert's testimony relating to reliability, take judicial notice, or use a combination of the two. The trial court should also look to precedent for guidance. When precedent justifies recognition of a scientific theory or technique, such as DNA analysis, the trial court should favor admissibility assuming the other requirements for admission are satisfied. When precedent shows that theories or techniques are unreliable, they are ordinarily inadmissible. *See, e.g., State v. Berry*, 143 N.C. App. 187, 202–06 (2001) (barefoot impression analysis inadmissible); *State v. Spencer*, 119 N.C. App. 662, 663–68 (1995) (penile plethysmograph results inadmissible). *Howerton* states that when there is no precedent or the theory or technique is not established, the trial court should consider the following indices of reliability: the expert's use of established techniques, the expert's professional background in the field, in a jury trial the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypothesis on faith, independent research conducted by the expert, and any other pertinent information. *Howerton* also states that in making its reliability determination, the court need not find that the methodology is conclusively reliable or indisputably valid. Once the trial court makes a preliminary determination of reliability, lingering questions or disputes about the quality of the expert's conclusions go to the weight of the testimony, not its admissibility.

The *Daubert* approach may be more rigorous. Under *Daubert*, the expert must base his or her testimony on “scientific knowledge,” which “implies a grounding in the methods and procedures of science.” *State v. McGrady*, ___ N.C. App. ___, 753 S.E.2d 361, 367 (2014) (quoting *Daubert*, 509 U.S. at 590), *rev. granted*, 367 N.C. 505 (2014). In deciding whether a theory or principle rests on sound scientific methodology, the trial court may consider: “(1) ‘whether [a theory or technique] can be (and has been) tested,’ (2) ‘whether the theory or technique has been subjected to peer review and publication,’ (3) ‘the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique’s operation,’ and (4) whether the theory or technique is generally accepted as reliable in the relevant scientific community.” *Id.* at 368 (quoting *Daubert*, 509 U.S. at 593–94); *see also* MOSTELLER § 10-3(B)(3), at 10-22 (“Proof of empirical validation of the theory is the key element under *Daubert*.”). The court in *McGrady* noted that the inquiry is a flexible one and subject to an abuse of discretion standard, but the above factors still may be stricter than the *Howerton* factors for assessing reliability.

Expert testimony need not be scientific in nature to be admissible under the revised rule. Both the previous and revised rules allow expert testimony based on “scientific, technical, or other specialized knowledge.” *See* N.C. R. EVID. 702 (allowing expert testimony based on “scientific, technical, or other specialized knowledge”). The trial judge still must assess the reliability of the expert testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (recognizing that *Daubert* principles require that the trial court assess the reliability of expert testimony in nonscientific fields).

3. Qualifications of witness. Under both *Howerton* and *Daubert*, an expert must be qualified to give an opinion on the particular subject. *See Howerton*, 358 N.C. at 461–62 (discussing evidence that satisfies this requirement). This requirement remains a part of the foundation for

admitting expert testimony under revised Evidence Rule 702(a), which requires that the witness be qualified by knowledge, skill, experience, training, or education.

Daubert may go a step further because of its increased focus on the reliability of the area of expertise. *See generally* MOSTELLER § 10-3(B)(3), at 10-22 (elements of *Daubert* foundation include that expert witness is qualified to establish the validity of the theory on which the expert relies).

4. Relevance of testimony. *Howerton* requires that the expert's testimony be relevant. Relying on Evidence Rule 401, which states the general rule of relevance, the court in *Howerton* stated that expert testimony meets the relevance requirement when the testimony would assist the jury in understanding the evidence or determining a fact in issue. A judge typically would find that expert testimony would assist the trier of fact when the subject is beyond a layperson's understanding or the expert can draw a substantially more reliable conclusion than a layperson. *See generally* MOSTELLER § 10-3(B), at 10-19.

Relevance remains a requirement under revised Evidence Rule 702; both the previous and revised versions require that the expert testimony "assist the trier of fact."

5. Rule 403 balancing. *Howerton* noted that the trial court has the inherent authority to exclude evidence, including expert testimony, under Evidence Rule 403, which provides that otherwise admissible evidence may be excluded if its probative value is substantially outweighed by other factors, such as the danger of unfair prejudice. *See also State v. King*, 366 N.C. 68 (2012), *modifying and aff'g* 214 N.C. App. 114 (2011) (finding that although expert testimony about repressed memory met requirements for admissibility, trial court had discretion to exclude it under Evidence Rule 403).

The revisions to Evidence Rule 702 do not appear to affect the trial court's discretion in this regard.

C. Other Requirements for Expert Opinion

The above discussion deals primarily with the validity of a witness's expertise. The following requirements address the admissibility of an expert's testimony in a particular case.

1. Adequacy of factual basis. *Howerton* did not explicitly address whether an expert's opinion must be supported by an adequate factual basis, but both the rules of evidence and case law appeared to establish this requirement. *See* N.C. R. EVID. 703 (expert may rely on facts or data that are not admissible in evidence as long as they are of a type reasonably relied on by experts in the field); *State v. McCall*, 162 N.C. App. 64, 72-73 (2004) (expert's opinion about the general characteristics and symptoms of sexually abused children was admissible; the expert relied on facts and data of a type reasonably relied on by experts even though the expert had not examined the child); *State v. Grover*, 142 N.C. App. 411 (expert's opinion that a child was sexually abused was improperly admitted; among other things, psychological testing was contrary to that of sexually abused children in that the answers to a 54-question

trauma symptom checklist administered to the child showed that the child was not in the clinical range for any symptoms), *aff'd per curiam*, 354 N.C. 354 (2001).

As revised, Evidence Rule 702(a) explicitly addresses the basis of the expert's testimony, requiring under new subdivision (1) that the testimony be "based upon sufficient facts or data" and under new subdivision (3) that the witness have "applied the principles and methods reliably to the facts of the case." Because these requirements are now an explicit condition of admissibility, courts may have to engage in greater scrutiny of an expert's work.

2. Degree of certainty of opinion. North Carolina cases have not required that an expert state his or her opinion with complete certainty but only to the degree of certainty that he or she believes. *See, e.g., In re C.M.*, 198 N.C. App. 53 (2009) (doctor testified that "he could not say with 'absolute certainty' as to whether [the child's] injuries were accidental or non-accidental, but that there were 'a number of factors' that made him think that it was 'likely that this was a non-accidental injury'"; this testimony and other evidence constituted clear and convincing evidence to support the finding that the child's injuries were inflicted by non-accidental means).

If uncertain, however, the opinion may be insufficient to support a finding. *See* 2 BRANDIS & BROUN § 189, at 752; *State v. Robinson*, 310 N.C. 530, 533–34 (1984) (holding that an expert's testimony that the insertion of a male sexual organ "could" have caused the vaginal condition was insufficient to support a rape charge). If too speculative or equivocal, courts may exclude the expert's testimony altogether. *See State v. Clark*, 324 N.C. 146, 160 (1989) (finding that the testimony was so speculative and conjectural that it would not have assisted the trier of fact).

The revisions to Rule 702(a) may not affect this part of the analysis. *Compare* MOSTELLER § 10-3(D), at 10-53 (discussing approaches of different jurisdictions about the required degree of certainty—for example, some require that the expert be "reasonably certain," others require a "reasonably probable" opinion).

3. Permissible topics and purposes. The courts have found that certain topics are improper areas for expert testimony—for example, the credibility of a witness, identity of the perpetrator, or conclusions about abuse in the absence of evidence of physical injuries (discussed in C.1., 3., and 6., below). These rulings could be construed as establishing additional limits on expert testimony, or they could be construed as applying the criteria for evaluating the reliability of expert testimony, described in B., above, although not all of the cases explicitly use that approach in finding the testimony impermissible.

Some opinions, although admissible, may be admissible for a limited purpose only—for example, to corroborate or explain (as discussed in C.7. and 8., below)—and therefore may not constitute substantive evidence or be sufficient to support a finding.

D. Expert Testimony about Children

The following cases have addressed the admissibility of expert testimony on the indicated topics. No criminal or juvenile cases to date have considered the potential impact of revised Evidence Rule 702(a) on types of expert testimony previously found to be admissible.

1. Credibility. An expert may not testify that a child is believable or is telling the truth. Several cases have applied this principle. *See State v. Aguallo*, 318 N.C. 590 (1986) (holding that it was improper under Evidence Rules 405 and 608 for the expert to testify that the child was believable, and ordering a new trial), *on appeal after remand*, 322 N.C. 818 (1988) (holding that it was not an impermissible comment on the child's truthfulness for an expert to testify that physical injuries were consistent with what the child had told the expert); *State v. Heath*, 316 N.C. 337 (1986) (holding that it was improper for the prosecutor to ask the expert whether the child had a mental condition that would cause her to make up a story about the sexual assault and for the expert to testify that the child had no record of lying); *State v. Brigman*, 178 N.C. App. 78 (2006) (expert improperly testified about the child's credibility when she testified about the child's disclosure that the defendant had "put his hand in his bottom and it hurt" and added "where a child not only says what happened but also can tell you how he felt about it is pretty significant because it just verifies the reliability of that disclosure"); *compare State v. Baymon*, 336 N.C. 748 (1994) (an expert witness may not testify that a child is believable or is not lying, but otherwise inadmissible evidence may become admissible if the door has been opened by the opposing party's cross-examination of the witness; because the defendant's cross-examination of the doctor suggested that the child had been coached by others, the doctor could testify that she did not perceive that the child had been coached or told what to say); *State v. Thaggard*, 168 N.C. App. 263 (2005) (noting *Baymon* but finding that the State improperly elicited the expert's opinion on credibility on direct examination); *see also State v. Ryan*, 223 N.C. App. 325 (2012) (reading *Baymon* as holding that expert testimony that a child had not been coached is admissible and not an impermissible comment on credibility; also holding under *Baymon* that defendant's opening statement, cross-examination of other witnesses, and general cross-examination questions of expert did not open door to testimony by expert that child's story was not fictitious, which is inadmissible testimony on credibility).

An expert also may not testify about the character of a particular child (or other person) for truthfulness. *See* N.C. R. EVID. 405(a) (so stating); *compare supra* § 11.8.B.3 (discussing admissibility of lay opinion on character).

An expert may testify generally, however, that children do not lie about sexual abuse. *See State v. Oliver*, 85 N.C. App. 1 (1987); *see also State v. Speller*, 102 N.C. App. 697, 702 (1991) (holding that it was permissible for the state's expert to testify that mothers of abused children generally do not believe their children). *But see State v. Robertson*, 115 N.C. App. 249, 260–61 (1994) (holding that the trial court did not abuse its discretion in refusing to allow the defendant's expert to testify about the suggestibility of small children).

Expert testimony about a child's statements also may be admissible if it does not amount to a comment on the child's credibility, but the line may be difficult to draw. *See* 1 BRANDIS &

BROUN § 96, at 325–26 (“courts have found numerous ways to permit expert comment on truthfulness, particularly of child witnesses, under various guises”); *State v. O’Hanlan*, 153 N.C. App. 546, 555 (2002) (“[T]he cases dealing with the line between discussing one’s expert opinion and improperly commenting on a witness’ credibility have made it a thin one.”). The expert’s testimony must be examined in each case to determine whether it crosses the line into impermissible opinion about credibility. *Compare, e.g., State v. Frady*, ___ N.C. App. ___, 747 S.E.2d 164 (2013) (trial court erred in allowing expert to testify that child’s disclosure was consistent with sexual abuse; this testimony essentially expressed an opinion that the child was credible, which is impermissible) *with State v. Dew*, ___ N.C. App. ___, 738 S.E.2d 215 (2013) (finding that expert’s testimony was devoid of direct comment on credibility).

2. Legal conclusions. An expert may testify about the ultimate issue to be decided in the case but not in the form of a legal conclusion. *See State v. Smith*, 315 N.C. 76, 100 (1985) (stating this principle and finding that it was permissible for an expert to testify that injuries were caused by a male sex organ or object of similar size or shape but that it would have been improper for the expert to testify that the victim had been raped, a legal conclusion).

3. Identity of perpetrator. An expert may not testify that a particular person is the perpetrator or is guilty. *See State v. Figured*, 116 N.C. App. 1, 8–9 (1994) (explaining that such testimony is improper under Evidence Rules 405, 608, and 702); *accord State v. Ryan*, 223 N.C. App. 325, 734 S.E.2d 598 (2012); *State v. Brigman*, 178 N.C. App. 78, 91 (2006).

An expert may testify, however, that a child said that a particular person was the perpetrator if the statement is admissible under the hearsay exception for statements for purposes of medical diagnosis or treatment. *See supra* § 11.6.E.8 (discussing this issue).

4. Cause of physical injuries. A qualified expert has been permitted to give an opinion about the cause of injuries, such as “injuries were caused by insertion of blunt object,” “injuries were intentionally inflicted, not accidental or self-inflicted,” or possibly even “injuries were caused by sexual abuse.” (The last phrase is not preferred because it approaches a legal conclusion, but the admission of such testimony has been found not to be error when used as a shorthand statement of matters that have already been described specifically.) *See, e.g., State v. Kennedy*, 320 N.C. 20, 32–33 (1987) (permitting testimony by a medical expert that injuries were not self-inflicted or accidental); *State v. Smith*, 315 N.C. 76, 99–100 (1985) (permitting testimony by a medical expert that injuries were caused by a male sex organ or an object of similar size and shape); *State v. Pearce*, 296 N.C. 281, 285–86 (1979) (explaining that testimony by the victim that she was “raped” was a shorthand reference to otherwise detailed testimony and permissible); *State v. Ryan*, 223 N.C. App. 325 (2013) (not error to allow expert to give opinion that child had been sexually abused in light of physical evidence of an unusual deep hymenal notch, along with the presence of bacterial vaginosis that by itself could have other causes); *State v. Goforth*, 170 N.C. App. 584, 589–91 (2005) (hymenal tissues of the children reflected penetrating trauma and, per *Stancil*, was sufficient physical evidence to support the doctor’s opinion of repeated sexual abuse); *State v. Fuller*, 166 N.C. App. 548, 561 (2004) (relying on *Howerton*, the court found that a SANE (sexual assault nurse examiner) nurse was properly qualified as an expert to offer an opinion about her

examination of the child at the hospital emergency room; the court also found that the SANE nurse and doctor were properly permitted to testify that physical findings concerning the victim were consistent with vaginal penetration and someone kissing the child's breast); *State v. Dick*, 126 N.C. App. 312 (1997) (permitting a medical expert to testify that injuries were very likely the result of sexual mistreatment); *In re Hayden*, 96 N.C. App. 77, 82 (1989) (permitting a doctor to give an opinion that burns on a child were not accidental); *see also State v. Ford*, 314 N.C. 498, 503–04 (1985) (in a case in which a child had contracted gonorrhea in the throat, permissible for an expert to testify about how venereal disease is transmitted); *cf. State v. Perry*, ___ N.C. App. ___, 750 S.E.2d 521 (2013) (rejecting defendant's argument that state of medical science had changed and did not support expert's opinion that child's brain injuries were caused by intentional acts and not accidental; court of appeals found no information in record concerning state of current medical science or degree to which significant doubt had arisen regarding the way brain injuries occur).

5. Battered child syndrome. Experts have been permitted to testify that a child suffers from battered child syndrome, which is a diagnosis that a pattern of physical injuries was the result of physical abuse and not accidental. *See* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996) (distinguishing battered child syndrome from other types of syndrome testimony not involving physical injuries); *see also State v. Stokes*, 150 N.C. App. 211, 225–27 (2002) (upholding the admission of expert testimony about battered child syndrome), *rev'd on other grounds*, 357 N.C. 220 (2003).

6. Opinion about abuse if no or inadequate evidence of physical injuries. If there is no evidence or inadequate evidence of physical injuries, an expert may not testify that a child was the victim of sexual or physical abuse. This view culminated in *State v. Stancil*, 355 N.C. 266 (2002), in which the court held that a doctor should not have been permitted to testify that a child was the victim of sexual abuse based on two examinations of the child in which no physical evidence of sexual abuse was observed and on the doctor's review of an in-depth interview of the child by a psychologist. Numerous cases have followed *Stancil*. *See State v. Towe*, 366 N.C. 56, 61–64 (2012) (finding that admission of testimony amounted to plain error); *State v. Black*, 223 N.C. App. 137 (2012) (holding that clinical social worker's testimony that child was sexually abused was improper where there was no physical evidence to support testimony); *State v. Treadway*, 208 N.C. App. 286, 292–95 (2010) (to same effect); *State v. Delsanto*, 172 N.C. App. 42, 45–47 (2005) (holding it was error to allow a doctor's opinion that the child was sexually abused where the only physical manifestation of injury was the child's statement of pain, which is subjective and not independently verifiable); *State v. Couser*, 163 N.C. App. 727, 729–32 (2004) (holding it was error to allow the state's medical expert to offer an opinion that the victim had suffered "probable sexual abuse" where the physical evidence consisted of two abrasions on either side of the introitus, which the expert admitted could have been caused by something other than sexual abuse); *State v. Bush*, 164 N.C. App. 254, 258–60 (2004) (in the absence of physical evidence, it was plain error to allow a doctor's opinion that the victim had been sexually abused; the opinion was not rendered admissible by the doctor's testimony that physical evidence is not always present and that its absence is absolutely consistent with abuse of a prepubertal child); *In re Morales*, 159 N.C. App. 429 (2003) (expert opinion that sexual abuse had occurred was improper absent any evidence of physical injury, but admission of the testimony was not prejudicial

because the judge did not rely on it). *But see In re B.D.*, 174 N.C. App. 234 (2005) (assuming that the interpretation of evidence rules in criminal cases applies to termination of parental rights proceedings, the court found that they did not bar admission of experts' opinions of sexual abuse based on the child's statements, reports from other sources of sexualized behavior, and his medical history; the court's opinion does not refer to physical injuries other than bruising on the lower legs of the child).

This prohibition is based on concerns about scientific reliability and vouching for the credibility of the child. It applies to opinions of both medical and psychological experts. Prior decisions allowing an expert to testify that a child was the victim of sexual abuse in the absence of physical injuries are no longer good law. *See, e.g., State v. Bailey*, 89 N.C. App. 212, 219 (1988) (allowing expert in the field of social work specializing in child development and family relations to give opinion that a child had been sexually abused based on several interviews with child; case decided before *Stancil*).

Experts have been permitted to testify that the absence of physical evidence of abuse does not establish that no abuse occurred. In *State v. Jennings*, 209 N.C. App. 329, 333–35 (2011), the court held it was permissible for an expert to testify that the lack of physical evidence of sexual abuse did not mean that the victim had not been sexually abused. The expert testified that had there been a tear in the victim's hymen, it would have healed by the time of the expert's medical examination a year after the alleged sexual abuse. The court found that this testimony did not amount to an impermissible opinion, without supporting physical evidence, that the victim had been sexually abused. *See also State v. Pierce*, ___ N.C. App. ___, 767 S.E.2d 860 (2014) (to same effect). Experts must remain cautious, however, about crossing the line into impermissible testimony that sexual abuse occurred. *See State v. Towe*, 366 N.C. 56 (2012) (admission of doctor's expert testimony that victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse was improper).

7. Psychological syndromes. With a proper foundation, qualified experts have been permitted to testify that a child suffered from post-traumatic stress syndrome. *See State v. Stancil*, 355 N.C. 266 (2002). Such opinion testimony has been found admissible without evidence of physical injuries, but to explain or corroborate only, not as substantive evidence that sexual abuse occurred. *See State v. Hall*, 330 N.C. 808, 817 (1992) (explaining that such testimony is admissible to assist the jury in understanding behavior patterns of sexually abused children and to aid the jury in assessing the complainant's credibility); *State v. Hicks*, ___ N.C. App. ___, 768 S.E.2d 373 (2015) (testimony about PTSD was not admitted as substantive evidence but rather to rebut inference, elicited on cross-examination, that victim's psychological problems were caused by something other than sexual assault; not plain error); *State v. Brigman*, 178 N.C. App. 78, 92–93 (2006) (holding that it was error to admit expert testimony about PTSD for substantive purposes); *see also* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996) (psychological syndrome evidence has not been proven to be diagnostic—that is, to establish cause—but it may be useful in explaining typical human behavior in response to certain conditions).

Testimony about child sexual abuse accommodation syndrome, if based on a proper foundation, has likewise been found admissible to corroborate or explain. *See State v. Stallings*, 107 N.C. App. 241, 248–51 (1992).

8. Characteristics of abused children. With a proper foundation, qualified experts have been permitted to testify, without identifying a particular syndrome and without evidence of physical injuries, that a child exhibited characteristics consistent with sexual abuse. *See State v. Stancil*, 355 N.C. 266 (2002); *State v. Khouri*, 214 N.C. App. 389 (2011) (allowing such testimony); *State v. Chavez*, ___ N.C. App. ___ (June 16, 2015) (finding no error in admission of doctor’s testimony that victim’s “cutting behavior” was common among children who have been sexually abused); *State v. Couser*, 163 N.C. App. 727, 729–32 (2004) (it was error to allow a medical expert’s opinion under this principle; the expert testified that the victim had suffered “probable sexual abuse” when there was insufficient physical evidence to support the opinion given and there was no evidence to support that the victim’s behavior or symptoms were consistent with being sexually abused); *State v. Wade*, 155 N.C. App. 1 (2002) (it was permissible for a professional psychologist, who had treated the child on a weekly basis for ten months, to testify that the child exhibited characteristics consistent with sexual abuse; the two-judge concurrence found that the psychologist’s testimony that the child had in fact been sexually abused was improper in the absence of evidence of physical injuries but that the admission of the testimony was not plain error). The courts have held that a physical examination of the child is not a necessary part of the foundation for this sort of opinion testimony as long as the expert is otherwise qualified to give the testimony. *State v. Ragland*, ___ N.C. App. ___, 739 S.E.2d 616 (2013).

The courts have held that the expert’s testimony must concern the characteristics of sexually abused children and not cross into impermissible opinion about whether a child is credible or, in the absence of physical evidence, whether sexual abuse occurred. *See State v. Frady*, ___ N.C. App. ___, 747 S.E.2d 164 (2013) (trial court erred in allowing expert to testify that child’s disclosure about incident was consistent with sexual abuse; testimony neither addressed characteristics of sexually abused children nor spoke to whether child exhibited symptoms consistent with those characteristics); *State v. Carter*, 216 N.C. App. 453 (2011) (upholding exclusion of testimony by social worker that victim was “overly dramatic,” “manipulative,” and exhibited “attention seeking behavior,” which court found was inadmissible commentary on child’s credibility, was not about the profiles of abused children, and was not a subject on which the witness was qualified to render an opinion), *rev’d on other grounds*, 366 N.C. 496 (2013).

As with syndrome testimony, the cases have indicated that an opinion about symptoms or characteristics is admissible to explain or corroborate but not as substantive evidence. *See State v. Kennedy*, 320 N.C. 20, 31–32 (1987) (such testimony “could help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim”); *State v. Hall*, 330 N.C. 808, 817 (1992) (reaffirming *Kennedy*); *State v. Ewell*, 168 N.C. App. 98, 102–05 (2005) (testimony about profiles and symptoms of abused children is permissible to inform the jury that the absence of physical evidence is not conclusive, but it was error to allow testimony by a doctor that it was “probable” that the child was a victim of sexual abuse); *State v. Kelly*, 118 N.C. App. 589, 595 (1995) (“Explanations of the symptoms

and characteristics of sexually abused children are admissible only through expert testimony for the limited purpose of assisting the jury in understanding the behavior patterns of abused children.”); *see also State v. Ware*, 188 N.C. App. 790, 798 (2008) (licensed clinical social worker was sufficiently qualified as an expert to give an opinion that it was common for children who have been abused by a parental figure to “have a dilemma” about reporting the abuse); *State v. Dick*, 126 N.C. App. 312 (1997) (expert in clinical social work could testify to reasons why a child may delay reporting sexual abuse). *But see State v. Isenberg*, 148 N.C. App. 29, 39–40 (2001) (court rejected the defendant’s argument that the trial court erred in failing to give an instruction limiting the jury’s consideration of an expert’s testimony to corroborative, not substantive, purposes because the defendant did not ask for a limiting instruction at trial; the court also stated that the defendant was not entitled to a limiting instruction when the testimony is about the general characteristics of abused children, not about a specific profile or syndrome, relying on *State v. Richardson*, 112 N.C. App. 58 (1993) [note, however, that the court in *Richardson* found the testimony permissible because it was *not* offered for the substantive purpose of showing that a sexual assault occurred]).

9. Repressed memory. In *State v. King*, 366 N.C. 68 (2012), *modifying and aff’g* 214 N.C. App. 114 (2011), the North Carolina appellate courts addressed the admissibility of testimony about repressed memory—that is, testimony about delayed recall of traumatic events such as sexual abuse.

The court of appeals in *King* considered the scope of the trial court’s discretion under *Barrett v. Hyldborg*, 127 N.C. App. 95 (1997), which held that testimony about repressed memories by an alleged victim of sexual abuse is admissible only if (1) the testimony is accompanied by expert testimony explaining the phenomenon of memory repression, and (2) the expert testimony has sufficient scientific assurance of reliability that the repressed memory is an indicator of what actually transpired in the past. The State argued that because *Barrett* requires that evidence of delayed recall of traumatic events be accompanied by expert testimony about repressed memory, the trial judge abused his discretion in excluding the State’s expert testimony on the subject. The majority of the court of appeals held that *Barrett* did not obviate the gatekeeping function of trial judges to assess the reliability of expert testimony or remove their discretion to weigh the admissibility of evidence under N.C. Rule of Evidence 403. The majority upheld the trial court’s determination that even if the State’s expert testimony about repressed memory technically satisfied the requirements for admission of expert testimony [under the then-applicable *Howerton* test], the testimony was inadmissible under Evidence Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

The supreme court in *King* affirmed the court of appeals’ ruling that the trial court did not abuse its discretion by excluding the State’s expert testimony on repressed memory under Evidence Rule 403. The court stated further: “We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702 [Testimony by experts].” 366 N.C. at 77. The supreme court disavowed the part of the court of appeals’ opinion that concluded, in reliance on *Barrett v. Hyldborg*, 127 N.C. App. 95 (1997), that all testimony based on recovered memory must be excluded unless it is

accompanied by expert testimony. The supreme court agreed with the holding in *Barrett* that a lay witness may not express the opinion that he or she has experienced repressed memory. The court stated, however, that *Barrett* “went too far” when it added that even if the witness in that case had avoided use of the term “repressed memory” and simply testified that she suddenly remembered traumatic incidents from her childhood, such testimony had to be accompanied by expert testimony. *Id.* at 78. The supreme court concluded that a lay witness may not testify that memories were repressed or recovered but may testify, in essence, that for some time period he or she did not recall, had no memory of, or had forgotten the incident. The court added that a defendant facing a witness who claims to have recently remembered long-ago events could seek to present an expert to address or refute the witness’s purported sudden recall, thereby requiring the trial court to determine the admissibility of the witness’s testimony.

E. Expert Testimony about Parents

The following cases involve expert testimony about parents.

State v. Faulkner, 180 N.C. App. 499, 507–09 (2006) (permissible for a developmental and forensic pediatrician to testify, in rebuttal of the defense claim that child abuse is over diagnosed, about the profile of normal caretaker behavior as one of the indicators of whether a child’s injuries are accidental or inflicted).

Tate v. Hayes, 127 N.C. App. 208 (1997) (substance abuse counselor was properly allowed to testify that the mother had a substance abuse problem in reliance on the “Sassy” [*sic*] test, which is accepted by the State of North Carolina for substance abuse assessments and is of a type reasonably relied on by experts in that field).

In re Carr, 116 N.C. App. 403, 408 (1994) (trial court did not err in refusing to allow an expert witness to testify about the mother’s mental health and parenting capacity where the witness was an expert in clinical social work specifically dealing with adolescents and there was no evidence she was an expert in mental health issues).

In re Chasse, 116 N.C. App. 52 (1994) (trial court erred in refusing to allow a psychologist to testify about the treatment of adult sexual offenders because of his lack of clinical experience with adults; “[h]is acknowledged expertise in the field of adolescent sex offenders and his study of the ‘entire psychological literature, which included the review articles on treatment of adult sexual offenders,’ made him better qualified than the trial court to render an opinion on the length and efficacy of adult sexual offender therapy . . .”).

In re Byrd, 72 N.C. App. 277, 280–81 (1985) (in a termination of parental rights proceeding, it was not error to admit expert testimony of witnesses tendered as experts in juvenile protective services, infant development, and permanency planning; although the witnesses should have refrained from giving an opinion about whether parental rights should be terminated [a legal conclusion and therefore an improper subject of expert testimony, as discussed in D.2., above], the substance of the testimony was that the child was in need of a permanent placement and a stable home environment).

In re Pierce, 67 N.C. App. 257, 260 (1984) (trial court did not err in permitting a social worker to give an opinion as to the parents' capacity to provide a stable home environment; although the proponent did not tender the social worker as an expert and the better practice is for the proponent to do so, the record was clear that the trial court treated the witness as an expert).

In re Peirce, 53 N.C. App. 373, 384–85 (1981) (trial court did not err in finding that a social worker was sufficiently qualified to give an expert opinion about whether the parents' actions were indicative of good parenting skills; although the proponent did not tender the social worker as an expert and the better practice is for the proponent to do so, the record was clear that the trial court treated the witness as an expert).

11.11 Evidentiary Privileges

Several statutes address the applicability of evidence privileges in juvenile proceedings. The statutes are not entirely consistent, but taken together they override most evidentiary privileges. The few privileges not overridden appear to apply to disposition as well as adjudication proceedings. *See generally* MOSTELLER § 8-2, at 8-3 (general rule is that privileges apply in any proceeding in which testimony can be compelled unless there is an exception overriding the privilege).

A. In Abuse, Neglect, and Dependency Proceedings

1. Effect of broad negation of privileges in G.S. 7B-310. G.S. 7B-310 is the broadest of the statutes on evidentiary privileges in juvenile cases, providing that no evidentiary privilege other than the attorney-client privilege is ground “for excluding evidence of abuse, neglect, or dependency in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile’s abuse, neglect, or dependency is in issue nor in any judicial proceeding resulting from a report submitted under this Article.” Because of its reference to abuse, neglect, and dependency, this statute applies at least to all hearings in abuse, neglect, and dependency cases.

2. Effect of specific negation of privileges in G.S. Chapter 8. Various communications are protected from compelled disclosure in court proceedings by G.S. Chapter 8, Article 7 (Competency of Witnesses). Several but not all of those statutes provide that a particular protection created by that chapter is not a ground for excluding evidence of abuse or neglect in judicial proceedings. Thus, G.S. 8-53.1 states that the protection for physician-patient and nurse-patient communications is not a ground for excluding evidence of abuse or neglect of a child under age 16. Similar, although not identical language, appears in G.S. 8-53.3 (psychologists), G.S. 8-53.10 (peer support group counselors), and G.S. 8-57.1 (spouses). *See State v. Knight*, 93 N.C. App. 460, 466–67 (1989) (by operation of G.S. 8-53.3, the psychiatrist-client privilege did not apply in a criminal prosecution for a sexual offense against a child); *see also* G.S. 8-57.2 (negating spousal privilege for paternity determinations).

No such language accompanies other privileges in G.S. Chapter 8. *See, e.g.*, G.S. 8-53.4 (school counselors), 8-53.5 (marital and family therapists), 8-53.7 (private social workers).

The absence of limiting language in those statutes is likely of no consequence in abuse, neglect, and dependency proceedings (except possibly for communications between clergy and communicants, discussed next) because G.S. 7B-310 is so broad that it likely overrides the incomplete treatment in G.S. Chapter 8. *See generally State v. Byler*, 167 N.C. App. 109 (2004) (unpublished) (reading G.S. 7B-310 and G.S. 8-53.1 together).

3. Attorney-client and clergy-communicant protections. G.S. 7B-310 explicitly protects information subject to the attorney-client privilege. The privilege may be asserted as grounds for excluding evidence—including evidence of abuse, neglect, or dependency—in any court action. In its technical sense, the attorney-client privilege protects only communications between attorney and client, but the statute likely protects information gained in the course of the attorney-client relationship and subject to attorney work product and confidentiality obligations. *See* N.C. REVISED RULES OF PROF'L CONDUCT R. 1.6 & comment (providing that a lawyer shall not reveal information acquired during the professional relationship with a client). A narrower reading could infringe on the respondent's constitutional and statutory right to counsel.

Note: For purposes of the duty to report suspected child abuse, neglect, or dependency, G.S. 7B-310 does not protect all information that is subject to the attorney-client privilege. The exemption states that it applies only to knowledge or suspicion the attorney gains from the client during representation in the abuse, neglect, or dependency case. *See* [N.C. State Bar Ethics Opinion](#), RPC 175 (1995) (ruling that a lawyer ethically may exercise discretion as to whether to reveal confidential information pursuant to the child abuse, neglect, and dependency reporting law). The right to counsel guaranteed by the U.S. and N.C. Constitutions may require a broader attorney exception, however. *See supra* § 5.1.A.4.

G.S. 8-53.2 recognizes a privilege for clergy-communicant communications and does not indicate any circumstances negating the privilege. G.S. 7B-310, however, does not exempt clergy-communicant communications from the broad override of privileges in that statute. Nevertheless, the protections for religion in the First Amendment of the U.S. Constitution and Art. I, Sec. 13 of the North Carolina Constitution may protect such communications. *Cf. In re Huff*, 140 N.C. App. 288, 294–99 (2000) (discussing the applicability of these limits on the questioning of parents about religious practices); *see also* JANET MASON, [REPORTING CHILD ABUSE AND NEGLECT IN NORTH CAROLINA](#) at 61–62 (UNC School of Government, 3d ed. 2013) (discussing application of reporting requirement to confidential communications with clergy).

4. Protections against disclosure of confidential information. G.S. 7B-310 overrides “privileges” only. In its technical sense, a privilege protects a witness from being compelled to testify in court proceedings or bars a witness from testifying without another person’s consent. Many other provisions of law, while not establishing a “privilege” not to testify, make information confidential, such as provisions on mental health and substance abuse records, school records, and the like. *See* 1 BRANDIS & BROUN § 125, at 448 (“There are many statutes which, while perhaps short of creating a privilege in the technical sense, provide, to varying

extent, for confidentiality of specified records, reports or information.”). G.S. 7B-310 probably should be interpreted as providing that confidentiality provisions are likewise not grounds for excluding evidence of abuse, neglect, and dependency.

Confidentiality laws still may pose barriers to admissibility in the sense that, to obtain protected information, a party must comply with the particular statute or other law governing production and disclosure of the information. GALs and DSSs have broad access to confidential information, but some information may have special state and federal law protections allowing disclosure only if certain conditions are met. *See supra* § 2.7.B (discussing access to confidential information); *see also In re J.S.L.*, 177 N.C. App. 151, 156–57 (2006) (admission of mental health records was proper where the respondent failed to request an in camera review of the records when the records were ordered disclosed and lodged only a general objection when the records were offered in evidence). Once obtained, the records still must satisfy the applicable evidence rules, such as authenticity and hearsay requirements, to be admissible. *See, e.g., supra* § 11.6.F (discussing the admissibility of business records).

B. In Termination of Parental Rights Proceedings

G.S. 7B-1109(f) addresses termination of parental rights proceedings, providing that “[n]o husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights.” The impact of this language, which is narrower than in G.S. 7B-310 (discussed in A., above), appears to be as follows:

- By its terms, G.S. 7B-1109(f) disallows the husband-wife and physician-patient privilege as grounds for excluding evidence in termination of parental rights proceedings.
- The provisions in G.S. Chapter 8 that override specific privileges, in addition to the two privileges specified in G.S. 7B-1109(f), apply to termination of parental rights proceedings as well. *See* G.S. 8-53.1 (nurses), 8-53.3 (psychologists), 8-53.10 (peer support group counselors).
- G.S. 7B-310 may preclude the assertion of other privileges in termination of parental rights proceedings when asserted to exclude evidence of abuse, neglect, or dependency. A counter-argument can be made that G.S. 7B-1109(f), which applies specifically to termination of parental rights proceedings, supersedes the more general G.S. 7B-310.

11.12 Right against Self-Incrimination

A. Right Not to Answer Incriminating Questions

Under the Fifth Amendment of the U.S. Constitution and Art. I, § 23 of the North Carolina Constitution, a person has the right not to “incriminate” himself or herself—that is, not to give testimony that might make the person subject to criminal prosecution under state or federal law. *See* 1 BRANDIS & BROUN § 126, at 449. The Fifth Amendment privilege is the same in civil and criminal cases in the sense that a witness called to testify in either type of

case, including in juvenile proceedings, has the right to refuse to answer questions that might incriminate him or her in future criminal proceedings. A court may not override the assertion of the privilege and compel a witness to testify unless the court finds no possibility that answering might tend to incriminate the witness. *See* 1 BRANDIS & BROUN § 126, at 466. This right is not inconsistent with the statutes discussed *supra* in § 11.11, which negate most evidentiary privileges but do not appear to apply to constitutional rights. *See also* G.S. 7B-802 (providing that in an adjudicatory hearing, the court must protect the rights of the juvenile and the juvenile's parent to assure due process of law). To the extent inconsistent, those statutes must yield to constitutional protections. *See generally In re Davis*, 116 N.C. App. 409, 412–13 (1994) (recognizing the right of the respondent in a termination of parental rights case to refuse to answer questions that might subject her to criminal responsibility).

The judge may, but is not required to, advise a witness of his or her right not to answer incriminating questions. *See State v. Poindexter*, 69 N.C. App. 691, 694 (1984) (finding no requirement that the court advise a pro se defendant of the defendant's Fifth Amendment right); *State v. Lashley*, 21 N.C. App. 83, 84–85 (1974) (same); 1 MCCORMICK § 131, at 749–50 (generally, a witness has no right to a warning, but the judge is not barred from alerting the witness to the right against self-incrimination). The court of appeals has found that this rule has been altered by statute for juvenile delinquency proceedings. *See In re J.R.V.*, 212 N.C. App. 205 (2011) (holding that G.S. 7B-2405 requires the judge to advise a juvenile alleged to be delinquent of his or her privilege against self-incrimination before permitting the juvenile to testify).

For a basic checklist of a witness's right not to answer incriminating questions, see John Rubin, [*Basics of Right against Self-Incrimination*](#) (UNC School of Government, June 2008).

B. No Right Not to Take Stand

The Fifth Amendment protection differs in criminal and civil proceedings in that a criminal defendant has the right to refuse to take the stand and may not be called as a witness by the State, the court, or another party. *See Jones v. State*, 586 A.2d 55 (Md. Ct. Spec. App. 1991) (co-defendant may not call another defendant as a witness at their joint trial). In contrast, in a civil proceeding such as a juvenile proceeding, a respondent does not have the right to refuse to take the stand, and one party may call another party to testify. *See* 1 BRANDIS & BROUN § 126, at 464–65; *see also In re Davis*, 116 N.C. App. at 412–13 (DSS was free to call the respondent mother as a witness, without a subpoena, where the mother was present at the termination of parental rights proceeding).

C. Drawing Adverse Inference from Refusal to Answer

In a civil proceeding, the Fifth Amendment does not forbid the drawing of an adverse inference against a party who refuses to answer in reliance on the privilege. *See In re Estate of Trogon*, 330 N.C. 143, 151–52 (1991) (finder of fact in a civil case may use a witness's invocation of the Fifth Amendment privilege against self-incrimination to infer that truthful testimony would have been unfavorable to the witness); *accord McKillop v. Onslow County*, 139 N.C. App. 53, 63–64 (2000); *see also In re B.W.*, 190 N.C. App. 328, 338–39 (2008)

(permitting the trial court to rely on, among other things, the mother's silence at the disposition hearing in support of its decision to cease reunification efforts). (The court's general statement in *In re B.W.* that the Fifth Amendment does not apply is correct in the limited sense that a court may draw an adverse inference from silence.)

A refusal to answer, and an adverse inference from the refusal, apparently may not be the sole basis for an adverse action against the party refusing to answer. There must be some other evidence to support the adverse action. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (suggesting this result in finding that an inmate's refusal to answer questions was not treated as a final admission of guilt of a disciplinary infraction). *But see* 1 MCCORMICK § 136, at 771–72 (discussing later U.S. Supreme Court cases that may have cast doubt on whether the automatic imposition of an adverse action for a refusal to answer is necessarily improper).

11.13 Evidence Procedures

This section briefly reviews the procedures for offering and objecting to evidence. For the most part, the procedures are not unique to juvenile cases. Counsel for the parties should consult local rules in their district to determine whether additional or different requirements apply. For local rules, see [Local Rules and Forms](#) on the North Carolina Court System webpage.

A. Production of Witnesses and Documents

The parties have the right to subpoena witnesses and documents to juvenile hearings in accordance with Rule 45 of the North Carolina Rules of Civil Procedure. A party or other person or organization receiving a subpoena has the right to object to or move to quash a subpoena as provided in that rule. For a brief discussion of motions to quash a subpoena to testify for a child witness, see *supra* § 11.2.A.5. For a further discussion of subpoena procedure, see John Rubin & Aimee Wall, [Responding to Subpoenas for Health Department Records](#), HEALTH LAW BULLETIN No. 82 (UNC School of Government, Sept. 2005) (bulletin addresses subpoenas for health department records but describes procedures generally applicable to subpoenas for documents, including subpoenas for confidential information).

The parties may have the right to obtain records without a subpoena. *See supra* § 2.7.B (discussing access to documents and other information). But, without a witness or other evidence establishing a foundation for the record, the party offering the record may not be able to establish its admissibility.

B. Pretrial Motions in Limine, Objections, and Other Notices

A party may, but generally is not required to, make a motion in limine to obtain a preliminary ruling on the admissibility of evidence. If a party makes a motion in limine to exclude evidence and the court denies the motion, the party who made the motion still must object when the evidence is offered at trial to preserve the issue for appeal. In 2003, the General

Assembly amended Evidence Rule 103 to do away with the requirement that a party object at trial if the court had already denied a motion in limine. The appellate courts found this revision invalid on the ground that it conflicts with North Carolina Appellate Rule 10(b)(1), which has been consistently interpreted as providing that an evidentiary ruling on a pretrial motion is not sufficient to preserve the issue for appeal and that the objection must be renewed at trial. *See State v. Oglesby*, 361 N.C. 550, 553–55 (2007).

Some local rules provide that objections are waived if not raised before the hearing. For a brief discussion of these rules, see *supra* § 11.1.A.4.

In limited circumstances, ordinarily not applicable to juvenile proceedings, a party must file a timely pretrial notice if he or she wants live testimony of the analyst who conducted certain forensic tests. *See, e.g.*, G.S. 20-139.1(c1), (e2) (chemical analysis of blood or urine), 90-95(g) (testing of controlled substance); *see also* Jessica Smith, [*The North Carolina General Assembly's Response to Melendez-Diaz*](#) (UNC School of Government, Aug. 27, 2009) (discussing revisions to the statutes on the admission of forensic reports and tests).

A party who intends to offer hearsay under the residual hearsay exception must give notice as required by that exception. *See supra* § 11.6.H.3.

C. Pre-Adjudication Conference

Local rules for pre-adjudication conferences may require the parties to exchange witness lists and exhibits that they intend to offer at the adjudication hearing. Counsel should consult their local rules to determine the effect of failing to produce an exhibit as required at the pre-adjudication conference. *See also* G.S. 7B-800.1 (requiring pre-adjudication hearings in abuse, neglect, and dependency proceedings); G.S. 7B-1108.1 (requiring pretrial hearings in termination of parental rights cases). For a further discussion of pre-adjudication conferences, see *supra* § 5.7.

D. Objections at Trial

The North Carolina appellate courts have strict waiver rules requiring that a party timely and specifically object to the admission of evidence to preserve the issue for review on appeal. The North Carolina appellate courts have declined to extend to juvenile cases the plain error doctrine, which allows review of errors to which a party did not object at trial if injustice would otherwise result. *See, e.g., In re B.D.*, 174 N.C. App. 234, 245 (2005) (declining to adopt the plain error doctrine in termination of parental rights proceedings); *In re Gleisner*, 141 N.C. App. 475, 479 (2000) (to same effect for neglect proceeding). The failure to make appropriate objections, however, may amount to ineffective assistance of counsel. *In re S.C.R.*, 198 N.C. App. 525, 531 (2009).

Even if a proper objection is made, it is presumed that the trial court did not rely on incompetent evidence unless it affirmatively appears to the contrary. However, ““this presumption is weakened when, over objection, the judge admits clearly incompetent

evidence.” 1 BRANDIS & BROUN § 5, at 14–15 (quoting *State v. Davis*, 290 N.C. 511, 542 (1976)).

In brief, to preserve an evidentiary issue fully for review on appeal, a party must do the following.

1. Timely objection. Evidence Rule 103(a) provides that the party opposing the introduction of evidence must make a timely objection to the evidence in question. Generally, to be timely, the objection must be made when the evidence is first offered and must be repeated thereafter each time the evidence is offered. *See In re Morales*, 159 N.C. App. 429 (2003) (parents waived their objection to the admission of a social worker’s opinion that the daughter was sexually abused where a physician later gave the same opinion without objection). The party making the objection also must obtain a ruling from the court on the objection. N.C. R. APP. P. 10(a).

A party is not required to repeat an objection if the court allows a standing, or line, objection to a particular line of questions. *See* N.C. R. CIV. P. 46. To ensure that a line objection is properly preserved, the party should ask the trial court’s permission to have a standing or line objection to the particular evidence. If a question within a line of questioning is objectionable on additional grounds, the party must interpose an objection to that question on the additional ground.

A party is not required to object to each question if the initial ground for objection is that the witness is incompetent or otherwise disqualified from testifying. *Id.*

2. Grounds for objection. The opposing party must state all grounds for the objection, including any constitutional grounds. *See In re K.D.*, 178 N.C. App. 322, 326 (2006) (“A party may not assert at trial one basis for objection to the admission of evidence, but then rely upon a different basis on appeal.”); N.C. R. APP. P. 10(a)(1) (“[A] party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”).

3. Evidence for limited purpose. The party offering evidence is not required to specify the purpose for which it is offered unless the evidence is challenged. *See State v. McGraw*, 137 N.C. App. 726, 730 (2000) (explaining that the better practice is for the offering party to specify the purpose, but it is not required). It is therefore incumbent on the opposing party to raise the issue and, if the evidence should be considered for a limited purpose only, request that the evidence be considered for that purpose only. *See In re A.S.*, 190 N.C. App. 679, 688–89 (2008) (holding that since the respondent did not object to the admission of the report or request that its use be limited, the report could be treated as substantive evidence), *aff’d per curiam*, 363 N.C. 254 (2009).

4. Motion to strike. If a party’s question is not objectionable but the witness’s answer is improper, the opposing party must make a timely motion to strike. *See* 1 BRANDIS & BROUN § 19, at 86.

5. Offers of proof. If evidence is excluded, the proponent of the evidence must make an offer of proof to preserve the issue for appeal unless the record otherwise shows what the substance of the excluded evidence would have been. *See* N.C. R. EVID. 103(a); *In re Montgomery*, 77 N.C. App. 709, 713 (1985); *see generally* 1 BRANDIS & BROUN § 18, at 74–80. This requirement applies to evidence a party offers and also when a witness is found to be incompetent and not permitted to testify. *See* 1 BRANDIS & BROUN § 18, at 79–80 (explaining that the substance of what an excluded witness would say should appear in the record). The most complete way to make an offer of proof is by eliciting the testimony from the witness on the record or, if the evidence is an exhibit, by filing the document with the trial court.

6. Importance of complete recordation. When conversations or proceedings take place at the bench or in chambers, extra steps may need to be taken to ensure that the conversations or proceedings, including any objections, appear in the record. A party may request the court to have the conversations or proceedings recorded or, if not recorded at the time, to summarize them for the record afterward.

Resource: For a fuller discussion of preserving the record for appeal, see Danielle M. Carman, Anne M. Gomez & Julie R. Lewis, [Preserving the Record on Appeal](#) (Fall 2009). The paper focuses on criminal cases, but many of the principles also apply to juvenile cases. *See also infra* § 12.3 (discussing preservation of the record for appeal).

Chapter 12

Appeals¹

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1. The following sources provided background information and research resources that facilitated the drafting of this chapter: Training materials from the North Carolina Appellate Boot Camp, Parent Representation Division, sponsored by the School of Government and the Office of Indigent Defense Services, November 13, 2009; PAMELA WILLIAMS & ALEXANDRA GRUBER, *THE SURVIVOR’S GUIDE TO GUARDIAN AD LITEM APPEALS* (2007).

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12.1 Scope of Chapter

This chapter addresses general characteristics of appeals in juvenile cases and issues that trial attorneys and trial court judges encounter in connection with these appeals. This chapter does not comprehensively discuss appellate procedure in juvenile cases.

The Juvenile Code addresses certain aspects of appeals, including who can appeal, which orders can be appealed, and notice of appeal. However, appeals in juvenile proceedings are governed primarily by the Rules of Appellate Procedure. Rule 3.1 of the Appellate Rules specifically addresses appeals in juvenile cases and provides, among other things, for an expedited process and protection of the juvenile's identity.

Tool: The NORTH CAROLINA RULES of APPELLATE PROCEDURE (including a redlined version showing changes made by 2009 amendments) and A STYLE MANUAL for the NORTH CAROLINA RULES OF APPELLATE PROCEDURE (with sample pleadings and motions) are available on the "[Office of the North Carolina Appellate Reporter](#)" section of the NC Administrative Office of the Courts website.

12.2 Parties and Representation

A. Who Can Appeal

1. Parties on appeal. Appeal to the court of appeals may be taken by:

- the juvenile, acting through a guardian ad litem (if one is not appointed under G.S. 7B-601, the court must appoint a Rule 17 GAL for purposes of the appeal);
- a county social services department;
- a parent, guardian, or custodian who is not a prevailing party; and
- any party who sought but failed to obtain termination of parental rights.

G.S. 7B-1002.

A caretaker, as defined in G.S. 7B-101(3), is not a parent, guardian, or custodian and does not have standing to appeal. The determination of whether one is a custodian or guardian depends on whether there is an order giving that person legal custody or guardianship. *See* G.S. 7B-101(8) (defining "custodian") and *supra* § 2.1.B.11 discussing caretakers, guardians, and custodians.

The fact that a parent is not properly served with the juvenile petition does not affect whether he or she is a proper party to appeal an adjudication and disposition order since G.S. 7B-1002(4) makes it clear that a parent is a proper party to appeal. *In re E.J.*, ___ N.C. App. ___, 738 S.E.2d 204 (2013).

A biological parent of children who have been adopted has no parental rights and therefore no standing to appeal. *In re T.H.*, ___ N.C. App. ___, 753 S.E.2d 207 (2014).

2. Joinder of parties. Any two or more parties whose interests are the same may pursue or respond to an appeal jointly. Parties who are appealing may join initially or after taking separate appeals. After joinder, the parties proceed as a single appellant or appellee. N.C. R. APP. P. 5.

3. Intervening party. Even though the state Department of Health and Human Services (DHHS) is not routinely involved in appeals in juvenile proceedings, in two related cases the court of appeals allowed DHHS to intervene and granted its motions to dismiss county DSSs' appeals. *In re Z.D.H.*, 184 N.C. App. 183 (2007); *In re J.L.H.*, 184 N.C. App. 180 (2007) (holding that county DSSs are agents of DHHS and "must act as instructed by their principal").

4. Nonparticipating party. When one party to a juvenile proceeding appeals, another party may choose not to participate in the appeal. For example, where both parents participate in a juvenile proceeding at the trial level and only one appeals a judgment, the other parent may or may not elect to participate in the appeal. Rule 26(b) of the Appellate Rules requires that copies of all papers filed by a party must be served on all other "parties to the appeal," which would seem to indicate that nonparticipating parties need not be served. However, because a party's decision not to participate in an appeal is typically not marked by a specific declaration or the filing of a specific document to make it clear that he or she is not a "party to the appeal," failure to serve nonparticipating parties in some circumstances could be problematic, and attorneys may view service on nonparticipating parties as the best approach. Attorneys who represent nonparticipating parties at the trial level sometimes are allowed to withdraw, in which case papers would be served directly on the party. If a party is unrepresented, he or she should be served at his or her last known address.

B. Appellate Representation in Juvenile Proceedings

1. Overview. Appellate representation for county departments of social services (or "human services") is handled by each individual county. The state Division of Social Services is not involved. For indigent parents, appellate representation is coordinated by the Office of Indigent Defense Services (IDS). Appellate representation for children through a guardian ad litem (GAL) is coordinated by the Guardian ad Litem state office. Respondents who are not indigent must bear the cost of their own representation. The court can review a party's financial status and eligibility for appointed counsel at any time.

Policies and procedures set by IDS and the GAL state office determine the manner in which appellate counsel is assigned to a case and the expectations for appellate representation. Both

programs also coordinate training events and provide materials addressing appeals in juvenile cases.

Indigent respondents who are not parents do not have a statutory right to court-appointed counsel. See G.S. 7B-602(a) and 7B-1101.1(a), which address only an indigent parent's right to appointed counsel. North Carolina appellate courts have not addressed the question of whether there is any circumstance in which an indigent guardian, custodian, or caretaker would be entitled to court appointed counsel. IDS, which is responsible for providing representation for indigent parent respondents, defers to the courts on that question and provides by policy that IDS will pay for representation "[i]f a judge concludes that due process requires appointment of counsel for a particular indigent non-parent respondent in an abuse, neglect, or dependency proceeding." N.C. Office of Indigent Defense Services, [*Appointment of Counsel for Non-Parent Respondents in Abuse, Neglect, and Dependency Proceedings*](#) (July 2, 2008).

Appellate entry forms are AOC forms typically filled out by the clerk when notice of appeal has been given. The form is signed by the judge and orders the clerk to furnish copies of the file to the parties, orders assignment of a transcriptionist, and orders appointment of IDS appellate counsel when appropriate. The forms also include contact information for persons involved in the appeal and address costs, any need for a translator or interpreter, and the dates of the hearings for which recordings should be sent to the transcriptionist. Form AOC-J-160 is used when the appealing party is a respondent, and form AOC-J-161 is used when DSS or another petitioner is the appealing party.

Tools: AOC Form AOC-J-160, "[Appellate Entries in Abuse, Neglect, Dependency, or Termination of Parental Rights Proceeding](#)" (June 2015) and AOC Form AOC-J-161, "[Appellate Entries for DSS/GAL in Abuse, Neglect, Dependency, or Termination of Parental Rights Proceeding](#)" (June 2015).

2. Appellate representation for parents. The statutory entitlement to counsel for indigent parents continues through any critical stage of the proceeding, including appeals. See G.S. 7A-451. When notice of appeal is given, a respondent is not required to file a new affidavit of indigency, and the trial court is not required to make a new determination of eligibility for appointed counsel. See *In re D.Q.W.*, 167 N.C. App. 38 (2004). However, the court may reexamine a party's entitlement to appointed counsel at any stage of the proceeding. *Id.*

Appellate representation for indigent parents is handled by the Parent Representation Division of the Office of the Appellate Defender in IDS. The appeal is assigned to an assistant appellate defender or a private attorney who has completed mandatory training and been accepted for placement on the "7B appellate roster." Once appellate entries (explained above) are completed and signed by the trial judge, the Office of Parent Representation completes a Notice of Appointment that contains the name and contact information of the assigned appellate attorney. This notice is mailed to the juvenile clerk for filing in the district court file and copies are sent to the parties' attorneys and the transcriptionist.

3. Appellate representation for children. When children participate in appeals through their guardians ad litem, representation is handled by the Guardian ad Litem Services Division (GAL state office) of the state Administrative Office of the Courts (AOC). When the GAL state office is notified by the AOC of an appeal, the case is either assigned “in house” to the GAL Appellate Counsel or Associate Counsel, or assigned to an attorney in the GAL pro bono attorney program coordinated by the GAL state office. Occasionally, the trial attorney advocate handles the appeal. When the case is assigned, an Order of Appointment of Appellate Counsel is forwarded to the GAL district office in the district where the appeal originated, for signature by the trial judge. This appointment order is filed in the juvenile court file and served on the parties’ attorneys and the transcriptionist. The GAL appellate attorney also files a Notice of Appearance with the court of appeals and serves it on the parties’ counsel (appellate counsel if known, otherwise trial counsel) and the transcriptionist.

4. Appellate representation for DSS. Appellate representation for DSS is the responsibility of the individual county. An appeal may be handled by the attorney who represented DSS at trial, another DSS attorney, or an attorney retained or contracted by DSS specifically to represent the department in the appeal. The state Department of Health and Human Services (DHHS) assumes no responsibility for county DSSs’ representation.

C. Role of Trial Counsel

The Rules of Appellate Procedure specifically address the role of trial counsel when a different attorney will be handling the appeal in a juvenile case. Rule 3.1(a) states that trial counsel is responsible for filing and serving the notice of appeal in the time and manner required. Rule 3.1(c)(2) states that trial counsel for an appealing party has a duty to assist appellate counsel in preparing and serving a proposed record on appeal and that trial counsel is not permitted to withdraw or be relieved of responsibilities until the record on appeal has been filed.

Rule 3.1(a) states that the appellant must cooperate with counsel throughout the appeal. N.C. R. APP. P. 3.1(a).

For information related to the responsibilities of respondents’ trial counsel in relation to appeals, *see* N.C. COMM’N ON INDIGENT DEFENSE SERVS., [PERFORMANCE GUIDELINES FOR ATTORNEYS REPRESENTING INDIGENT PARENT RESPONDENTS IN ABUSE, NEGLECT, DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS AT THE TRIAL LEVEL](#), 34-35 (2007).

Practice Note: The role and division of responsibilities between trial counsel and appellate counsel in the early stage of an appeal depend on the arrangements made between the attorneys themselves as well as policies of their respective agencies. Trial counsel should advise the client about the effect of the appeal, make any appropriate motions before appellate counsel becomes involved, and respond to requests for information from appellate counsel.

12.3 Preserving the Record

A. Preserving Issues for Appeal

Some topics relating to preservation of issues for appeal (including pretrial motions; specific, continuing, and timely objections; and offers of proof) are discussed *supra* § 11.13.B., C., and D.

1. Objection, grounds, and ruling required. In order to preserve an issue for appellate review, in the trial court a party must:

- state specific grounds for the desired ruling (unless the specific grounds are apparent); and
- obtain a ruling on the request, objection, or motion.

N.C. R. APP. P. 10(a). *See also In re K.A.*, __ N.C. App. __, 756 S.E.2d 837 (2014) (holding that the issue of the trial court’s misapplication of the doctrine of collateral estoppel was properly objected to and therefore preserved for appeal); *In re A.D.N.*, __ N.C. App. __, 752 S.E.2d 201 (2013) (acknowledging the respondent’s claim that the trial court failed to appoint a GAL for the child although required to do so but declining to address the issue because it was not raised at trial). A constitutional issue not raised at the trial level will not be considered for the first time on appeal. *See, e.g., In re T.P.*, 217 N.C. App. 181 (Nov. 15, 2011) (declining to address the trial court’s finding that the respondent had acted inconsistently with her protected parental status, which was a constitutional issue).

2. Issues automatically preserved for appeal. Certain issues are preserved as a matter of law even if no objection is made, including but not limited to:

- lack of subject matter jurisdiction [N.C. R. APP. P. 10(a)],
- whether the judgment is supported by the findings of fact and conclusions of law [N.C. R. APP. P. 10(a)],
- questions directed to a witness by the trial court [N.C. R. CIV. P. 46(a)(3)], and
- whether the trial court failed to follow a statutory mandate, resulting in prejudice to the respondent, or misinterpreted the law.

See State v. Ashe, 314 N.C. 28 (1985) (addressing trial court actions contrary to statutory mandate); *State v. Hernandez*, 188 N.C. App. 193, 204 (2008) (allowing consideration of an issue on appeal although not objected to at trial, because “[w]hen a trial court acts contrary to a statutory mandate, no objection is necessary to preserve the error”) (citing *State v. Golphin*, 352 N.C. 364, 411 (2000)); *In re Taylor*, 97 N.C. App. 57, 61 (1990) (reviewing the trial court’s failure to conduct a special hearing in a termination of parental rights case despite respondent’s failure to object at trial, and stating that “[w]hen ... a judge acts in contravention of a statute to the prejudice of a party, the right to appeal is preserved notwithstanding the failure to enter an objection”).

However, even when an appellate issue involves a statutory mandate, appellate courts will not necessarily consider the issue on appeal when not objected to at trial. For example, appellate

cases have recognized the appointment of a GAL for the child (in certain circumstances) to be a statutory mandate, but have not always been willing to consider on appeal the issue of failure to appoint a GAL where no objection was made at the trial level. In the case *In re A.D.N.*, __ N.C. App. __, 752 S.E.2d 201 (2013), the court of appeals rejected respondent's request to reverse the TPR order based on the trial court's failure to appoint a GAL, even though the statute required one, because the respondent did not object at trial. In doing so, the court cited two cases, *In re Fuller*, 144 N.C. App. 620 (2001), and *In re Barnes*, 97 N.C. App. 325 (1990), in which the same issue arose. In *Fuller* and *Barnes*, the court of appeals held that preservation of the issue of failure to appoint a GAL required objection at trial, and although the requirement of appointing a GAL was referred to as a "statutory mandate," the court did not discuss the automatic preservation of an issue for appellate review based on a statutory mandate. *Fuller* and *Barnes* did, however, invoke Rule 2 of the Rules of Appellate Procedure, which allows suspending the appellate rules for "manifest injustice," in order to reach this issue on appeal. The court in *A.D.N.* refused to invoke Rule 2, finding that it was inapplicable to the facts of the case as there was no manifest injustice, and also did not discuss the preservation issue in the context of a statutory mandate.

B. Scope of Appellate Review

As explained above, with few exceptions only those issues properly preserved at trial may be presented as issues on appeal. In addition, appellate courts will only review issues presented and discussed in briefs. Issues not presented and discussed in a party's brief are deemed abandoned. N.C. R. APP. P. 28(a). *See also In re J.D.R.*, __ N.C. App. __, 768 S.E.2d 172 (2015) (although mother appealed from more than one order, because the brief only addressed the disposition order, appellate review was limited to that issue). Issues are also presented in the record on appeal, but failure to present an issue in the record will not prevent a party from arguing the issue as long as it is presented and discussed in a brief. N.C. R. APP. P. 10(b). (Appellate rules in effect prior to October 1, 2009, had more stringent requirements with respect to the presentation of issues in the record on appeal, requiring parties to present issues as "assignments of error" in the record or lose the opportunity to argue them.) Note that the issue of subject matter jurisdiction can be raised for the first time on appeal and may be raised by the court *sua sponte*. *See, e.g., Rodriguez v. Rodriguez*, 211 N.C. App. 267, 269 (2011), in which the court of appeals on its own motion raised the issue of the juvenile court's exclusive jurisdiction.

Thus, a brief must assert specific determinations of the trial court (as opposed to general determinations) as issues in order to have them reviewed by the appellate court. For example, one cannot assert that there is insufficient evidence for the court's findings generally, or errors in the court's conclusions generally. Rather, a brief must assert a particular finding of fact for which there is insufficient evidence or a particular conclusion for which there are insufficient findings in order to properly present an issue for review by the appellate court. *See, e.g., In re A.H.*, 183 N.C. App. 609 (2007) (holding that although respondent assigned error to various findings, under the former appellate rule that required assignments of error, they were not argued in her brief and were deemed abandoned); *In re J.M.W.*, 179 N.C. App. 788 (2006) (refusing to review two of the grounds for termination of parental rights because appellant failed to argue them in her brief); *In re P.M.*, 169 N.C. App. 423 (2005) (holding

that where the appellant failed to specifically argue in her brief that specified findings were unsupported by evidence, the appellate court would consider only whether the findings supported the conclusions of law).

The brief itself is not a source of evidence, so representations made in a brief that do not relate to matters in the record cannot be considered by the court. *See In re A.B. and J.B.*, ___ N.C. App. ___, 768 S.E.2d 573 (2015) (counsel’s representations in a brief that attempted to explain an error in drafting a court order could not be considered evidence on appeal).

Thus, the scope of the court’s review also depends on the contents of the record on appeal. The record must contain anything necessary for the appellate court to review all issues presented on appeal, without including unnecessary documents from the court file. For example, the appellate court cannot address an alleged error in admitting a document unless the document is contained in the record on appeal. The contents, format, and requirements for the record on appeal are addressed in Appellate Rule 9. Appellate Rule 9(b)(5) allows a responding party to “supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9” when “the record as settled is insufficient to respond to issues presented in appellant’s brief.” These supplemental materials, however, cannot contain documents or issues that were not before the trial court in the case being considered. *See In re M.G. and H.G.*, ___ N.C. App. ___, 767 S.E.2d 436 (2015) (admonishing counsel for filing supplemental materials containing documents from another case not before the trial court in the present case and raising issues never considered by the trial court).

Practice Note: In an unpublished opinion, the court of appeals admonished all counsel regarding the unnecessarily large volume of the record on appeal. The court of appeals devoted part of its opinion to discussing the waste of time and resources, pointing out that the record was 770 pages, consisting of what appeared to be copies of everything in the trial record. *In re J.J.*, 199 N.C. App. 755 (2009) (unpublished).

Parties may be judicially estopped from taking inconsistent positions at trial and on appeal, and a party who changes its position has a responsibility to notify the affected courts and explain a change in position to justify its actions. *See In re I.K.*, ___ N.C. App. ___, 742 S.E.2d 588 (2013); *In re Maynard*, 116 N.C. App. 616 (1994).

The appellate court, pursuant to Appellate Rule 2, may suspend or vary the requirements or provisions of the Appellate Rules and consider issues that are not properly preserved or presented for review, either to “prevent manifest injustice to a party” or to “expedite decision in the public interest.” *See, e.g., In re S.B.*, 166 N.C. App. 488 (2004) (considering *sua sponte* whether the trial court erred by failing to appoint a guardian ad litem for the respondent); *In re Fuller*, 144 N.C. App. 620 (2001).

12.4 Which Orders Can Be Appealed?

A. Appealable Orders

The Juvenile Code specifies the types of final orders in juvenile cases that may be appealed by an aggrieved party who has standing to appeal. *See* G.S. 7B-1001(a).

1. No jurisdiction. Any order finding a lack of jurisdiction may be appealed. G.S. 7B-1001(a)(1). *See also In re A.T.*, 191 N.C. App. 372 (2008) (rejecting the appellant's assertion that an order resulting from a nonsecure custody hearing was related to a lack of jurisdiction and therefore appealable).

2. Order determining the action. Any order that in effect determines the action and prevents a judgment from which appeal might be taken, including the involuntary dismissal of a petition, may be appealed. G.S. 7B-1001(a)(2). In the case *In re E.H.*, ___ N.C. App. ___, 742 S.E.2d 844, 847 (2013), the trial court denied the GAL's Rule 60 motion to set aside DSS's voluntary dismissal of its petition, and the GAL appealed. The court of appeals held that the trial court's order was appealable because it (1) terminated jurisdiction by refusing to set aside the voluntary dismissal, and (2) determined the action and prevented a final judgment on the merits.

Orders made during the pendency of an action that do not dispose of the case are interlocutory. Interlocutory orders are not immediately appealable unless failure to grant immediate review would affect a substantial right. *See* G.S. 1-277(a). The burden is on the appellant to establish that a substantial right will be affected, with the test being whether the right itself is substantial and the deprivation of that right would cause injury if not corrected before appeal from the final judgment. *See In re J.G.*, 186 N.C. App. 496 (2007) (and cases cited therein) (holding that the trial court's order affecting DSS's right to choose how to dispose of funds it received as a representative payee for Social Security benefits affected a substantial right and was immediately appealable). *See also In re A.R.G.*, 361 N.C. 397 (2007) (analyzing a previous version of G.S. 7B-1001 and holding that respondent's appeal was properly dismissed because the order was interlocutory and did not affect a substantial right).

3. Initial disposition and underlying adjudication order. An initial disposition order and the adjudication order upon which it is based may be appealed. G.S. 7B-1001(a)(3). Dispositional orders that are temporary in nature may not be appealed. *See In re C.M.*, 183 N.C. App. 207 (2007).

4. Order changing custody. An order, other than a nonsecure custody order, that changes the legal custody of a juvenile may be appealed. G.S. 7B-1001(a)(4). *See also In re J.V.*, 198 N.C. App. 108 (2009) (stating that a permanency planning order that named relatives as guardians modified custody and was immediately appealable).

In analyzing an earlier version of this Juvenile Code provision, which included in the list of appealable orders "any order modifying custodial rights," the N.C. Supreme Court considered

a father's argument that the trial court's determination that it was in the child's best interest to pursue TPR cut him off as a possible placement and therefore modified custodial rights. *In re A.R.G.*, 361 N.C. 392 (2007). The supreme court rejected this argument, finding that throughout the case the trial court had ordered that legal custody of the child remain with DSS, the father had never been awarded custody, and there had not yet been an order terminating parental rights. (*Note*: the version of the statute that the court analyzed did not include the provisions added to G.S. 7B-1001 in 2005 to address appeal of orders ceasing reunification efforts, discussed below, limiting the relevancy the *A.R.G.* holding to an analysis of whether an order modifies custodial rights.)

5. Order ceasing reunification efforts. An order pursuant to G.S. 7B-507(c) to cease reunification efforts may be reviewed on appeal, but the timing of an appeal by a parent is somewhat unusual. G.S. 7B-1001(a)(5); see § 12.5.A below on timing. The court of appeals has interpreted an order that does not explicitly cease reunification efforts but directs DSS to file a TPR petition as implicitly ceasing reunification efforts, making the order appealable as long as proper notice of appeal is given. *In re A.P.W.*, ___ N.C. App. ___, 741 S.E.2d 388 (2013); *In re J.N.S.*, 207 N.C. App. 670 (2010).

6. TPR order. Any order terminating parental rights or denying a petition or motion to terminate parental rights may be appealed. G.S. 7B-1001(a)(6).

B. When an Appeal Is Moot

When a legal controversy between opposing parties ceases to exist, the case generally is rendered moot. The appellate court will decide a case only if the controversy giving rise to the appeal continues at the time of appeal. *See In re A.S. III.*, ___ N.C. App. ___, 753 S.E.2d 684 (2013) (published, but originally reported as unpublished) (holding that respondent's appeal was moot because the order being appealed had been subsequently modified in a review hearing and any determination of the issues on appeal would have no practical effect, nor did any exceptions to the mootness doctrine apply); *In re B.G.*, 207 N.C. App. 745 (2010) (dismissing an appeal as moot when juvenile reached the age of 18 while the appeal was pending); *In re H.D.F.*, 197 N.C. App. 480 (2009) (dismissing as moot part of the mother's appeal challenging the trial court's finding that returning custody of the child to her was not in the child's best interest, where the trial court apparently had entered a subsequent order returning custody to the mother).

In certain cases, however, if the continued existence of the judgment itself may result in adverse collateral legal consequences for the appellant, the validity of the judgment continues to be a live controversy. *See In re A.K.*, 360 N.C. 449, 454 (2006), in which the court said that "a parent may reasonably expect 'collateral legal consequences of an adverse nature' to result from an adjudication of his or her minor child as neglected." (citing *In re Barbosa*, 357 N.C. 160 (2003)). Therefore, a parent's appeal from an adjudication is not rendered moot simply because the child is returned to the parent's custody. *Id.*

ATPR may be a ground for termination of that parent's rights to another child if that parent lacks the ability or willingness to establish a safe home for the other child. G.S. 7B-

1111(a)(9). The court of appeals has held this collateral consequence makes it so that the appeal is not moot even after a child has been adopted during the TPR appeal. In the case of *In re Baby Boy [Costin]*, while the parties were awaiting a determination from the court of appeals as to whether an adoption was valid, adoptive parents initiated a TPR petition, TPR was ordered, and the respondent parent appealed. *In re Baby Boy [Costin]*, ___ N.C. App. ___, 767 S.E.2d 628 (2014). Subsequently, the court of appeals held that the adoption was valid, and although the TPR would have no practical effect on the outcome of the child's parentage, the court of appeals determined that the order terminating the mother's rights had collateral consequences and the appeal was therefore not moot. *See also In re C.C.*, 173 N.C. App. 375 (2005) (refusing to dismiss as moot a mother's appeal from an order terminating her parental rights, when the child took his own life after notice of appeal was given, because termination of a parent's rights may form the basis of a subsequent proceeding to terminate the parent's rights in relation to another child). In the case *In re J.S.L.*, 218 N.C. App. 610 (2012) (published, but originally reported as unpublished), the putative father in a private TPR case filed an answer denying paternity and moving for DNA paternity testing. The court denied the motion, proceeded with the termination proceeding, adjudicated two grounds, and terminated respondent's rights. The court of appeals reversed and remanded, finding that when respondent denied paternity the trial court was required under G.S. 8-50.1(b1) to order paternity testing. The court of appeals stated that the order terminating respondent's rights did not render his appeal moot since termination of parental rights had collateral consequences.

12.5 Notice of Appeal

A. Timing, Manner, and Content of Notice

1. Timing and manner generally. Notice of appeal (or of intent to appeal an order ceasing reunification efforts, discussed in 2. below) must be given in writing within 30 days after entry and service of the order pursuant to Rule 58 of the Rules of Civil Procedure. G.S. 7B-1001(b). *See supra* § 4.9.C (relating to entry of orders and Rule 58, including the effect of delays in service of the order).

Notice of appeal given within 30 days after the oral rendering of judgment in open court, but before entry of judgment, is timely. *See In re J.L.*, 184 N.C. App. 750 (2007) (holding that the trial court erred in dismissing the respondent's appeal for failure to timely give notice of appeal, when the respondent filed a written notice of appeal after the court rendered its judgment but before the court entered its written judgment); *In re S.F.*, 198 N.C. App. 611 (2009) (holding that notice of appeal was timely where respondent filed the notice nine days after the court orally announced the decision to terminate parental rights, even though the court's written order was not entered until more than a month later).

Any necessary amendment to the notice of appeal must also be filed within the 30-day time limit. *See In re K.C.*, 199 N.C. App. 557 (2009) (dismissing the appeal when the amended notice of appeal, the only notice that referenced the disposition order, was filed more than 30 days after the order was entered).

2. Timing and manner of appeal of order ceasing reunification efforts. Requirements for appeal by a parent from an order that ceases reunification efforts are different.

(a) Immediately for custodian or guardian. When reasonable efforts are aimed at reunifying the child with a custodian or guardian, a custodian or guardian appealing an order ceasing reunification efforts must give notice of appeal within 30 days after entry of the order. G.S. 7B-1001(a)(5)(c).

(b) Later appeal for parent. Instead of an immediate appeal of an order ceasing reunification efforts, a parent gives notice of an intent to appeal, in order to preserve the right to appeal. The timing of the appeal depends on whether there is a subsequent motion or petition for termination of parental rights. Notice to preserve the right to appeal must be made in writing within 30 days after entry and service of the order ceasing reunification efforts. G.S. 7B-1001(b).

i. Where no TPR is filed. If no TPR petition or motion is filed within 180 days after entry of the order ceasing reunification efforts, a parent who has given proper notice of the intent to appeal may proceed with the appeal at that time. G.S. 7B-1001(a)(5)(b). Once the 180 days has elapsed, notice of appeal must be filed within 30 days (within 210 days after the entry of the order ceasing reunification). *In re A.R.*, __ N.C. App. __, 767 S.E.2d 427 (2014) (applying the 30-day limitation in G.S. 7B-1001(b) to this circumstance and holding that respondent's notice of appeal filed more than 210 days after order ceasing reunification efforts was untimely and therefore must be dismissed).

In the case *In re D.K.H.*, 184 N.C. App. 289 (2007), the court of appeals dismissed the father's appeal from an order ceasing reunification efforts where the father had given proper notice of his intent to appeal, but fewer than 180 days had passed since entry of the order.

ii. Combined with TPR appeal. When a TPR action is filed within 180 days of the order ceasing reunification efforts and there is a subsequent appeal of an order terminating the parent's rights, the appeal of the order ceasing reunification efforts will be reviewed together with the TPR appeal if:

- the motion or petition to terminate parental rights has been heard and granted;
- the TPR order is appealed in a proper and timely manner; and
- the order to cease reunification efforts is identified as an issue in the record on appeal of the TPR.

G.S. 7B-1001(a)(5)(a).

[Note: The statute is silent with respect to how or when a parent appeals an order ceasing reunification efforts when a TPR petition or motion is heard but not granted. It seems likely that the parent would have 30 days from entry of the order denying the TPR to give notice of appeal.]

Both G.S. 7B-507(c) and the introductory sentence to G.S. 7B-1001(a)(5) refer to a proper notice of intent to appeal a cease reunification order. However, the court of appeals has considered challenges to these orders without such notice when combined with the appeal of the TPR order. *See In re H.D. and K.R.*, __ N.C. App. __, 768 S.E.2d 860 (2015) (relying on the supreme court’s decision in *In re L.M.T.*, __ N.C. __ 752 S.E.2d 453 (2013)); *In re A.E.C.*, __ N.C. App. __, 768 S.E.2d 166 (2015).

In an appeal of both the TPR and cessation of reunification efforts orders, the GAL argued that the appeal of the order ceasing reunification efforts should be dismissed because the respondent failed to comply with G.S. 7B-1001(a)(5)(a)(2) by not bringing forward any issues on appeal related to the TPR. The court of appeals rejected this argument, holding that the statute only required that the TPR appeal be filed in a timely and proper manner, and this appeal was proper and timely. *In re A.P.W.*, __ N.C. App. __, 741 S.E.2d 388 (2013).

The North Carolina Supreme Court has interpreted the statute that combines appellate review of the order ceasing reunification efforts with review of the TPR order to mean that the two orders are to be reviewed together, not separately. *In re L.M.T.*, __ N.C. __, 752 S.E.2d 453 (2013). In this case, the court of appeals held that the permanency planning order that ceased reunification efforts was insufficient and, reversed the order without reviewing the TPR order. The supreme court reversed, holding that both the permanency planning order and the TPR order when read together were sufficient, stating that even if the permanency planning order was deficient, it should have been reviewed in conjunction with the TPR order to determine whether statutory requirements were met. *Id. See also In re D.C.*, __ N.C. App. __, 763 S.E.2d 314 (2014) (holding that although the permanency planning order that ceased reunification efforts standing alone was insufficient, the TPR order contained sufficient findings to meet the statutory requirements for cessation of reunification efforts).

Practice Note: In the notice of appeal from the order terminating parental rights, the better practice is to mention that the party is also appealing the order ceasing reunification efforts, pursuant to the party having given timely notice of the intent to appeal that order. Referencing both orders in the notice of appeal helps ensure that the clerk knows which recordings of hearings to submit to the transcriptionist and that appellate counsel, if different from trial counsel, knows immediately that the appeal includes that order.

3. Signatures. Both the Juvenile Code and the appellate rules require that the notice of appeal be signed by both the appealing party and counsel for the appealing party, if any. G.S. 7B-1001(c); N.C. R. APP. P. 3.1(a). *See In re A.S.*, 190 N.C. App. 679 (2008) (dismissing the appeal for failure of the mother to sign the notice of appeal, but granting her writ of certiorari). *See also In re L.B.*, 187 N.C. App. 326 (2007) (dismissing the appeal because, under an earlier version of the statute, the signatures of respondents’ guardians ad litem on the notices of appeal were not sufficient signatures by the “appellant”), *aff’d per curiam*, 362 N.C. 507 (2008). *But see also In re A.S.Y.*, 208 N.C. App. 530, 537 & n.5 (2010) (stating that a 2009 amendment to G.S. 7B-1101.1(c) “significantly alter[ed] the analysis of a GAL’s duties,” but also stating that its determination in the case relating to duties of a GAL did not require it “to

touch upon or otherwise disturb the ultimate question determined by the *L.B.* Court that a notice of appeal signed by the GAL but not the parent is insufficient to grant jurisdiction of the appeal to this Court”). Because the sufficiency of a GAL’s signature is not altogether clear, the safer practice is for both the GAL and the party to sign the notice along with the attorney when possible.

For an appeal by a juvenile, the notice of appeal must be signed by the GAL attorney advocate.

4. Contents. The notice of appeal must specify the party or parties taking the appeal and must designate the judgment or order from which the appeal is taken and the court to which the appeal is taken. N.C. R. APP. P. 3(d). Special rules related to the protection of the child’s identity apply to the notice of appeal and are explained in § 12.6 *infra*. Where respondent mother alleged error with the GAL appointment in both the TPR and underlying neglect case, because her notice of appeal only referenced the TPR order, the court dismissed her argument on appeal related to the underlying neglect case. *In re D.W.C.*, 205 N.C. App. 266 (2010).

B. Service and Proof of Service

Service of the notice of appeal may be made pursuant to Rule 4 of the Rules of Civil Procedure on a party or the party’s attorney. Service also may be made by delivering a copy of the notice to the party or the attorney, by mailing a copy to the recipient’s last known address, or, if no address is known, by filing it with the clerk. Delivery of a copy means handing it to the attorney or to the party or leaving it at the attorney’s office with a partner or employee. Service by mail is complete upon deposit of a properly addressed and postage paid envelope or package in a post office or official depository of the United States Postal Service or, for those having access to such services, upon deposit with “the State Courier Service or Inter-Office Mail.” See N.C. R. APP. P. 26(c). See “[Mail Service Center](#)” on the North Carolina Department of Administration website for additional information about the state Mail Service Center, including explanations of state courier mail and interoffice mail.

When a document relating to an appeal is filed electronically to the official appellate court website, service also may be accomplished electronically by use of the other counsel’s correct and current electronic mail address. See N.C. R. APP. P. 26(c). See also “[North Carolina Supreme Court and Court of Appeals Electronic Filing Site and Document Library](#),” on the North Carolina Appellate Courts website; “[Attorney’s Instructions for Electronic Filing of Documents in the Supreme Court and Court of Appeals of North Carolina](#),” on the North Carolina Administrative Office of the Courts website.

Practice Note: The ability to use electronic filing in juvenile appeals is not specified in the appellate rules and appears to depend on:

- the type of proceeding from which the appeal is taken,
- the type of document being filed,

- the court (appellate or supreme) in which the document is being filed, and
- current appellate court policies.

As of the time of this writing, the electronic filing website for the appellate courts says that documents for “3-1” TPR (3-1 is presumably the same as 3.1) cases, records on appeal, 9(b)(5) supplements, or memorandums of additional authority are not accepted for electronic filing in the court of appeals. However, some motions and other documents have in practice been accepted for electronic filing in the court of appeals. In the supreme court, electronic filing for all documents in all cases appears to be accepted. Since the electronic filing website is continually evolving, and appellate court policies may change, further information should be sought regarding what documents may be filed electronically. Questions may be directed to 919-831-5708 or efiling@sc.state.nc.us.

Note: For time limits other than the time for serving notice of appeal, three days may be added when service is by mail. N.C. R. APP. P. 27(b)

Appeals from juvenile proceedings are given priority over other cases being considered by the court of appeals. N.C. R. APP. P. 3.1(e).

The notice of appeal filed with the court must contain an acknowledgment of service signed by the person served or a certificate of service. *See* N.C. R. APP. P. 26(d). Failure to file proof of service with the notice of appeal, when not waived by the party entitled to be served, is grounds for dismissal of the appeal. *In re A.C.*, 182 N.C. App. 759 (2007); *In re C.T.*, 182 N.C. App. 166, *aff’d per curiam*, 361 N.C. 581 (2007). The failure to show proof of service affects personal jurisdiction, not subject matter jurisdiction, and can be waived. *In re S.F.*, 198 N.C. App. 611 (2009). When parties are joined in an appeal, service on any one of the joined parties is sufficient. N.C. R. APP. P. 26(e).

12.6 Protection of the Child’s Identity in Juvenile Cases

For appeals and extraordinary writs in juvenile cases, Appellate Rule 3.1(b) provides special protection of a child’s identity.

A. Identity Substituted or Redacted

The identity of anyone involved in a juvenile proceeding who is under the age of 18 at the time of the trial proceedings (a “covered juvenile”) must be referenced only by the use of initials or a pseudonym in briefs, petitions, and all other filings in the appellate court. The child’s name must be similarly redacted from all documents, exhibits, appendices, or arguments submitted with filings. The addresses and social security numbers of juveniles also must be excluded from all filings and documents, exhibits, appendices, and arguments, with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). N.C. R. APP. P. 3.1(b).

If parties want to use pseudonyms, they must stipulate in the record on appeal to the pseudonym to be used for each covered juvenile. Appellate courts are not bound by the stipulation, and appellate case captions will utilize initials. N.C. R. APP. P. 3.1(b).

B. Exceptions to Substitution or Redaction of Identity

Neither identity substitution nor redaction is required for the following:

- settled records on appeal;
- supplements to the record on appeal filed pursuant to Rule 11(c);
- objections, amendments, or proposed alternative records on appeal submitted pursuant to Rule 3.1(c)(2); and
- any verbatim transcripts submitted pursuant to Rule 9(c).

N.C. R. APP. P. 3.1(b). However, these pleadings and filings are not published on the court's electronic filing site and are available to the public only with the permission of an appellate court. In addition, they must bear a special statement explained below. *Id.*

C. Special Statement Required

Some appellate documents in a juvenile case must contain a special statement to protect them from public inspection. Documents requiring the statement include:

- pleadings and filings not subject to substitution or redaction (explained above);
- the first document filed in the appellate courts; and
- the record on appeal.

N.C. R. APP. P. 3.1(b), 9(a).

The required statement is as follows:

FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO
PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE
APPELLATE DIVISION.

12.7 Expedited Appeals Process in Juvenile Cases

Appellate Rule 3.1(c) sets out an expedited process for juvenile cases. The timelines and the process itself move the case through the appellate system much more quickly than the average case.

A. Transcript

The Appellate Rules require the clerk of court to notify the court reporting coordinator at the AOC about an appeal within one business day of the filing of the notice of appeal and require

the coordinator to assign a transcriptionist within two business days of receiving the notice. When an order exists establishing the appellant's indigency, the transcript must be prepared and delivered within 35 days of the date of assignment. When the appellant is not indigent, preparation and delivery must be within 45 days. Motions for extensions of time to prepare and deliver transcripts are "disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances." N.C. R. APP. P. 3.1(c)(1).

Practice Note: The printing and distribution of transcripts and copies of transcripts (electronic and hardcopy) is handled exclusively by the AOC, and it is against AOC policy for parties to share a copy of the transcript or for one party to make a copy for another party, as this creates problems with billing transcription costs.

B. Record on Appeal

1. Appellant's proposed record. The appellant must prepare a proposed record on appeal and serve it on all other parties within ten days after receipt of the transcript. The contents and requirements for the record on appeal are contained in Appellate Rule 9. N.C. R. APP. P. 3.1(c)(2).

Note on time limits: Three days may be added to time limits when service is by mail. N.C. R. APP. P. 27(b).

Practice Notes: Appellate counsel prepares the record on appeal based on information contained in the Appellate Entries Form, which is prepared by the clerk of court when notice of appeal is given.

If two or more appellate counsel are working jointly (e.g., one counsel for each parent), the ten-day period begins after the last attorney receives the transcript.

2. Appellee's response. An appellee has ten days after being served with the proposed record to respond by serving on all other parties one of the following:

- notice of approval of the proposed record,
- specific objections or amendments to the proposed record, or
- a proposed alternative record.

N.C. R. APP. P. 3.1(c)(2).

3. Agreement on settled record. The parties then have an additional ten days (twenty days after receipt of the transcript) to come to an agreement on the settled record. Within five business days after coming to an agreement (settling the record), the appellant must file three copies of the settled record with the clerk of the court of appeals. N.C. R. APP. P. 3.1(c)(2).

4. No response by appellee. If the appellee does not respond to the proposed record on appeal within the ten-day time limit, the proposed record becomes the settled record on appeal. The

appellant then has five business days to file three copies of the settled record with the clerk of the court of appeals. (The appellant must file the copies within five business days from the last date on which the appellee could have responded.) N.C. R. APP. P. 3.1(c)(2). Note that a party could still file a motion to amend the record after this point pursuant to Appellate Rule 9(b)(5).

5. Failure to agree on record. If an appellee responds seeking changes to the record but the parties cannot agree to a settled record within thirty days after receiving the transcript, then within five business days after the last day on which the record could have been settled by agreement (twenty days after receipt of the transcript plus five business days),

- the appellant must file his or her proposed record, and
- the appellee must file his or her objections, amendments, or proposed alternative record.

N.C. R. APP. P. 3.1(c)(2).

C. Briefs

1. Time limits for briefs. The appellant's brief must be filed within thirty days after the record on appeal has been filed, and the appellee's brief must be filed within thirty days after appellee is served with appellant's brief. Copies of briefs must be served on all other parties of record. Motions for extensions of time to file briefs are allowed only in extraordinary circumstances. N.C. R. APP. P. 3.1(c)(3). Three days may be added to time limits when service is by mail. N.C. R. APP. P. 27(b).

2. No-merit briefs. The Rules of Appellate Procedure allow an appellant to file a "no-merit" brief in a juvenile case, in appeals taken pursuant to G.S. 7B-1001, under certain circumstances. N.C. R. APP. P. 3.1(d).

(a) Circumstances for no merit brief. A no-merit brief is permitted when appellate counsel conducts a "conscientious and thorough" review of the record on appeal and concludes that there is no issue of merit on which to base an argument and that the appeal would be frivolous. N.C. R. APP. P. 3.1(d).

(b) Contents of no-merit brief. A no-merit brief must identify any issues in the record on appeal that might arguably support the appeal and state why those issues lack merit or would not alter the ultimate result. N.C. R. APP. P. 3.1(d).

(c) Duty to appellant. When appellate counsel files a no-merit brief, he or she must provide the appellant with a copy of the brief, the transcript, the record on appeal, and any Rule 11(c) supplements or exhibits that have been filed with the court of appeals. Appellate counsel also must advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the filing of the no-merit brief. Counsel must attach to the brief "evidence of compliance" with these requirements. N.C. R. APP. P. 3.1(d).

Practice Note: The Office of Indigent Defense Services and the GAL Services Division may have policies related to no-merit briefs that should be consulted by appellate counsel prior to filing a no-merit brief.

12.8 Issues on Appeal and Standards of Review

A. Introduction

Specific issues on appeal from juvenile proceedings are addressed in the appellate cases discussed throughout this manual. This section is not a comprehensive presentation of issues on appeal but addresses some general categories of issues in which juvenile appeals tend to fall and discusses standards of review used for various issues.

B. Sufficiency of Evidence and Findings

1. Generally. Issues dealt with frequently in appeals in juvenile cases are whether the evidence is sufficient to support the findings of fact and whether the findings of fact are sufficient to support the trial court's conclusions of law. *See, e.g., In re D.B.J.*, 197 N.C. App. 752 (2009). "[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510 (1997) (citations omitted); *see also In re A.B.*, 179 N.C. App. 605 (2006). However, appellate courts have repeatedly found a trial court's misclassifications of conclusions of law and findings of fact to be inconsequential, stating that if a contested finding of fact is more accurately characterized as a conclusion of law, it is treated as a conclusion of law on appeal. *See In re B.W.*, 190 N.C. App. 328 (2008); *In re R.A.H.*, 182 N.C. App. 52 (2007).

Where a finding is properly supported by evidence, the finding is binding on appeal, even if there is evidence that would support a finding to the contrary. *See In re C.M.*, 198 N.C. App. 53 (2009); *In re B.W.*, 190 N.C. App. 328 (2008). Where a party fails to except to findings of fact on appeal, they are deemed supported by competent evidence and are conclusive on appeal. *See In re L.A.B.*, 178 N.C. App. 295 (2006).

2. Review of findings of fact and conclusions of law at adjudication. The standard of review for adjudications (for abuse, neglect, dependency, or TPR) is whether the findings of fact are supported by *clear and convincing evidence*. *See In re McCabe*, 157 N.C. App. 673 (2003) (abuse, neglect, dependency); *In re Huff*, 140 N.C. App. 288 (2000) (TPR). There is no distinction between "clear, cogent, and convincing" – the statutory standard in TPR cases -- and "clear and convincing." *See In re Belk*, 364 N.C. 114 (2010); *In re Montgomery*, 311 N.C. 101 (1984). The appellate court then reviews whether the conclusions of law are supported by adequate findings of fact. *See In re Huff*, 140 N.C. App. 288 (2000) (TPR); *In re Helms*, 127 N.C. App. 505 (1997) (abuse, neglect, dependency).

3. Review of dispositional findings. The standard of review that applies to findings of fact in disposition, review, permanency planning, and TPR disposition orders is whether the findings are supported by “*competent*” or “*credible*” evidence. *See In re B.W.*, 190 N.C. App. 328 (2008); *In re C.M.*, 183 N.C. App. 207 (2007); *In re Weiler*, 158 N.C. App. 473 (2003). Appellate courts will review dispositional (or best interest) conclusions of law according to an abuse of discretion standard (described in C., below). Nevertheless, the trial court must consider and make findings about relevant statutory factors. For abuse, neglect, and dependency orders, for example, certain dispositions are available only for a “juvenile who needs more adequate care or supervision or who needs placement,” and the court must make findings to that effect. *See* G.S. 7B-903(a)(2); *see also In re S.H.*, 217 N.C. App. 140 (2011). In a TPR case, the court must consider and make findings about the dispositional factors set out in G.S. 7B-1110(a) that are relevant. *See In re D.H.*, ___ N.C. App. ___, 753 S.E.2d 732 (2014); *In re J.L.H.* ___ N.C. App. ___, 741 S.E.2d 333 (2012) (remanding the disposition portion of the trial court’s order for failing to make the specific relevant findings required by G.S. 7B-1110(a)).

C. Abuse of Discretion

The appellate court will disturb certain rulings by the trial court only if it finds that the trial court abused its discretion. ““An abuse of discretion occurs when the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.”” *In re Robinson*, 151 N.C. App. 733, 737 (2002) (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109 (1997)) (internal quotation marks omitted).

Abuse of discretion as a standard of review is most commonly applied to errors alleged in the disposition phase of the case when the court is making discretionary determinations related to the child’s best interest. *See, e.g., In re N.G.*, 186 N.C. App. 1 (2007) (reviewing order ceasing visitation and reunification efforts), *aff’d per curiam*, 362 N.C. 229 (2008); *In re Pittman*, 149 N.C. App. 756 (2002); *In re Blackburn*, 142 N.C. App. 607 (2001) (reviewing whether TPR was in child’s best interest); *In re Brim*, 139 N.C. App. 733 (2000) (reviewing whether TPR was in child’s best interest).

Abuse of discretion is also the standard applied in the review of other discretionary determinations, such as whether to grant a continuance or appoint a guardian ad litem for a parent. *See, e.g., In re C.G.A.M.*, 193 N.C. App. 386 (2008) (holding that trial court acted within its discretion in not appointing a guardian ad litem for the father); *In re C.D.A.W.*, 175 N.C. App. 680 (2006) (holding that trial court did not abuse its discretion by denying mother’s motion for a continuance so that she could enter a drug treatment facility), *aff’d per curiam*, 361 N.C. 232 (2007). A trial court may abuse its discretion not only by making a decision that is arbitrary or unreasoned, but also by failing to exercise its discretion at all. *See, e.g., In re M.H.B.*, 192 N.C. App. 258 (2008) (holding that trial court’s failure to conduct a hearing to determine whether a parent was incompetent or had diminished capacity and needed a guardian ad litem was an abuse of discretion).

D. Jurisdictional Issues

A lack of subject matter jurisdiction can be raised at any time, including for the first time on appeal. *See In re K.J.L.*, 363 N.C. 343 (2009). Appellate review related to subject matter jurisdiction is to determine whether evidence in the record supports the trial court's conclusion that it has jurisdiction. *See In re E.X.J.*, 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009). An order entered by a court that lacks subject matter jurisdiction is void. *See supra* § 3.2 (discussing subject matter jurisdiction in juvenile proceedings).

Where service is not completed on a party or there is a defect in service or process, a party's own actions may subject the party to the court's personal jurisdiction. Unlike subject matter jurisdiction, challenges to personal jurisdiction must be raised by the parties themselves and can be waived. *See In re J.T.*, 363 N.C. 1 (2009); *In re K.J.L.*, 363 N.C. 343 (2009). *See supra* § 3.4 (discussing personal jurisdiction in juvenile proceedings).

E. Failure to Follow Statutory Mandates and Procedures

Often appeals assert error based on the trial court's failure to comply with mandates or procedures set out in the Juvenile Code or, when applicable, the Rules of Civil Procedure.

For example, the Juvenile Code sets out specific criteria the court must address in its findings in orders resulting from review and permanency planning hearings, and a common issue on appeal is whether the court made all of the required findings. *See, e.g., In re J.B.*, 197 N.C. App. 497 (2009) (reversing for failure to make findings required for a civil custody order, under G.S. 7B-911, and for review and permanency planning orders, under G.S. 7B-906 and 7B-907); *In re L.B.*, 184 N.C. App. 442 (2007) (reversing and remanding where the trial court allowed the waiver of review hearings without making the required findings under G.S. 7B-906(b)); *In re Z.J.T.B.*, 183 N.C. App. 380 (2007) (vacating and remanding where trial court did not make findings required by G.S. 7B-907(b)(3) as to whether adoption should be pursued and G.S. 7B-907(b)(4) as to whether the child should remain in the current placement or be placed in another living arrangement). Note that G.S. 7B-906 and 7B-907 have been replaced by G.S. 7B-906.1, which includes many of the same requirements.

Even if the appellate court finds error in failing to follow statutory mandates, it may decline to disturb the lower court's ruling unless there is a showing that the error was prejudicial. *See In re D.B.*, 186 N.C. App. 556 (2007) (discussing the standard by which prejudice should be measured as whether the error in question had a probable impact on the outcome of the proceeding and stating that a judgment should not be reversed due to a technical error not affecting the outcome), *aff'd per curiam*, 362 N.C. 345 (2008); *In re H.T.*, 180 N.C. App. 611, 613 (2006) ("[I]n general, technical errors and violations of the Juvenile Code will be found to be reversible error only upon a showing of prejudice.").

The Juvenile Code prescribes timelines for conducting hearings and for the entry of orders. After numerous appellate court decisions analyzing whether a trial court's delay in holding a hearing or entering an order was prejudicial, the N.C. Supreme Court held that the proper remedy for a court's failure to follow the timelines is a petition for a writ of mandamus,

rather than an assertion of error on appeal. *In re T.H.T.*, 362 N.C. 446 (2008); *see also In re E.K.*, 202 N.C. App. 309 (2010).

F. Motions to Dismiss and Failure to Comply with Rules

A motion to dismiss an appeal may be made if a party fails to comply with the Rules of Appellate Procedure. If a party gives notice of appeal but then fails to take actions required by the Rules of Appellate Procedure to move forward with the appeal, another party may move to dismiss the appeal. Before the appeal is filed in an appellate court, motions to dismiss for failure to take timely action are made to the trial court. After an appeal is filed in the appellate court, motions to dismiss are made to that court. N.C. R. APP. P. 25(a).

Motions to dismiss must be supported by affidavits or certified copies of docket entries that show the failure to take timely action or otherwise perfect the appeal. The motion to dismiss must be granted unless:

1. the party against whom the motion is made can show
 - that he or she did in fact comply or
 - that there was a waiver of compliance in the record; or
2. the court finds good cause for noncompliance.

N.C. R. APP. P. 25(a).

In determining whether failure to comply with appellate rules warrants dismissal, the appellate court will engage in an analysis of the appropriate remedy for noncompliance, looking at whether the noncompliance is substantial or gross; which, if any sanction should be imposed; and if dismissal is the appropriate sanction, whether the circumstances of the case justify suspension of the rules under Rule 2 to reach the merits of the appeal. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191 (2008).

In addition to dismissing an appeal for failure to comply with the rules, the appellate court may issue sanctions. N.C. R. APP. P. 25(b). *See also, e.g., In re T.M.*, 180 N.C. App. 539 (2006) (sanctioning appellate counsel and requiring him to personally pay the costs of the appeal because he submitted a brief in which the one-page statement of facts was almost entirely naked argument and contained no citations to the record, in contravention of the Rules of Appellate Procedure, and counsel had previously been admonished by the court for appellate rules violations).

See Appellate Rule 25 for additional details related to failure to comply with appellate rules and motions to dismiss for noncompliance, including sanctions for noncompliance. In addition, see Appellate Rule 37 governing motions in the appellate courts.

12.9 Extraordinary Writs and Discretionary Review

The supreme court and the court of appeals have jurisdiction to issue prerogative writs, including mandamus, prohibition, certiorari, and supersedeas. G.S. 7A-32.

A. Writ of Certiorari

A petition for a writ of certiorari, filed in the appellate courts, is a means by which a party may seek appellate review when other means do not exist.

1. Review of trial court. In civil cases a writ of certiorari may be issued by either the court of appeals or the state supreme court to permit review of a decision of the trial court when:

- the right to appeal has been lost for failure to take timely action, or
- no right of appeal from an interlocutory order exists.

N.C. R. APP. P. 21(a)(1).

2. Review of court of appeals. A writ of certiorari may be issued by the state supreme court to permit review of a decision of the court of appeals when:

- the right to appeal or petition for discretionary review has been lost by failure to take timely action; or
- no right of appeal exists.

N.C. R. APP. P. 21(a)(2).

Requirements for filing, content, service, and responses are contained in Appellate Rule 21.

B. Petition for Discretionary Review

Under Appellate Rule 15, a party may petition the supreme court in writing to certify a cause for discretionary review by the supreme court, either prior to or after the court of appeals rules on a matter, upon any grounds specified in G.S. 7A-31. Under G.S. 7A-31(a), discretionary review may also be initiated by the supreme court on its own motion.

The grounds for granting a petition for discretionary review are as follows:

- Where the court of appeals has not yet made a determination and in the opinion of the supreme court:
 - (1) The subject matter of the appeal has significant public interest, or
 - (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
 - (3) Delay in final adjudication is likely to result from failure to certify and thereby

- cause substantial harm, or
- (4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

G.S. 7A-31(b).

- Where the court of appeals has already made a determination and in the opinion of the supreme court:
 - (1) The subject matter of the appeal has significant public interest, or
 - (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
 - (3) The decision of the court of appeals appears likely to be in conflict with a decision of the Supreme Court.

G.S. 7A-31(c).

Interlocutory determinations by the court of appeals, including orders remanding the cause for a new trial or for other proceedings, will be certified for review by the supreme court only upon a determination by the supreme court that failure to certify would cause a delay in final adjudication that would probably result in substantial harm. G.S. 7A-31(c); N.C. R. APP. P. 15(h).

C. Writ of Mandamus or Prohibition

A writ of mandamus is used to compel a trial court (or any governmental official) to perform a required ministerial act or a mandatory duty.

Mandamus is appropriate where:

- the party seeking relief has demonstrated a clear legal right to the act requested;
- the defendant has a clear legal duty to perform the act requested;
- performance of the duty-bound act is ministerial in nature and does not involve the exercise of discretion; and
- the defendant neglects or refuses to perform the act requested, and the time for performance of the act has expired.

In re T.H.T., 362 N.C. 446, 453–54 (2008).

For example, the North Carolina Supreme Court has held that mandamus is the appropriate remedy for the trial court's failure to act within statutory timelines set out in the Juvenile Code. *In re T.H.T.*, 362 N.C. 446 (2008).

A writ of prohibition is the converse of mandamus and is used to preclude a court from exceeding its jurisdiction in matters it does not have the power to hear or determine.

Requirements for filing, content, service, and response for mandamus and prohibition are set out in Appellate Rule 22.

D. Writ of Supersedeas

A writ of supersedeas may be sought to stay the execution or enforcement of any judgment, order, or other determination of a trial court when the judgment is not automatically stayed by the taking of the appeal or when a petition for mandamus, prohibition, or certiorari has been filed and

- a stay order has been sought and denied in the trial court, or
- extraordinary circumstances make it impracticable to obtain a stay from the trial court.

N.C. R. APP. P. 23(a)(1).

Requirements for filing, content, service, and response for supersedeas are set out in Appellate Rule 23.

12.10 Trial Court's Role during and after Appeal

A. Trial Court's Role Pending Appeal

1. Enforcement or stay of order. During an appeal of an order entered in a juvenile proceeding, the trial court may enforce the order unless a stay is ordered by the trial court or the appellate court. G.S. 7B-1003(a).

A motion in the trial court for a stay is governed by Rule 62(d) of the Rules of Civil Procedure. If the trial court denies or vacates a stay, a motion may be made to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Appellate Rule 23. N.C. R. APP. P. 8(a). *See supra* § 12.9.D (writ of supersedeas).

2. Continued court involvement in non-TPR appeals. While an appeal is pending in an abuse, neglect, or dependency case, the trial court must continue to exercise jurisdiction, conduct hearings (except TPR proceedings, discussed below), and enter orders related to custody and placement that it finds to be in the child's best interests. G.S. 7B-1003(b).

3. Cannot proceed to TPR with underlying appeal. The trial court may not proceed in a termination of parental rights case when an appeal from an underlying abuse, neglect, or dependency case is pending. G.S. 7B-1003(b)(1). *See also In re P.P.*, 183 N.C. App. 423 (2007); *In re Z.J.T.B.*, 183 N.C. App. 380 (2007). However, the North Carolina Supreme Court has held that once an appeal has been resolved, the trial court is not prevented from acting on a TPR motion that was filed during the pendency of the appeal. *In re M.I.W.*, 365 N.C. 374 (2012). In *M.I.W.*, the TPR motion was filed while appeals of the disposition order were pending, but the trial court did not take up the TPR motion until after the appellate mandate had issued and after the time within which a petition for discretionary review could

have been filed. In making its ruling, the supreme court reasoned that G.S. 7B-1003 did not divest the trial court of jurisdiction altogether, but rather prohibited the exercise of jurisdiction before the appellate mandate issued, and that issuance of the mandate returned the power to exercise jurisdiction to the trial court. *Id.*

G.S. 7B-1003 prevents proceeding in a TPR case when an appeal from an underlying abuse, neglect, and dependency case is pending. That statute does not apply to appeals from related cases arising outside the context of the Juvenile Code, such as an adoption case. *See In re Baby Boy [Costin]*, __ N.C. App. __, 767 S.E.2d 628 (2014) (where adoptive parents appealed an order declaring mother's relinquishment void and filed a termination of parental rights petition, the court of appeals held that the trial court had jurisdiction to determine the TPR case during pendency of appeal in adoption case, which is a G.S. Chapter 48 action and not a G.S. Ch. 7B action).

4. Continued court involvement in TPR appeals. While an appeal is pending in a TPR case, the court may enter temporary orders related to custody and placement that it finds to be in the child's best interest. G.S. 7B-1003(b), (c). However, "the trial court has no authority—even in the underlying abuse, neglect, and dependency action—to enter any orders other than ones affecting the custody and/or placement of the juvenile." *In re K.L.*, 196 N.C. App. 272, 273 (2009). (Note that the court of appeals in *In re K.L.* stated that TPR proceedings initiated by motion are governed by G.S. 7B-1003(b) and TPR proceedings initiated by petition are governed by G.S. 7B-1003(c), but when an appeal is pending, *both* provisions only allow the court to enter orders affecting the custody and placement of the child that it finds to be in the child's best interest).

5. Order requirements pending appeal disposition. Pending disposition of the appeal, orders must meet certain requirements:

- Any order entered during an appeal that places or continues placement of a child in foster care must comply with the requirements in G.S. 7B-905(b), (c), and (d) (generally, requirements for dispositional orders). G.S. 7B-1003(e).
- When the child has suffered physical abuse by someone with a history of violent behavior, the court must consider the opinion of the mental health professional who performed the required evaluation on the person before returning the child to the custody of that person pending resolution of the appeal. G.S. 7B-1003(d).

Rule 60 of the Rules of Civil Procedure permits the trial court to correct clerical mistakes and errors in its order arising from oversight or omission up to the time an appeal is docketed in the court of appeals, but the court may not make substantive changes to the order. *In re C.N.C.B.*, 197 N.C. App. 553 (2009) (holding that the trial court could not add a finding that was essential to adjudication of a ground for termination). *See supra* § 4.9.E (relating to Rule 60 modifications).

B. Trial Court's Role after Appeal

1. Modification of order. On affirmation of an order by the appellate court, the trial court may modify its original order in the child's best interest to reflect the child's adjustment or changed circumstances. If modification is *ex parte*, the court must notify interested parties within 10 days to show cause why the order should be vacated or altered. G.S. 7B-1003(c), 7B-1004.

The statute does not create a right to another review proceeding; it gives the trial court discretion to modify or vacate the original order due to changed circumstances. The trial court has discretion to hear or decline to hear evidence in support of a motion to modify or vacate an order after an appeal. *In re Montgomery*, 77 N.C. App. 709 (1985).

2. Carrying out appellate mandate. The trial court is bound by the mandate of the appellate court but may not act until the mandate issues.

The mandate of the court, which consists of certified copies of its judgment and opinion and any direction as to costs, is issued by transmittal from the clerk of the appellate court to the clerk of the trial court. Unless otherwise ordered, mandates are issued twenty days after the written opinion of the court has been filed with the clerk. N.C. R. APP. P. 32.

- The trial court erred when it failed to carry out the mandate of the court of appeals to make findings according to G.S. 7B-907(b). *In re J.M.D.*, 210 N.C. App. 420 (2011).
- The trial court erred when it ignored the mandate of the court of appeals to hold a new termination of parental rights hearing, but the error was not prejudicial when the court, instead, held a permanency planning hearing. *In re R.A.H.*, 182 N.C. App. 52 (2007).
- The trial court committed reversible error when it failed to carry out the mandate of the court of appeals by holding a termination of parental rights hearing instead of a permanency planning hearing after remand of the permanency planning order. *In re P.P.*, 183 N.C. App. 423 (2007).

See also In re S.R.G., 200 N.C. App. 594 (2009) (discussing “the law of the case doctrine” that applies to cases in which a question before an appellate court has previously been answered on an earlier appeal in the same case, constituting the law of the case both in subsequent proceedings in the trial court and on a subsequent appeal).

When an appellate court remands a case to the trial court the opinion may give the court specific directions or it may say “for further action consistent with this opinion,” or “for additional findings.” Within the parameters of the appellate court's mandate, the trial court often has discretion as to how to proceed once the mandate issues. When an appellate court remands a case for additional findings, for example, unless the opinion says otherwise the trial court has discretion as to whether to conduct a further hearing and hear additional evidence. *See In re J.M.D.*, 210 N.C. App. 420 (Mar. 15, 2011) (rejecting respondent's argument that the trial court erred in refusing to allow her to present evidence on remand, stating that whether to receive new evidence on remand is within the discretion of the court, and in this case there was no abuse of discretion).

Chapter 13

Federal Laws Relevant to Juvenile Proceedings

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Many federal laws affect juvenile proceedings. This chapter does not attempt to address all of them, but it seeks to:

- provide an overview of federal laws that North Carolina judges and attorneys encounter most frequently and that impose specific requirements in juvenile cases (§§ 13.3 through

- 13.7); and
- highlight some other federal laws that have influenced state laws and state agency programs and procedures (§ 13.2).

Some sections in this chapter provide links to additional resources on specific federal laws. Also, information on all of the federal laws mentioned or summarized in this chapter (including those in the timeline below that are not discussed in the chapter) is available on the Child Welfare Information Gateway website. See [“Major Federal Legislation Index and Search,”](#) on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services.

B. Overview of Federal Impact and Timeline of Major Federal Laws¹

States are primarily responsible for the laws and programs that address the needs of children and families, but states must abide by certain federal laws and regulations in order to be eligible for federal funding for these programs. Many requirements of relevant federal laws have been integrated into the North Carolina Juvenile Code, and some are referenced in the Code but not codified. Requirements of federal laws also are integrated into policies and procedures of state and local child welfare agencies.

The largest federally funded programs that support state and tribal child welfare programs and activities—including protective services, foster care, and adoption—are authorized under Titles IV-B and IV-E of the Social Security Act (the Act). These programs are administered by the U.S. Department of Health and Human Services and include the Title IV-B Child Welfare Services and Promoting Safe and Stable Families (formerly known as Family Preservation) programs, the Title IV-E Foster Care Program, the Title IV-E Adoption Assistance Program, and the Title IV-E Chafee Foster Care Independence Program. The Social Services Block Grant (SSBG) is authorized under Title XX of the Act and funds a wide range of programs that support social policy goals specified in the Act.

Periodically, the federal Children’s Bureau (in the Administration for Children and Families in the U.S. Department of Health and Human Services) reviews North Carolina cases to assess compliance with federal laws. Two significant audits are the Child and Family Services Review (CFSR) and the IV-E Eligibility Review.

The CFSR evaluates performance in child protection cases and is conducted at five-year or shorter intervals (depending on whether the state was in substantial conformity in the previous review). Outcomes measured by the CFSR include:

1. Some content for this section is sourced or reproduced from CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION](#) (2012). Sources for information regarding federal audits and state plans include supplementary information in the Federal Register explaining 45 C.F.R. parts 1355, 1356, and 1357, Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, [65 Fed. Reg. 4020](#) (Jan. 25, 2000) and CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [TITLE IV-E FOSTER CARE ELIGIBILITY REVIEW GUIDE](#) (2012). Angie Stephenson, Assistant Attorney General for the State of North Carolina, provided input for this section.

- whether children under the care of the state are protected from abuse and neglect;
- whether children are safely maintained in their own homes whenever possible and appropriate;
- whether children have permanency and stability in their living conditions;
- whether the continuity of family relationships and connections is preserved for children;
- whether families have enhanced capacity to provide for their children's needs;
- whether children receive appropriate services to meet their educational needs; and
- whether children receive adequate services to meet their physical and mental health needs.

In addition to these outcomes, the CFSR evaluates programmatic factors such as service delivery, training, and responsiveness.

The IV-E Eligibility Review is conducted every three years to assess compliance with Title IV-E of the Social Security Act. For this review, sample cases from a few counties are evaluated, and the state's "score" is based on the number of cases with errors. The numerous eligibility factors that are examined include whether court orders in the sample cases comply with federal requirements, such as those relating to:

- "reasonable efforts" and "contrary to the welfare" determinations (in North Carolina, contained in G.S. 7B-507);
- voluntary placements (in North Carolina, contained in G.S. 7B-910); and
- vesting responsibility for the child's placement and care with the state (or county) agency (in North Carolina, contained in G.S. 7B-507).

After a review, the state develops a Program Improvement Plan to identify corrective actions that need to be taken to improve compliance with federal laws. Elements of the Program Improvement Plan are integrated into the goals and objectives of a required state Child and Family Services Plan. The state plan can be found on the "[Child Welfare, Program Statistics and Review](#)" page of the North Carolina Division of Social Services website.

Resources:

- For information about the Child and Family Services Review, see "[Child and Family Services Reviews](#)" on the website for the Children's Bureau, U.S. Department of Health and Human Services.
 - For the state's protocol for these reviews, see "[Child Welfare, Program Statistics and Reviews](#)" on the N.C. Division of Social Services website.
 - For information about the IV-E Eligibility Review, see "[Title IV-E Reviews](#)" on the website for the Children's Bureau, U.S. Department of Health and Human Services.
 - For supplementary information in the Federal Register explaining 45 C.F.R. parts 1355, 1356, and 1357, Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, see [65 Fed. Reg. 4020](#) (Jan. 25, 2000).
 - CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD WELFARE POLICY MANUAL [Ch. 7 \(Title IV-B\)](#) and [Ch. 8 \(Title IV-E\)](#).
 - CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVICES, [TITLE IV-E FOSTER CARE ELIGIBILITY REVIEW GUIDE](#) (2012).
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For a timeline of the enactment of major federal legislation, see [Timeline of Major Federal Legislation Concerned With Child Protection, Child Welfare, and Adoption](#).

13.2 Highlights of Relevant Federal Laws²

For a more detailed summary of each of the federal laws highlighted in this section, see “[Major Federal Legislation Index and Search](#),” on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services.

A. Child Abuse Prevention and Treatment Act

The Child Abuse Prevention and Treatment Act (CAPTA), as rewritten and amended since its enactment in 1974 [Pub. L. No. 93-247, 88 Stat. 4], has provided the basis for many North Carolina Juvenile Code provisions. CAPTA provides funds to states to establish programs to prevent and treat child abuse and neglect. It was the federal law that linked federal funding to such requirements as mandatory child abuse and neglect reporting laws, aspects of the definitions of child abuse and neglect, immunity and confidentiality for people who report, representation for children whose cases result in judicial proceedings, and confidentiality of records. The Act also authorized government research into child abuse prevention and treatment, created the National Center on Child Abuse and Neglect (NCCAN) (now replaced by the Office on Child Abuse and Neglect) and the National Clearinghouse on Child Abuse and Neglect Information, and addressed state programs for child death reviews. CAPTA funds training programs, recruitment of volunteers, and the establishment of resource centers in fields related to abuse and neglect.

The Act is codified at 42 U.S.C. §§ 5101 *et seq.* and 42 U.S.C. §§ 5116 *et seq.* Regulations issued pursuant to the Act are at 45 C.F.R. §§ 1340. For a summary of the Act, see “[Child Abuse Prevention and Treatment Act](#)” on the website for the Children’s Bureau, U.S. Dept. of Health and Human Services. Information on some of the legislation reauthorizing and/or amending the Act in [1978](#), [1988](#), [1992](#), [1996](#), [2003](#), and [2010](#) is available at “[Major Federal Legislation Index and Search](#),” on the Child Welfare Information Gateway website, U.S. Department of Health and Human Services.

B. Adoption Assistance and Child Welfare Act

The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, provided federal funds for foster care and adoption assistance. It also required states, as a condition of receiving funds for foster care, to make reasonable efforts (i) to prevent the need to place children outside their homes or (ii) to reunify children with their families. It was the genesis of the reasonable efforts requirements set out in G.S. 7B-507. The Act also required periodic review of cases to consider the child’s best interest, with an emphasis on returning

2. Some content for this section is adapted or reproduced from CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION](#) (2012).

the child home as soon as possible. Some of the time requirements in the North Carolina Juvenile Code are based on the Act. The Act established standards for foster family homes and for reviewing those standards periodically, and required maintenance of a data collection and reporting system about children in care.

C. Family Preservation and Support Services Program Act

The Family Preservation and Support Services Program Act, Pub. L. No. 103-66, 107 Stat. 312, was enacted in 1993. Among its many provisions, the Act broadened the definition of “family,” strengthened family preservation and support services, and established the Court Improvement Program. For information about the North Carolina Court Improvement Program, see *supra* § 1.3.B.3.

D. Adoption and Safe Families Act

The Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115, was enacted in 1997. ASFA emphasized, among other things, safety for abused and neglected children, timely permanent placements for children, and increased agency accountability. Like the acts described above, ASFA itself placed no requirements directly on North Carolina courts, but many of its requirements have been integrated into the North Carolina Juvenile Code and some federal funding is dependent on compliance with ASFA provisions.

Highlights of ASFA:

Emphasized safety for abused and neglected children:

- Added consideration of “safety of the child” to every step of the case plan and review process
- Required criminal records checks for foster and adoptive parents who receive federal funds on behalf of a child, unless a state opted out of this requirement

Emphasized the need for children to have permanent placements without undue delay:

- Required states to initiate court proceedings to free a child for adoption when the child had been in foster care for at least 15 of the most recent 22 months, unless one of several exceptions applied. North Carolina’s version of this requirement refers to 12 of the most recent 22 months. (*See* G.S. 7B-906.1(f) and *supra* § 8.3.G, explaining the North Carolina requirement.)
- Required that the first permanency planning hearing be held no later than 12 months after a child entered foster care (reflected in North Carolina’s Juvenile Code in G.S. 7B-906.1)

Promoted adoptions:

- Provided incentive funds to states that increased adoptions
- Ensured health coverage for eligible adopted children with special needs
- Prohibited states from delaying or denying placements of children based on the

- geographic location of the prospective adoptive families
- Required states to document and report child-specific adoption efforts

Increased accountability:

- Required the federal Department of Health and Human Services to establish new outcome measures to monitor states' performance

Clarified “reasonable efforts” (North Carolina’s reasonable efforts provisions are in G.S. 7B-507):

- Required expansion of the reasonable efforts requirement to apply to efforts to achieve a permanent placement when reunification was no longer the plan
- Emphasized children’s health and safety
- Required states to specify situations in which reunification services are not required

The North Carolina Juvenile Code includes many references to the need for the child to have a “safe, permanent home within a reasonable amount of time.” *See, e.g.*, G.S. 7B-100(5) (stating one of the purposes of Subchapter I of the Code).

E. Foster Care Independence Act

In 1999, Congress enacted the Foster Care Independence Act, Pub. L. No. 106-169, 113 Stat. 1822. Its purpose was to provide states with more funding and greater flexibility in carrying out programs designed to help older children make the transition from foster care to self-sufficiency.

North Carolina’s foster care independence program, which seeks to carry out the goals of the Foster Care Independence Act, is called NC Links. The purpose of Links is to “build a network of relevant services with youth so that they will have ongoing connections with family, friends, mentors, the community, employers, education, financial assistance, skills training, and other resources to facilitate their transition to adulthood.” 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(VII\)\(A\)](#) (Oct. 2010).

Details of the NC Links Program are contained in § 1201(VII) of the manual cited above. Provisions relating to the program are not codified.

Highlights of the Foster Care Independence Act:

- Expanded opportunities for independent living programs providing education, training, employment services, and financial support for foster youth to prepare for living on their own
- Allowed funds to be used to pay for room and board for former foster youth age 18 to 21
- Required development of outcome measures to assess state performance in operating independent living programs as well as national data collection

- Mandated that state plans for foster care and adoption assistance include certification that prospective parents will be adequately prepared to provide for the needs of the child and that such preparation will continue, as necessary, after placement of the child
- Provided states with the option to extend Medicaid coverage to 18- to 21-year-olds who have been emancipated from foster care
- Emphasized permanence by requiring that efforts to find a permanent placement continue concurrently with independent living activities
- Increased funding for adoption incentive payments

F. Intercountry Adoption Act

The Intercountry Adoption Act, Pub. L. No. 106-279, 114 Stat. 825, was enacted in 2000. This Act provided for implementation by the United States of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. The Act addressed programs and services related to the adoption of children between countries.

G. Keeping Children and Families Safe Act

The Keeping Children and Families Safe Act, Pub. L. No. 108-36, 117 Stat. 800, was enacted in 2003 and amended several other federal laws including CAPTA (described above). Among its many provisions, the Act addressed:

- DSS procedures in training child protective service workers;
- the duties of these workers to advise individuals of reports made involving them;
- state disclosure of confidential information to government entities who need the information; and
- requirements to benefit infants and young children who are exposed to HIV, have a life threatening illness, or are perinatally exposed to a dangerous drug.

The Act also implemented programs to increase the number of adoptions of older foster children.

H. Safe and Timely Interstate Placement of Foster Children Act

The Safe and Timely Interstate Placement of Foster Children Act, Pub. L. No. 109-239, 120 Stat. 508, was enacted in 2006. The purpose of the Act was to improve protections for children and to hold states accountable for the safe and timely placement of children across state lines. This Act, along with other measures to expedite interstate placements, set out specific timelines for completion and acceptance of home studies. The Act also provided for notification and/or a right to be heard for a relative caregiver, foster parent, or preadoptive parent in certain proceedings involving a foster child. See *supra* § 7.8 for an explanation of interstate placements and the Interstate Compact on the Placement of Children.

I. Adam Walsh Child Protection and Safety Act

The Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587, was enacted in 2006. The purpose of the Act was to protect children from sexual exploitation and violent crime; to prevent child abuse and child pornography, with an emphasis on comprehensive strategies across federal, state, and local communities to prevent sex offenders' access to children; to promote Internet safety; and to honor the memory of Adam Walsh and other child crime victims. The Act required more extensive background checks for prospective foster and adoptive parents and other adults living in the home and safeguards and standards for disclosure of information in a child abuse and neglect registry.

J. Child and Family Services Improvement Act

The Child and Family Services Improvement Act, Pub. L. No. 109-288, 120 Stat. 1233, was enacted in 2006. Among its many provisions, the Act addressed support for monthly caseworker visits with children in foster care and emphasized activities designed to improve caseworker retention, recruitment, training, and ability to access the benefits of technology. The Act provided support for children affected by methamphetamine or other types of substance abuse. The Act also required that children who are the subject of certain foster care proceedings be consulted in an age-appropriate manner.

K. Fostering Connections to Success and Increasing Adoptions Act

The Fostering Connections to Success and Increasing Adoptions Act, Pub. L. No. 110-351, 122 Stat. 3949, was enacted in 2008. A main purpose of the Act was to connect and support relative caregivers. Among many provisions, the Act promoted and supported funding and programs related to kinship placements, guardianship, and adoptions of foster children (focusing on a foster child's connection to relatives and siblings); extended and increased adoption incentives; required transition plans before a foster child's emancipation; and required case plans that ensure educational stability of children in foster care.

In 2009, the Division of Social Services of the N.C. Department of Health and Human Services issued an administrative letter explaining the Act and its connection to existing social services policies and procedures. See [DSS Administrative Letter CWS-02-09](#) (Mar. 17, 2009) in the "Family Support and Child Welfare Administrative Letters" section of the website for the NC Department of Health and Human Services. Since the Act became law, the Division of Social Services has implemented a number of policies and procedures to carry out its provisions.

Resources: For an explanation of the Act and tools and resources related to its provisions, see "[Fostering Connections](#)" on the website for the National Resource Center for Permanency and Family Connections.

For an explanation of the Act and federal guidance to the states on its provisions, see CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, [PROGRAM INSTRUCTION ACYF-CB-PI-08-05](#) (Oct. 23, 2008).

L. Preventing Sex Trafficking and Strengthening Families Act³

On September 29, 2014, the Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, was signed into law. It has a significant impact on child welfare proceedings. Highlights of the Act include:

- Requiring state agencies to develop policies and procedures to identify and provide appropriate services to children who are victims or at risk of being victims of sex trafficking;
- Requiring states to develop and implement plans to locate children missing from foster care, to identify factors that contributed to their absence, to address the needs of those children, and to report to the federal government on those children;
- Requiring states to implement a “reasonable and prudent parent standard” for decisions made by foster parents and child care institutions that allow a foster child to engage in age or developmentally appropriate activities;
- Adding case plan and review requirements for older youth and eliminating Another Planned Permanent Living Arrangement (APPLA) as a permanency goal for children under 16;
- Providing foster care youth ages 14 and older the opportunity to participate in developing and revising their own case plans;
- Requiring states to insure that youth exiting the foster care system receive official documents such as birth certificate, social security card, etc.;
- Improving adoption incentives and extending family connection grants;
- Collecting data on adoption and legal guardianship disruption and dissolution;
- Encouraging foster care placement with siblings; and
- Improving international child support recovery.

3. Source for some content in this section: [online fact sheet for Preventing Sex Trafficking and Strengthening Families Act from the Children’s Defense Fund](#), dated October, 2014, accessed May, 2015.

13.3 Special Immigrant Juvenile Status and Deferred Action for Childhood Arrivals⁴

A. The Connection between Juvenile Court and Immigration Law

Children who come into juvenile court may have immigration issues that could be affected by juvenile court proceedings. Undocumented children who will not be reunified with their parents may be eligible to achieve the lawful immigration status of Special Immigrant Juvenile Status (SIJS), if the juvenile court (or another state court) makes specific findings pertaining to the child that are provided to the Citizenship and Immigration Services (CIS).

In 2012, the U.S. Department of Homeland Security implemented the “Deferred Action for Childhood Arrivals Initiative,” under which certain people brought to this country as undocumented children may seek deferral of removal (deportation) and obtain work authorization if several criteria are met.

Note: This section provides only a general overview of SIJS and the Deferred Action for Childhood Arrivals process. In some cases it is advisable to seek assistance from an immigration specialist, especially where the child has a delinquency or criminal history. Resources for consultation and/or representation include:

- The “[Immigrant and Refugee Rights Project](#)” section of the North Carolina Justice Center website.
- The “[Immigrant Children](#)” section of the U.S. Committee for Refugees and Immigrants website.

Attorneys dealing with juvenile proceedings in North Carolina should be familiar with any policies, procedures, or guidance relating to SIJS or other immigration issues promulgated by their respective agencies (Division of Social Services in DHHS, Guardian ad Litem Program, and the Parent Representation Division of the Office of Indigent Defense Services).

B. Special Immigrant Juvenile Status and Obtaining Lawful Permanent Residency

1. Introduction. With SIJS, an undocumented child who will not be reunified with his or her parents due to abuse, neglect, or abandonment may be able to become a lawful permanent

4. Sources for this section include: SALLY KINOSHITA & KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES (2005); ANGIE JUNCK, SALLY KINOSHITA & KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, [IMMIGRATION BENCHBOOK FOR JUVENILE AND FAMILY COURT JUDGES](#) (2010); training materials from [Special Immigrant Juvenile Status \(SIJS\): Highlighting Changes Implemented by the Trafficking Victims Protection and Reauthorization Act](#), a webinar sponsored by the Immigrant Legal Resource Center, March 2009; [Memorandum from Donald Neufeld](#), Acting Assoc. Dir., Domestic Operations, and Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship & Immigration Services, to Field Leadership (Mar. 24, 2009); LISA MENDEL-HIRSA, EMPIRE JUSTICE CTR., [UNDERSTANDING SPECIAL IMMIGRANT JUVENILE STATUS: AN ADVOCATES CALL TO ACTION](#) (2010); “[Consideration of Deferred Action for Childhood Arrivals Process](#)” page on the U.S. Citizenship and Immigration Services website. Sejal Zota, formerly with the UNC School of Government, provided input on this section.

resident by applying for special immigrant juvenile status and permanent residency based on the SIJS petition. This is only possible once a court has made specific findings and orders meeting the requirements of SIJS.

Before applying for SIJS, it is important to make a correct determination of eligibility because an ineligible child who is denied SIJS could be referred for deportation. Before proceeding, attorneys should carefully consider with their clients the possible consequences or risks of applying for SIJS.

The status of “special immigrant juvenile” (defined in the Immigration and Nationality Act (INA) § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J)) was created by § 153 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The federal regulations that implement the statute are contained in 8 C.F.R. § 204.11. In 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044, changed some of the requirements and process for obtaining SIJS, and also changed grounds of inadmissibility (discussed below) that are waived for SIJS.

Note regarding change in law: Although federal regulations have not yet been amended to put the new TVPRA amendments into effect, new regulations were proposed and the comment period ended in November 2011. *See* Special Juvenile Immigrant Petitions, [76 Fed. Reg. 54, 978-01](#) (proposed Sept. 6, 2011). Because there has not been a timely enactment of federal regulations there is a lack of awareness and some confusion among attorneys and government officers about the SIJS requirements. In a USCIS memorandum dated March 24, 2009, to its field leadership, the USCIS explains the TVPRA changes and provides guidance to immigration service officers working with Special Immigrant Juvenile petitions regarding implementation of those changes. The memo directs officers to proceed under the new TVPRA laws, and provides a useful explanation of the changes in the law and SIJS requirements in general. *See* [Memorandum from Donald Neufeld](#), Acting Assoc. Dir., Domestic Operations, and Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship & Immigration Services, to Field Leadership (Mar. 24, 2009), available in the SIJ section of the [U.S. Citizenship and Immigration Services website](#), labeled as the “Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions Memo.” A settlement in a class action lawsuit, *Perez-Olano v. Holder*, Case No. CV 05-3604 (C.D. Cal. 2005), addressed some of the issues also addressed by the TVPRA, such as protection for children who “age out” of the system while awaiting a response to their applications. Information about this lawsuit is also available on the USCIS website noted above.

There is no guarantee that the federal regulations will be changed to reflect the new laws or that CIS will continue to proceed the same way. Therefore, it is important to be aware of both the old and new requirements for SIJS and proceed with caution.

Tools and Resources:

- Form I-360 and I-485 along with additional information can be obtained on the [CIS website](#).

- ANGIE JUNCK, SALLY KINOSHITA & KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CENTER, [IMMIGRATION BENCHMARK FOR JUVENILE AND FAMILY COURT JUDGES](#) (2010), available on the [SIJS pages](#) of the U.S. Committee for Refugees and Immigrants website along with other information and resources on SIJS and immigration.
 - For news, research, and legal assistance on immigrant issues, see “[Immigrants and Refugees](#)” on the North Carolina Justice Center website.
 - For materials on SIJS, see [Remedies for Immigrant Children and Youth](#) on the Immigrant Legal Resource Center website.
 - For (redacted) examples of North Carolina court orders and motions related to SIJS (that preceded changes in the law), see “[Special Immigrant Juvenile Status, Samples by State or Region](#)” on the U.S. Committee for Refugees and Immigrants website.
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2. Eligibility for Special Immigrant Juvenile Status

(a) **Court findings and orders.** In order to be classified as a Special Immigrant Juvenile, the following requirements must be met and should be enumerated as specific findings in an order signed by a judge that will be submitted to CIS with the SIJS petition:

- **Dependent or in custody.** The child must be declared a dependent of a juvenile court or placed in the custody of an agency or department of a state, *or an individual or entity appointed by either the state or a juvenile court* in the United States. (The law prior to the TVPRA and current regulations do not include the language in italics regarding an entity or individual.) As long as the court has jurisdiction to make determinations about the custody and care of juveniles it falls within the term “juvenile court.”
- **Reunification not viable.** A court must find that reunification with one or both of the child’s parents is not viable due to abuse, neglect, abandonment, *or similar basis found under state law*. (The language in italics was added by the TVPRA and is not contained in current regulations.) Finding that reunification is not viable does not require termination of parental rights or a finding that reunification will never be possible in the future. However, the court’s order should include clear findings relating to the basis for the child’s placement and the reasons that reunification is not a viable option, to make it clear that entry of the order is not a sham for the sole purpose of obtaining special immigrant juvenile status.
- **Best interest not to return.** There must be a judicial or administrative finding that it would not be in the best interest of the child to be returned to the child’s or parent’s country of nationality or country of last habitual residence.

(b) **Additional requirements for eligibility.** In addition to the required court findings, the following requirements must be met to be eligible for SIJS:

- **Age.** The child must be under 21 at the time of filing for SIJS. Prior to the TVPRA (and still according to regulations), applicants needed to complete the entire immigration adjudication process prior to turning 21.
- **Court jurisdiction.** The juvenile court must have jurisdiction over the child. Prior to the TVPRA (and still according to regulations), the person applying for SIJS had to

remain under juvenile court jurisdiction throughout the immigration process. The CIS has stated that for now it will approve petitions as long as the juvenile court had jurisdiction *when the SIJ petition was filed*; however, changed regulations may alter this policy. If jurisdiction does terminate due to the child aging out, an order that explicitly states that age is the reason for terminating jurisdiction could be beneficial in dealing with the tension between the regulations and the TVPRA.

- **Unmarried.** The applicant must be unmarried not only at the time of application but throughout the entire immigration process.

3. The application process. Application for SIJS requires two steps:

- the child must apply for special immigrant juvenile status (the I-360 petition), and
- the child must apply for permanent residency (the I-485 petition), called “applying for adjustment of status,” based on the SIJS petition.

Practice Note: There are fees for an I-485 petition, but not for an I-360 petition filed on behalf of a Special Immigrant Juvenile. The I-485 fee is \$985, and although an application for a fee waiver may be made, this could result in delays.

It is best to file the SIJS and adjustment of status applications at the same time because, once approved for SIJS, the petitioner is immediately eligible to adjust his or her status to lawful permanent resident. An applicant for SIJS is eligible to receive work authorization while the SIJS and adjustment of status applications are pending.

Once SIJS eligibility has been established, eligibility for lawful permanent residency must be established through form I-485. This involves showing that the child does not come within any of the applicable “grounds of inadmissibility,” or that the child qualifies for a waiver of grounds. If a child comes within the “grounds of inadmissibility” and applies for SIJS, he or she will be barred from becoming a permanent resident and might be referred for deportation proceedings, absent the grant of a waiver.

Grounds of inadmissibility and waivable grounds for SIJS are contained in INA § 212(a), 8 U.S.C. § 1182(a) (but amended by the TVPRA). Most grounds of inadmissibility relate to criminal activity. For example, SIJS applicants might not be able to obtain permanent residency if they have a record of involvement with drugs or prostitution; an adult criminal record; a classification as suicidal, mentally ill, or a sexual predator; or previous deportation.

The CIS is required to adjudicate SIJS petitions within 180 days of the filing of the petition. Prior to the TVPRA changes in the law, there was no time limit and the processing of an application could take as long as three years.

(Note that the process differs for children already involved in removal (deportation) proceedings.)

In addition to completing the I-360 petition for SIJS and the I-485 application for adjustment of status, the process may include but is not limited to the following steps, some of which relate to

determining whether the child comes within grounds of inadmissibility:

- completing additional CIS forms;
- providing proof of age and identity;
- obtaining a special medical exam (related to discovering illegal drug use, HIV, other designated diseases, or mental illness);
- providing photographs;
- being fingerprinted;
- submitting to an interview with the CIS;
- paying CIS fees or obtaining a fee waiver.

Note, however, that CIS officers may waive interviews for children under the age of 14 or when it is determined that an interview is unnecessary. Interviews are to focus on eligibility for the status and not on matters pertaining to abuse, neglect, or abandonment, as those matters were handled by the juvenile court according to state law.

4. Impact on parents. Once SIJS is granted, the parents cannot derive any immigration benefit from the child. The granting of SIJS, a court finding that reunification with a child is not viable, or an order for termination of parental rights does not cause a parent to become deportable or inadmissible (related to grounds of inadmissibility discussed above). However, a criminal conviction for child abuse, neglect, or abandonment is a ground of deportability.

C. Deferred Action for Childhood Arrivals

On June 15, 2012, the U.S. Department of Homeland Security announced the implementation of a policy that would allow some undocumented persons to obtain temporary work authorization and deferral of removal (deportation) action. Under the “Deferred Action for Childhood Arrivals Initiative” (DACA), certain persons who were brought to the U.S. as children and who meet several key requirements may request deferral of a removal action, which creates eligibility for work authorization but does not confer legal status.

A person may request consideration of deferred action if he or she meets all of the following requirements:

- was under the age of 31 as of June 15, 2012;
- came to the U.S. before reaching his or her 16th birthday;
- has continuously resided in the U.S. since June 15, 2007, up to the present time;
- was physically present in the U.S. on June 15, 2012, and at the time of making the request for consideration of deferred action;
- entered the country without inspection before June 15, 2012, or had a lawful immigration status that expired as of June 15, 2012;
- is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a GED, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.; and
- has not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety.

To request deferred action, a person must be at least 15 years of age. However, if a person is currently in removal proceedings or has a final removal or voluntary departure order, and is not in immigration detention, the person may be younger than 15 years old at the time the request is submitted.

For details on how to meet requirements for deferred action, including forms and process instructions, see “Guidelines” on the “[Consideration of Deferred Action for Childhood Arrivals](#)” page on the USCIS website.

Note: On November 20, 2014, President Obama announced an expansion of DACA, but this expansion is on hold pursuant to a federal district court decision. Additional information on DACA and the pending expansion can be found on the website for the [National Immigration Law Center](#).

13.4 Medical, Mental Health, and Substance Abuse Records Protection (HIPAA and 42 C.F.R. Part 2)

Note: Content for this section is an adaptation of an outline written by Mark Botts of the University of North Carolina School of Government, with the author’s permission.

A. Connection between Federal Law Records Protection and Juvenile Proceedings

Medical, mental health, and substance abuse records of parents, children, or caregivers are often relevant to the child protective assessment process as well as decisions made throughout juvenile proceedings. Although state laws give certain individuals and agencies access to confidential information for the purpose of child protection and juvenile proceedings, access to and disclosure of the records addressed in this section are also subject to federal law restrictions. See *supra* § 5.8.C for an explanation of access to and disclosure of information in juvenile proceedings under state law.

B. HIPAA⁵ Privacy Rule—45 C.F.R. Parts 160, 164⁶

The federal “privacy rule”⁷ (HIPAA) governs the privacy of health information.

1. Covered health care providers. This includes any “health care provider” that transmits any health information in electronic form in connection with a HIPAA transaction.⁸ “Health care

5. “HIPAA” stands for The Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936, codified in part at 42 U.S.C. §§ 1320d to 1320d-8. This act directed the U.S. Department of Health and Human Services to develop regulations governing the privacy of health information.

6. Jill Moore of the University of North Carolina School of Government also provided input for this subsection.

7. The term “privacy rule” in this [chapter] refers to the final rule published in 67 Fed. Reg. 53,181 (Aug. 14, 2002), with modifications published in 78 Fed. Reg. 5566 (Jan. 25, 2013).

8. 45 C.F.R. §§ 160.103, 164.500. “Transaction” means the transmission of information between two parties to carry out financial or administrative activities related to health care. Examples of HIPAA transactions include transmitting claims information to a health plan to obtain payment and transmitting an inquiry to a health plan to

provider” is defined broadly to include any person or organization that, in the normal course of business, furnishes, bills, or is paid for care, services, or supplies related to the health of the individual.⁹

2. Protected health information. This includes health information that is maintained in any form or medium (e.g., electronic, paper, or oral) that

- is created or received by a health care provider, health plan, employer, or health care clearing house;
- identifies an individual (or with respect to which there is a reasonable basis to believe the information can be used to identify an individual); and
- relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.¹⁰

3. Duty to comply with HIPAA. A covered entity, including a covered health care provider, may use and disclose protected health information only as permitted or required by the privacy rule. Failure to comply with HIPAA may result in civil monetary penalties. *See* 45 C.F.R. § 160.402. Any person or organization may file a complaint regarding HIPAA violations.

4. Impact on abuse and neglect laws.

(a) Permissible disclosure. The HIPAA privacy rule permits a covered provider or other covered entity to disclose protected health information to a government authority authorized by law to receive reports of child abuse or neglect. *See* 45 C.F.R. § 164.512(b). Thus, the privacy rule permits a covered provider to disclose protected health information when making a report required by the state reporting law, G.S. 7B-301. The privacy rule also permits a covered provider to disclose protected health information to the extent the disclosure is required by law. *See* 45 C.F.R. § 164.512(a). Thus, the privacy rule permits a covered provider to disclose protected health information to DSS when that department demands the information pursuant to G.S. 7B-302 or to the guardian ad litem as necessary to comply with G.S. 7B-601.

(b) Disclosure pursuant to subpoena and court order. The privacy rule permits a covered entity to disclose protected health information in response to a subpoena if certain circumstances apply. *See* 45 C.F.R. § 164.512(e)(1)(ii). However, because HIPAA does

determine if an enrollee is covered by the health plan.

9. 45 C.F.R. § 160.103. This includes (1) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and (2) sale or dispensing of a drug, device equipment, or other item in accordance with a prescription. For definitions of “health care provider” and “health care,” see 45 C.F.R. § 160.103.

10. See the definitions of “protected health information” and “individually identifiable health information” at 45 CFR § 160.103. The privacy rule excludes from the definition of “protected health information” certain records, including education records covered by the Federal Educational Rights and Privacy Act and employment records held by a covered entity in its role as employer.

not preempt more stringent state and federal confidentiality laws, and because the state mental health confidentiality law and federal substance abuse records law do not permit disclosure in response to a subpoena alone, information governed by the state mental health law or federal substance abuse records law cannot be disclosed pursuant to a subpoena alone. Information that is subject to the state communicable disease confidentiality law may be disclosed pursuant to a subpoena, but the subject of the information may request that the information be reviewed in camera before it is disclosed.¹¹ A covered provider may disclose protected health information in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the information expressly authorized by the order. 45 C.F.R. § 164.512(e)(1)(i). The GAL's appointment order from the court specifically provides for the release of confidential information, including information subject to HIPAA, to the GAL. *See* AOC Form AOC-J-207, "Order to Appoint or Release Guardian ad Litem and Attorney Advocate" (June 2014).

Resource and Tool: For a detailed guide to HIPAA, see OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, [SUMMARY OF THE HIPAA PRIVACY RULE](#) (2003).

C. Federal Substance Abuse Records Law—42 C.F.R. Part 2

Federal substance abuse records laws restrict the use and disclosure of patient information received or acquired by a federally assisted alcohol or drug abuse program. (42 U.S.C. § 290dd-2; 42 C.F.R. pt. 2).

1. Covered programs: To be covered by 42 C.F.R. part 2, a provider must meet the definition of "program" and must be "federally assisted."¹² "Program" means an individual or entity, other than a general medical care facility, that holds itself out as providing, and does provide, alcohol or drug abuse diagnosis,¹³ treatment,¹⁴ or referral for treatment. Patient records maintained by a general medical facility, such as a hospital, are not covered unless the patient receives treatment, diagnosis, or referral for treatment from

11. G.S. 130A-143. The communicable disease confidentiality law applies to information identifying an individual with a reportable communicable disease, including HIV and sexually transmitted diseases. The complete list of diseases covered by the law is at 10A N.C.A.C. 41A.0101.

12. See 42 C.F.R. 2.12(b) for definition of "federal assistance."

13. "Diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition identified as having been caused by that abuse, which is made for the purpose of treatment or referral for treatment. "Diagnosis" is not limited to the work of medical personnel. A substance abuse evaluation or assessment carried out by a drug counselor or drug court coordinator that identifies alcohol or drug abuse and is made for the purpose of treatment or referral for treatment is a "diagnosis." Thus, the term "program" covers not only treatment programs, but also individuals or entities that diagnose and refer a person to treatment at another program. On the other hand, a "screen" or "prescreen" procedure to identify persons who *may* have alcohol or drug problems for the purpose of referring them to an alcohol or drug specialist for evaluation or assessment is not a "diagnosis." In this instance, the information gathered in the screening process does not constitute a diagnosis and the screening agency is referring individuals for an assessment, not treatment. Therefore, the screening agency is not a program covered by 42 C.F.R. part 2.

14. "Treatment" is not limited to care provided by medical personnel under a medical model and can include individual or group counseling.

- a. a specialized drug or alcohol abuse unit of the hospital or medical center, or
- b. medical personnel or other staff whose primary function is to provide services for alcohol or drug abuse.

Practice Note: If a hospital emergency room treating a trauma patient performs a blood test that identifies cocaine or other drugs in the patient’s blood, the hospital emergency room is not a “program” covered by the regulations and, therefore, the drug test results are not protected by 42 C.F.R. Part 2. If, however, a substance abuse counselor evaluates the same patient for drug abuse after he or she is admitted to a medical floor of the hospital, then the substance abuse counselor would be considered a “program” under b., above, and any information acquired by the counselor that falls within the scope of 2., below, would be governed by 42 C.F.R Part 2. If the hospital emergency room provides detoxification services, then the detox unit of the hospital emergency room would be considered a “program” under a., above.

2. Confidential information. The federal prohibition against disclosure¹⁵ applies to any information, whether recorded or not, that:

- would identify a “patient”—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as an alcohol or drug abuser;
- is alcohol or drug abuse information obtained by a federally assisted alcohol or drug abuse program; and
- is for the purpose of treating alcohol or drug abuse, making a diagnosis for that treatment, or making a referral for that treatment.

“Identify” means a communication, either written or oral, of information that identifies someone as a substance abuser, the affirmative verification of another person’s communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

Practice Note: Suppose a child protective services worker investigating a report of child neglect requests access to a child’s mental health record. The family/social history section of the child’s record states that the mother, during an interview with the child’s mental health counselor, disclosed that she abuses cocaine. This information is not covered by 42 C.F.R Part 2, because it was not obtained for the purpose of treating or diagnosing the mother or referring her for treatment. The information also would not identify the mother as a person who applied for or received substance abuse treatment.

3. Duty imposed by federal substance abuse records law. The regulations prohibit the disclosure and use of patient records except as permitted by the regulations themselves.

15. In addition to restricting disclosure, the federal regulations restrict the “use” of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient. This restriction on use applies to any information whether or not recorded that is substance abuse information obtained by a federally assisted substance abuse program for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment.

Anyone who violates the law is subject to a criminal penalty in the form of a fine (up to \$500 for first offense, up to \$5,000 for each subsequent offense).¹⁶

4. Impact of 42 C.F.R. part 2 on abuse and neglect laws.

(a) Disclosure permissible only for reporting or by consent or court order. The restrictions on disclosure and use in the federal regulations do not apply to the reporting under state law of incidents of suspected child abuse and neglect to appropriate state or local authorities. 42 C.F.R. § 2.12(c)(6). Therefore, the federal law does not bar complying with the reporting law in G.S. 7B-301, even if it means disclosing patient identifying information.

Although substance abuse programs (or third party payers who have received information from substance abuse programs) must make a report of suspected abuse, neglect, or dependency mandated by G.S. 7B-301, they are not authorized to provide information beyond the initial report when DSS requests further information pursuant to G.S. 7B-302 or when the GAL requests information pursuant to G.S. 7B-601. The federal rules permit disclosure of patient-identifying information for follow-up investigations or for court proceedings that may arise from the report only with the patient's written *consent* or a *court order* issued pursuant to Subpart E of the federal regulations. 42 C.F.R. § 2.12(c)(6) "[N]o State law may either authorize or compel any disclosure prohibited by these regulations." 42 C.F.R. § 2.20.

(b) Court order requirements. A person holding records may not disclose the records in response to a subpoena unless a court of competent jurisdiction enters an authorizing order under Subpart E of 42 CFR part 2 (or the regulations explicitly make an exception to confidentiality under the circumstances). Under Subpart E, a federal, state, or local court may authorize a substance abuse program to make a disclosure that would otherwise be prohibited under the regulations, but only in certain circumstances. *See* 42 C.F.R. § 2.64. A permissible circumstance for court orders arising in the context of juvenile proceedings is when the order for disclosure is necessary to protect against an existing threat to life or serious bodily injury, including circumstances that constitute suspected child abuse and neglect and verbal threats against third parties.

When the information is sought for non-criminal purposes, the patient and program must be notified and given an opportunity to file a written response or appear in person to address the request for court ordered disclosure. The judge may examine the records before making a decision. This inspection must be *in camera*. To order disclosure, the court must find "good cause" for the disclosure. This means that the court must determine that there is no other effective way to obtain the information and that the public interest and need for disclosure outweigh the potential injury to the patient, the patient's relationship to the program, and the program's ongoing treatment services. Any order authorizing disclosure must (i) limit disclosure to parts of the record essential to fulfill the

16. A substance abuse program must maintain records in a secure room, locked file cabinet, safe or other similar container when not in use; the program must adopt written policies and procedures to regulate and control access to records. *See* 42 C.F.R. § 2.16.

purpose of the order, (ii) limit disclosure to persons who need the information, and (iii) protect the information from disclosure to others by sealing portions of the public record in the case.

(c) Consent requirements (42 C.F.R. § 2.31). A written consent to a disclosure under these regulations must include:

- (1) The specific name or general designation of the program or person permitted to make the disclosure.
- (2) The name or title of the individual or the name of the organization to which disclosure is to be made.
- (3) The name of the patient.
- (4) The purpose of the disclosure.
- (5) How much and what kind of information is to be disclosed.
- (6) The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under 42 C.F.R. § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under 42 C.F.R. § 2.15 in lieu of the patient.
- (7) The date on which the consent is signed.
- (8) A statement that the consent is subject to revocation at any time except to the extent that the program or person which is to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third party payer.
- (9) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must insure that the consent will last no longer than reasonably necessary to serve the purpose for which it is given.

5. Relationship of federal substance abuse law to state law. No state law may authorize or compel any disclosure that is prohibited by the federal drug and alcohol confidentiality law. Where state law authorizes or compels disclosure that 42 C.F.R. pt. 2 prohibits, 42 C.F.R. pt. 2 must be followed. 42 C.F.R. § 2.20. The federal drug and alcohol confidentiality law does not require disclosure under any circumstances. If the federal law permits a particular disclosure, but state law prohibits it, the state law controls. 42 C.F.R. § 2.20.

13.5 Education Records and FERPA¹⁷

A. Introduction

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, was enacted in 1974; the corresponding regulations are found at 34 C.F.R. part 99. FERPA is a complex federal law that provides for access to education records by parents and eligible students and governs the disclosure of education records by all educational institutions that receive federal

17. Source for this section: [Website for the Family Policy Compliance Office of the U.S. Department of Education](#). Laurie Mesibov of the UNC School of Government provided input on this section.

funds. Although state laws give certain individuals and agencies access to confidential information for the purpose of child protection and juvenile proceedings, access to and disclosure of education records in some circumstances are subject to FERPA requirements. See *supra* § 5.8 for an explanation of access to and disclosure of information in juvenile proceedings under state law.

FERPA gives parents and “eligible students” (a student who is 18 or attending a postsecondary institution) certain rights with respect to inspecting, requesting changes to, and preventing disclosure of education records. For the purposes of this manual, this section will focus on consent to disclose information and certain exceptions to the need for consent. This section is an introductory overview of FERPA requirements most relevant to juvenile proceedings and does not comprehensively address FERPA (see resources below).

Resources and Tools: For more detailed information about FERPA, including regulations, explanations, and model forms, see “[Family Policy Compliance Office](#)” on the U.S. Department of Education website. In 2011, the U.S. Department of Education announced a series of initiatives related to FERPA and formed a Privacy Technical Assistance Center (PTAC) resulting in a series of technical briefs and assistance tools accessible via a “[PTAC Toolkit](#)” website.

B. Consent Required for Disclosure

1. Consent required. Under FERPA, an educational agency or institution may not provide *personally identifiable information* from a student’s *education records* without obtaining specific written consent from the parent or eligible student, unless an exception to the consent requirement applies.

2. Personally identifiable information. “Personally identifiable information” includes but is not limited to:

- the student’s name;
- the name of the student’s parent or other family members;
- the address of the student or student’s family;
- a personal identifier, such as the student’s social security number, student number, or biometric record;
- other indirect identifiers, such as the student’s date of birth, place of birth, and mother’s maiden name;
- other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or
- information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. § 99.3

3. Education records. The term “education records” used in FERPA generally includes all records, files, documents, and other materials that are maintained by the agency or institution (or by a party acting for the agency or institution) and contain information directly related to a student. 34 C.F.R. § 99.3. (This means the records themselves and the information in them, wherever they are stored.)

There are a number of exceptions in the definition of “education records.” One narrow exception excludes personal notes kept in the *sole possession* of the maker as a memory aid and not shared with anyone except a temporary substitute. Thus, personal notes that are not shared and personal knowledge and observations of educators and administrators that do not rely on the contents of an education record are likely not subject to FERPA requirements. Another exception involves “records of a law enforcement unit.” This applies to records created and maintained by a law enforcement officer, department, commissioned police officer, or non-commissioned security guard who is officially authorized by the educational institution to enforce laws or maintain the physical security and safety of the school. This means records of a School Resource Officer (SRO) are not education records, unless the records are created and maintained exclusively for a non-law enforcement purpose, such as school discipline. For more information, see 34 C.F.R. 99.8.

4. Content of consent. A consent to release records protected by FERPA must: (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made. 34 C.F.R. § 99.30.

C. Exceptions to Consent Requirement

1. Overview. There are a number of exceptions to the requirement of written consent to allow disclosure to certain parties under certain conditions. Those most relevant to juvenile proceedings and explained in more detail below are disclosures:

- to an agency caseworker or tribal organization authorized to access a student’s case plan when legally responsible for the care and protection of the student;
- to comply with a judicial order or lawfully issued subpoena;
- to appropriate officials in cases of health and safety emergencies;
- of information that is “directory” information such as name, address, phone number, dates of attendance, etc.

See 34 C.F.R. §§ 99.31, 99.36, 99.37, 99.38 and the Uninterrupted Scholars Act, Pub. L. No. 112-278, 2013, 126 Stat. 2480.

2. Disclosure to child welfare agency responsible for child. The Uninterrupted Scholars Act of 2013 addresses obtaining timely access to school records. See Pub. L. No. 112-278, 2013, 126 Stat. 2480; 20 U.S.C. §1232g(b)(1)(L). It allows schools to release records without first obtaining consent from a parent to a caseworker or other representative of a state or local child welfare agency or tribal organization authorized to access a student’s case plan when the agency or organization is legally responsible for the care and protection of the student. It is important to note, however, that this provision is permissive and not mandatory. The child

welfare agency may only disclose (or re-disclose) the records to an individual or entity engaged in addressing the student's education needs. That individual or entity must be authorized to receive the records, and the disclosure (or re-disclosure) must be consistent with state confidentiality laws. Federal regulations have not yet been amended to put the new Uninterrupted Scholars Act amendments into effect.

See also Dear County Directors of Social Services letter, dated June 1, 2013, from Kevin Kelley, Section Chief, Child Welfare Services, DHHS Division of Social Services (Subject: Family Educational Rights and Privacy Act) (available from the manual authors).

3. Disclosure to comply with judicial order or subpoena. An educational agency or institution may disclose information in order to comply with a judicial order or lawfully issued subpoena. Thus, a juvenile court may order that the information be disclosed. However, the educational agency or institution must make a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance so the parent or eligible student may seek legal recourse. Notification to the parent is not required if:

- the parent has been a party to a court proceeding involving child abuse, neglect, or dependency and the order is issued in the context of that proceeding;
- the disclosure is in compliance with a federal grand jury subpoena or a subpoena issued for law enforcement purposes for which a court has ordered that the existence or contents of the subpoena or information furnished in response to the subpoena not be disclosed; or
- the disclosure is in compliance with an ex parte court order obtained by the U.S. Attorney General or that person's designee concerning certain investigations or prosecutions.

34 C.F.R. § 99.31(a)(9) and the Uninterrupted Scholars Act, Pub. L. No. 112-278, 2013, 126 Stat. 2480; 20 U.S.C. § 1232g(b)(2)(B). Note, the regulations have not been amended since the enactment of the Uninterrupted Scholars Act.

4. Disclosure for health or safety emergency. An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. In making a determination as to whether this exception applies, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the determination is made that there is an articulable and significant threat to the health or safety of a student or other individual, disclosure may be made to any person whose knowledge of the information is necessary to protect the health or safety of the student or others. 34 C.F.R. §§ 99.31(a)(10), 99.36. Although FERPA does not include a specific exception for reporting child abuse or neglect, the health or safety exception may apply in the few cases in which it is necessary to consult school records to determine whether a report should be made. The exception also may apply when a social services director acting pursuant to G.S. 7B-302(e) makes a written demand for information or reports the director believes are relevant to an assessment or to the provision of protective services.

5. Disclosure of directory information. Schools may disclose, without consent, “directory” information such as a student’s name, address, telephone number, email address, photograph, date and place of birth, major field of study, grade level, enrollment status, honors and awards, dates of attendance (“dates of attendance” does not mean specific daily records of attendance), participation in sports, etc. Directory information does not include a student’s social security number or a student identification number that is used to gain access to education records (when not used in conjunction with other authenticating factors such as a PIN or password). However, parents and eligible students must be informed about directory information and their right to ask the school not to disclose it. 34 C.F.R. §§ 99.3, 99.31(a)(11), 99.37. Schools are required to notify parents and eligible students annually of their rights under FERPA. 34 C.F.R. § 99.7.

D. Redisclosure and Use of Information

When an educational agency or institution is permitted to disclose personally identifiable information from an education record, it may do so only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. The disclosed information may be used only for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a). This restriction on redisclosure does not include disclosure that is required by a court order or subpoena or for directory information. 34 C.F.R. 99.33(c). Redisclosure by child welfare agencies is also governed by G.S. 7B-302 and -2901(b), which require information received by the department of social services to be maintained confidentially except for one of the enumerated statutory conditions.

E. Complaints and Enforcement

A parent or eligible student may file a written complaint with the Family Policy Compliance Office of the U.S. Department of Education regarding an alleged violation of FERPA. 34 C.F.R. § 99.63. The complaint contents, investigation procedures, and enforcement actions are explained in 34 C.F.R. §§ 99.64 through 99.67.

The United States Supreme Court has held that FERPA’s nondisclosure provisions create no personal rights that are enforceable under 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

13.6 Indian Child Welfare Act

Some of the content in this section was reproduced or adapted from a summary written by Jane Thompson and Kirk Randleman, Assistant Attorneys General for the State of North Carolina, April 2008, with permission. This section is an overview and not intended to be a comprehensive guide to the Indian Child Welfare Act (ICWA). Additional resources and tools related to ICWA can be found at the end of this section.

A. Introduction and Applicability

The Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, was enacted in 1978 to establish uniform, nationwide procedures for the handling of Indian child placements in recognition of the importance of the child/tribe relationship and the history of removal of Indian children from their homes with little, if any, deference to Indian culture. The Code of Federal Regulations contains detailed guidance on the Act at 25 C.F.R. 23. However, proposed federal regulations (at 80 Fed. Reg. 54 (Mar. 20, 2015) pp. 1488094) will significantly impact 25 C.F.R. 23. The comment period for those regulations ended in May 2015, and readers are cautioned to monitor the finalization of the regulations since revised regulations will significantly alter the law as presented in this subsection of the manual. The proposed regulations are based upon February 2015 revisions to the Bureau of Indian Affairs Guidelines to ICWA, found at 80 Fed. Reg. 31 (Feb. 25, 2015) pp. 1014659. However, the Guidelines do not have the binding effect of law. Links to the new guidelines, the proposed federal regulations, and a presentation on the changes can be found in the [Indian Child Welfare Act](#) section of the Bureau of Indian Affairs website.

1. State recognized tribes not covered by ICWA. ICWA applies only to federally recognized Indian tribes, of which there are over 500. It does not apply to Canadian tribes or to tribes that have only state recognition. The only federally recognized tribe in North Carolina is the Eastern Band of the Cherokee Nation. Other state recognized tribes, to which the Act does not apply, are:

- Coharie Tribe
- Haliwa Saponi Indian Tribe
- Lumbee Tribe of North Carolina
- Meherrin Indian Tribe
- Occaneechi Band of the Saponi Nation
- Sappony
- Waccamaw Siouan Tribe

See “[Commission of Indian Affairs](#)” on the N.C. Department of Administration website. *See also* G.S. Chapter 71A, Indians.

Even though ICWA is inapplicable to tribes with only state recognition, the Juvenile Code provides for special placement consideration and notice in the pre-adjudication phase for children who are members of a state recognized tribe. Under G.S. 7B-505(c) and 7B-506(h)(2a), “nonrelative kin” is a placement option for the court to consider when making a nonsecure custody placement if the court determines it is not going to place the juvenile with a relative. For child members of state-recognized tribes, nonrelative kin includes any member of a state-recognized tribe or any member of a federally recognized tribe, even if there is no substantial relationship between the child and the adult tribal member. Under these statutes, the court may order the department to notify the juvenile’s state-recognized tribe of the need for the juvenile’s placement in nonsecure custody.

In addition, G.S. 143B-139.5A requires the state Division of Social Services to collaborate with the N.C. Association of County Directors of Social Services, the Department of Administration, and the Commission of Indian Affairs to develop effective processes to accomplish a number of goals such as:

- enabling state-recognized tribes to receive notice when Indian children are involved in the child protective services system, and to be consulted on matters related to the placement of Indian children in foster care or for adoption;
- identifying and recruiting N.C. Indians to become foster care and adoptive parents;
- teaching cultural, social, and historical perspectives associated with Indian life to appropriate child welfare workers and foster and adoptive parents.

2. Proceedings covered by ICWA. ICWA applies to child custody proceedings, which include (1) foster care placements (other than voluntary placements), (2) TPR proceedings, (3) preadoptive and adoptive placements, and (4) juvenile court provisions for custody or guardianship of the juvenile. ICWA does not apply to placements arising out of delinquency cases or to custody cases arising out of divorce actions.

3. Children and parents covered by ICWA. ICWA states that it applies only to an “Indian child,” as defined in ICWA. However, the U.S. Supreme Court has interpreted ICWA’s application to also depend on the relationship an Indian child has with his or her Indian parent.

An Indian child is defined in 25 U.S.C. § 1903(4) as a child who is either (i) a member of a federally recognized tribe or (ii) eligible for membership and the biological child of an enrolled member. Each federally recognized tribe decides membership issues, and the tribe’s determination is conclusive. Although the only federally recognized tribe based in North Carolina is the Eastern Band of the Cherokee Nation, children from other federally recognized tribes may reside in North Carolina. Since only the tribe can determine its membership (explained in 4. below) and failure to follow ICWA can invalidate a juvenile proceeding because of a lack of subject-matter jurisdiction, early notification of the tribe is critical when a juvenile case involves a child who may be covered by ICWA. A Notice of Inquiry can be sent to determine the child’s membership in a particular tribe. The Bureau of Indian Affairs maintains a [Tribal Leaders Directory](#) with contact information for tribes.

In 2013, the U.S. Supreme Court decided *Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S.Ct. 2552 (2013), and addressed when ICWA applies to a proceeding involving an Indian child who was never in the physical or legal custody of an Indian parent or who did not have a relationship with an Indian parent. By focusing on the purpose of ICWA to prevent the inappropriate removal of Indian children from their homes, and by citing the phrases “prevent the breakup of the Indian family” and “continued custody of the child by the parent or Indian custodian” (found at 25 U.S.C. 1912(d) and (f)), the Court held that ICWA does not apply when an Indian parent never had physical or legal custody of the Indian child or a relationship with the child. [Note that the revised BIA Guidelines and the 2015 proposed federal regulations are not consistent with this opinion.]

4. Who must assert or establish that ICWA applies. Anyone may raise the question of whether ICWA applies in a particular case. The North Carolina Court of Appeals has held that the burden is on a party who seeks to invoke the protections of ICWA to demonstrate that it applies, and mere allegations of “Indian heritage” will not suffice. *In re C.P.*, 181 N.C. App. 698 (2007) (holding that ICWA did not apply because the only evidence offered by the parent that she and the children were tribe members was her testimony, even though the tribe was given notice and the case was continued twice to permit a response from the tribe); *In re Williams*, 149 N.C. App. 951 (2002) (rejecting respondent’s claim that the trial court failed to follow ICWA where respondent merely made a mention of his Indian heritage but provided no supporting evidence that ICWA was applicable).

In the case *In re A.R.*, respondent parents contended that the trial court failed to comply with the notice requirements of ICWA. The parents had reported to social services an affiliation with a Native American group and the trial court found as a fact that social services should investigate this affiliation, but the court never addressed the result of that investigation. The court of appeals remanded the case for the trial court to determine the results of the investigation and, if applicable, comply with ICWA notification requirements. *In re A.R.* ___ N.C. App. ___, 742 S.E.2d 629 (2013).

5. The Eastern Band of the Cherokee. The Eastern Band of the Cherokee, the only federally recognized tribe in North Carolina, is headquartered on the Qualla Boundary, a 56,688 acre tract that lies in Jackson and Swain counties. There are also some small tracts of tribal lands in Clay County and Cherokee County.

The Eastern Band of the Cherokee is a sovereign nation governed by a Constitution that was first enacted in 1827. The Tribe has its own court system and body of laws. See “Jurisdiction” in Section B below regarding tribal versus state court actions.

Practice Notes: Cherokee Family Services is the agency of the Eastern Band of the Cherokee that handles cases that involve the Indian Child Welfare Act. If you think you are dealing with a Cherokee Indian child, you should contact Cherokee Family Services at P.O. Box 507, Cherokee, North Carolina 28719, (828) 497-6092. That office can assist you in checking with the enrollment office to determine whether the child is an “Indian child.” Enrollment in the Eastern Band of the Cherokee, as with enrollment in any other tribe, may open and close at any time set by the tribe, and the standards for enrollment can change. The tribe has sole discretion in determining its membership.

If the child is subject to ICWA, Cherokee Family Services will be involved in the case as the Tribe’s representative. In some cases, you might experience a delay in getting a response from the Tribe because Cherokee Family Services coordinates their activities with the Tribal Attorney’s Office, which provides legal services for the Tribe in any ICWA case.

In addition to determining Tribal membership, the Tribe designates who qualifies as “extended family” for the child. These persons may or may not be related by blood or marriage to the child. The Tribe bases kinship determinations on significant involvement in the child’s life. Anyone on the Qualla Boundary could be designated as “extended family” for

ICWA purposes. The Tribe has the right to approve all placements and adoptions of the child, even if it does not remove the case to tribal court.

B. Jurisdiction

1. Exclusive tribal court jurisdiction. Exclusive tribal court jurisdiction exists where an Indian child resides on a reservation (even if visiting elsewhere) or is the ward of the tribal court, even if the child does not reside on the reservation. If exclusive tribal court jurisdiction exists, a state court still may act in an emergency situation to prevent imminent physical danger or harm to the child, but must then “expeditiously” initiate proceedings under ICWA to transfer the child to tribal court jurisdiction. An exception to exclusive jurisdiction of the tribe is that states and tribes may enter into agreements related to the care and custody of Indian children and jurisdiction over child custody proceedings, including agreements allowing for transfer of jurisdiction on a case-by-case basis and agreements providing for concurrent jurisdiction between the state and the tribe. 25 § U.S.C. 1919. The Eastern Band of Cherokee Indians entered into a memorandum of agreement with the NC DHHS Division of Social Services and four county departments of social services located within Judicial District 30 (Cherokee, Swain, Jackson, and Graham) that defers jurisdiction of child protective cases from the tribal court to state court. However, the North Carolina Court of Appeals has held that it will not take judicial notice of this memorandum of agreement because it is a “legislative fact” that is not subject to judicial notice. *In re E.G.M.* __ N.C. App. __, 750 S.E.2d 857 (2013) (remanding the case for a determination of subject matter jurisdiction where the trial court made no findings related to the agreement between the state and the Tribe and the court of appeals refused to take judicial notice of the existence of such an agreement). As a result, the memorandum of agreement must be admitted as evidence in each state court case where the Cherokee tribal court would have jurisdiction.

2. Concurrent jurisdiction and intervention. In all other cases state and tribal courts have *concurrent* jurisdiction, but the Tribe has the right to intervene in a state court proceeding at any time, and the only bar to that intervention is that the child is not an Indian child or the Tribe is not the child’s Tribe.

C. Transfer of ICWA Case to Tribal Court

The parent, the Indian custodian, or the Tribe can petition the state court to *transfer* jurisdiction to the tribal court. See 25 U.S.C. § 1911. An Indian custodian is an Indian person with legal custody of an Indian child under tribal law or custom or state law or by agreement of the child’s parent. 25 U.S.C. § 1903.

A transfer request *must* be granted unless (1) either parent objects (including a non-Indian parent), (2) the tribal court declines jurisdiction, or (3) the state court finds “good cause to the contrary,” such as:

- The proceeding was at an advanced stage when the transfer petition was received, and it was not filed promptly after receiving notice of the hearing.
- An Indian child over 12 years old objects to the transfer.

- Evidence necessary to the case could not be adequately presented in tribal court without undue hardship to the parties or witnesses.
- The parents of a child over 5 years of age are not available and the child has had little or no contact with the child's Tribe or members of the Tribe.

Note that these regulations on transfer differ from the 2015 proposed regulations and the 2015 revised guidelines. *See* "Procedures for transfer to tribal court," in the newly revised "Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings," published in the Federal Register at 80 Fed. Reg. 31 (Feb. 25, 2015) pp. 1014659.

Practice Note: Even if the Tribe, parent, or custodian does not request transfer to tribal court or the Tribe does not intervene in the juvenile case, ICWA still applies because the child is an Indian child.

D. Notice to the Tribe, Parent, Indian Custodian, and Others

In any proceeding to which ICWA applies, notice must be given by registered mail, return receipt requested, to the parent, custodian, *and* Tribe, along with a copy of the petition. 25 U.S.C. § 1912(a). Under ICWA, a "parent" does not include the unwed father where paternity has not been acknowledged or established. 25 U.S.C. § 1903(9).

In North Carolina, the relevant tribe will often be the Eastern Band of the Cherokee. This Tribe has designated Barbara Jones as the tribal agent to receive the required ICWA notice at: Eastern Band of Cherokee, Barbara Jones, Program Manager, 134 Boys Club Loop, P.O. Box 507, Cherokee, NC 28719. *See* Designated Tribal Agents for Service of Notice, [79 Fed. Reg. 12, 3225](#), 3232 (Jan. 17, 2014). Her contact information also includes: Telephone: (828) 497-6092; Fax: (828) 497-3322; Email: barbjone@nc-cherokee.com.

To determine a tribal agent for another tribe, see the annual Designated Tribal Agents for Service of Notice in the Federal Register. (The most recent version as of this writing is: 79 Fed. Reg. 12, 3225 (Jan. 17, 2014)).

Copies of the notice must be sent by registered mail, return receipt requested, to the Secretary of the Department of Interior as well as the Regional Director for the Bureau of Indian Affairs. 25 C.F.R. 23.11. For proceedings in North Carolina, the Regional Director may be reached at: BIA Eastern Regional Office, 545 Marriott Drive, Suite 700, Nashville, TN 37214, (615) 564-6500. 79 Fed. Reg. 92, 27189 (May 13, 2014)(to be codified at 25 C.F.R. 23. (Note: this address was recently updated in the Federal Register, and future changes could occur.) If the proceedings involve a tribe located outside the Eastern Region, notice should also be sent to the other relevant regional office. A [map](#) and [contact information](#) for the other regions may be found at "Regional Offices" on the Bureau of Indian Affairs, Department of the Interior website.

If the identity or location of the Indian parent, Indian custodian, or Tribe cannot be determined, written notice by registered mail must be sent to the Secretary of the Department of the Interior. 25 U.S.C. § 1912(a). Notice should also be sent by registered mail to the

Regional Director (25 C.F.R. 23.11(b)) (see above for contact information). The purpose of this notice is to seek assistance establishing the tribal identity.

There is no provision for service by publication.

The federal regulations (at 25 C.F.R. 23.11), and the new “[Bureau of Indian Affairs Guidelines for State Courts: Indian Child Custody Proceedings](#),” (at 10146 Fed. Reg. Volume 80, No. 37 (Feb. 25, 2015)) contain detailed descriptions of the required contents of the notice, but the two are not identical. Although the regulations are binding as compared to the guidelines, the best practice would be to include all of what is required by both.

Resource: For practical guidance, see the “[Notice](#)” section of the online resource: *A Practical Guide to the Indian Child Welfare Act* cited in the resource section below.

E. Timing of Court Proceedings

No foster care placement or TPR proceeding may be held sooner than 10 days following receipt of the notice by the parent or Indian custodian and the Tribe. The parent, Indian custodian, or Tribe *must*, upon request, be granted up to 20 additional days to prepare. 25 U.S.C. § 1912(a). [Thus, DSS may have to ask the court to continue a hearing to comply with ICWA.] If ICWA requirements are not met, the Tribe and the Indian custodian or parent can move to vacate the proceeding and begin again. See U.S.C. § 1914.

F. “Active Efforts” Required

[Note that the 2015 proposed federal regulations differ from the following requirements related to active efforts.]

When a state court is seeking to place an Indian child in foster care or terminate parental rights to an Indian child, the court must find that “active efforts” have been made to provide remedial services to prevent the breakup of the Indian family and that these efforts proved unsuccessful. 25 U.S.C § 1912(d). [These efforts must take into account the social and cultural conditions of the Tribe and use the resources of the extended family, the Tribe, and Indian social service agencies.]

The U.S. Supreme Court held that this requirement of a finding of active efforts did not apply where the Indian parent had abandoned the child prior to birth and the child had never been in the parent’s legal or physical custody. The court reasoned that the term “breakup” refers to discontinuing a relationship, and in this case there was no existing relationship. The “breakup of the Indian family” had long since occurred since the Indian father had never supported or lived with his daughter. *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S.Ct. 2552 (2013), discussed in 13.6.A.3 above.

In the case *In re E.G.M.*, ___ N.C. App. ___, 750 S.E.2d 857 (2013), the North Carolina Court of Appeals addressed the difference between ICWA’s “active efforts” requirement and the N.C. Juvenile Code’s “reasonable efforts” requirement, in relation to the cessation of

reunification efforts. Although “active efforts” differ from “reasonable efforts, the court held that ICWA does not prohibit a trial court from ordering the cessation of reunification efforts if it finds that such efforts clearly would be futile. The court further held that ICWA does not require reunification efforts to persist if those efforts are clearly inconsistent with the child’s need for health, safety, and a safe, permanent home within a reasonable period of time. Finally, the court held that ICWA requires a finding, both before ordering a foster care placement and before terminating parental rights, that “active efforts” to prevent the disruption of the Indian family “proved unsuccessful.”

G. Finding of Serious Emotional or Physical Damage

No Indian child may be placed in foster care or be the subject of a termination of parental rights unless the court finds that continued custody by the parent or Indian custodian is likely to result in *serious emotional or physical* damage to the child. 25 U.S.C. § 1912(e), (f). For foster care placements, this finding must be supported by clear and convincing evidence; for TPR, the evidence must be beyond a reasonable doubt. The finding must be based on testimony from a “qualified expert witness.” ICWA does not define qualified expert, but the Bureau of Indian Affairs’ (BIA) non-binding Guidelines for State Courts states that the expert should be, in priority order, (1) a member of the child’s Tribe recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing, (2) any expert witness with substantial experience in the delivery of family services to Indians and extensive knowledge of tribal child rearing practices, or (3) a professional person having substantial education and experience in his or her specialty. The BIA can assist in identifying a qualified expert witness, if requested to do so by a party or the court. The North Carolina Court of Appeals has held that the required expert testimony must occur at the hearing that results in the foster care placement and cannot be based on expert testimony heard at an earlier hearing. *In re E.G.M.*, __ N.C. App. __, 750 S.E.2d 857 (2013) (holding that the requirement of expert testimony was not met where the expert testimony had been at the disposition hearing and not at the permanency planning hearing in which the court gave DSS custody).

The U.S. Supreme Court held that this requirement did not apply where the Indian parent never had legal or physical custody of the child. The court reasoned that the term “continued custody” refers to custody that a parent already has or had at some point in the past and does not apply when an Indian parent never had custody of the child. *Adoptive Couple v. Baby Girl*, __ U.S. __, 133 S.Ct. 2552 (2013), discussed in 13.6.A.3 above.

For a case in which a state court terminated the parental rights of an Indian child’s parents following both North Carolina and ICWA requirements, see *In re Bluebird*, 105 N.C. App. 42 (1992).

H. Placement Preferences

An Indian child placed in foster care must be in the least restrictive setting that approximates a family and is within reasonable proximity to his home, taking into account any special needs. Preference must be given, in the absence of good cause to the contrary, to (1) a

member of the child's extended family, (2) a foster home licensed or approved by the child's Tribe, (3) an Indian foster home approved by a non-Indian authority, and (4) an institution approved by the Tribe and suitable for the child. 25 U.S.C. § 1915(b).

For adoptive placement, ICWA requires that absent good cause to the contrary, the child must be placed with: (1) a member of the child's extended family, (2) other members of the child's Tribe, or (3) another Indian family. 25 U.S.C. § 1915(a). In a private adoption, this preference for an Indian family is not applicable if an alternative adoptive party has not formally sought to adopt the child. *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S.Ct. 2552 (2013).

Note that the Tribe can change these preferences through its governing body at any time. 25 U.S.C. § 1915(c)

I. Consent to Foster Placement, Relinquishment, and Consent to Adoption

A parent or Indian custodian's voluntary consent to a foster care placement or voluntary relinquishment for or consent to adoption must be in writing and recorded before a family court judge who certifies in writing that the parent or Indian custodian understood the consent or relinquishment. See 25 U.S. Code § 1913. [Note that in North Carolina, relinquishment for adoption refers only to placement of a child by a parent or guardian with a DSS or licensed child-placing agency for purposes of adoption. See G.S. 48-3-701 through 48-3-707 for requirements related to relinquishment for adoption. A parent's signed consent to a private adoption is pursuant to G.S. 48-3-606 and 48-3-607.]

There are several important differences between ICWA adoption procedures and procedures for other adoptions in North Carolina law. When ICWA applies, its stricter provisions supersede the procedures under state law. The following list is not all-inclusive:

- Under ICWA, adoption consents may *not* be given prior to or within 10 days after birth of the child. 25 U.S. Code § 1913(a). (North Carolina law allows the father to consent pre-birth and the mother to consent immediately after birth. G.S. 48-3-604.)
- Under ICWA, adoption consents may be revoked at any time for any reason before the final decree of adoption. 25 U.S. Code § 1913(b). (North Carolina law provides for a 7-day revocation period. G.S. 48-3-608; G.S. 48-3-706(a).)
- The adoption of an Indian child can be challenged for up to two years for fraud or duress. 25 U.S. Code § 1913(d). (North Carolina law allows voiding consent for fraud or duress only before entry of the adoption decree. G.S. 48-3-609; G.S. 48-3-707(a).)
- When an Indian adoptee reaches age 18, the court entering the final decree will inform the adoptee of his or her tribal affiliation and any other information needed to protect rights flowing from tribal membership. 25 U.S. Code § 1917. (This issue is not addressed in North Carolina law.)

There is no explicit requirement to notify the Tribe of *voluntary* surrenders or foster care placements, if it is already known that the child is an Indian child. The state court must provide a copy of a final adoption decree involving an Indian child to the Secretary of BIA,

along with information that shows the name and tribal affiliation of the child, name and address of biological parents (unless they have signed a court affidavit for anonymity), names and addresses of adoptive parents, and agency information relating to the adoptive placement.

Resources and Tools:

- For links to ICWA provisions, amendments affecting ICWA, and related laws, see “[Existing Law](#)” on the National Indian Child Welfare Association website.
 - For additional information related to the Indian Child Welfare Act and to child welfare issues involving American Indian children, see the [National Indian Child Welfare Association website](#).
 - [Guidelines for State Courts; Indian Child Custody Proceedings](#), 44 Fed. Reg. 67,584 (Nov. 26, 1979).
 - NATIVE AMERICAN RIGHTS FUND, [A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT](#) (2009).
 - The NC Department of Social Services provides information and policy on ICWA at 1 DIV. OF SOC. SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, FAMILY SERVICES MANUAL ch. IV § [1201\(IV\)\(E\)\(2\)](#) (Dec. 2009). The DSS manual also contains an “[Indian Child Welfare Act Compliance Checklist](#).” Note, however, that this checklist was last updated in April, 2008 and will not reflect changes in the law since then.
 - For issues related to American Indian child welfare court reform, see NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES AND NAT’L INDIAN CHILD WELFARE ASS’N, TECHNICAL ASSISTANCE BRIEF, [COURT REFORM AND AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN: INCREASING PROTECTIONS AND IMPROVING OUTCOMES](#) (2009).
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13.7 Multiethnic Placement Act¹⁸

The Howard M. Metzenbaum Multiethnic Placement Act (MEPA), Pub. L. No. 103-382, §§ 551–554, 108 Stat. 3518, 4056, was enacted in 1994 and was amended by the Removal of Barriers to Interethnic Adoption provisions (IEP), Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903, in the Small Business Job Protection Act of 1996 (collectively referred to here as “MEPA-IEP”).

MEPA-IEP is designed to prevent discrimination in the placement of children in foster care or for adoption on the basis of race, color, or national origin; decrease the length of time that children wait to be adopted; and facilitate the identification and recruitment of foster and

18. Sources of information for content in this section include: 1 DIV. OF SOCIAL SERVICES, N.C. DEP’T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(IV\)\(E\)](#) (2009); JOAN HEIFETZ HOLLINGER & THE ABA CENTER ON CHILDREN AND THE LAW, NATIONAL RESOURCE CENTER ON LEGAL AND COURT ISSUES, [A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996](#) (1998); CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVICES, [MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION](#) (2012)).

adoptive parents. All child placements by agencies receiving federal funds must comply with MEPA-IEP, and two provisions in the North Carolina Juvenile Code specifically require compliance with MEPA. *See* G.S. 7B-505(d) and 7B-506(h)(2).

MEPA-IEP does not operate to alter the requirements of ICWA in cases of Indian children who are subject to ICWA. MEPA specifically provides that it has no effect on ICWA, which stresses the placement of Indian children with Indian families. However, placement of a child who is a member of a non-federally recognized Indian tribe is subject to MEPA-IEP.

Compliance with MEPA-IEP is a civil rights issue, and noncompliance is deemed a violation of Title VI of the Civil Rights Act. For more information about Title VI, see 42 U.S.C. §2000d *et seq.*, 28 C.F.R. 42.101 *et. seq.*; 28 C.F.R. 50.3; 45 C.F.R. Part 80.

Under MEPA-IEP, states and other entities involved in foster care or adoption placement that receive federal financial assistance are prohibited from:

- delaying or denying a child's foster care or adoptive placement on the basis of the child's or the prospective parent's race, color, or national origin;
- denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent's or the child's race, color, or national origin.

MEPA also requires states to diligently recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state who need foster and adoptive homes. The N.C. DHHS manual addresses recruitment plans pursuant to MEPA in section 1201. *See* 1 DIV. OF SOC. SERVICES, N.C. DEP'T OF HEALTH & HUMAN SERVICES, [FAMILY SERVICES MANUAL ch. IV § 1201\(IV\)\(E\)](#) (Dec. 2009).

Race and ethnicity may be considerations in placement decisions only in the context of a child's individualized needs, with the rationale specifically documented in the placement record. Generalizations about the needs of children of a particular race or ethnicity, or about the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity, may not be used in making placement decisions.

Resources and Tools: For a comprehensive guide to MEPA, as well as common questions and checklists for implementation, see JOAN HEIFETZ HOLLINGER & THE ABA CENTER ON CHILDREN AND THE LAW, NATIONAL RESOURCE CENTER ON LEGAL AND COURT ISSUES, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 (1998), available on the [American Bar Association website](#).

For additional guidance, see OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVICES, [ENSURING THE BEST INTERESTS OF CHILDREN THROUGH COMPLIANCE WITH THE MULTIETHNIC PLACEMENT ACT OF 1994, AS AMENDED, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964](#).

For other resources related to MEPA, including training materials, articles, reports, and information on transracial adoption, see "[MEPA/IEP: Multiethnic Placement Act/Interethnic](#)

[Placement Provisions](#)” on the website for the National Resource Center for Permanency and Family Connections at the Hunter College School of Social Work.

Appendixes

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Appendix 1

Primary Court Hearings in Abuse, Neglect, Dependency, and Termination of Parental Rights Cases

Statute/Event	Timing	Criteria or Factors Considered (Consult statute. List below may be highlights only.)	Procedural Requirements	Decisions to Be Made
Initial Non-secure Custody Order 7B-502, 7B-503, 7B-504, 7B-505, 7B-508	<p>On motion, usually by DSS, for nonsecure custody.</p> <p>Initial non-secure custody order may be granted ex parte or after a hearing, but <u>not</u> before a petition is filed.</p> <p>Chief district court judge, by administrative order filed with clerk, may authorize others to enter orders.</p>	<p>Court must first consider release of juvenile to parent, relative, guardian, custodian, or other responsible adult.</p> <p>Court may order nonsecure custody only if there is a reasonable factual basis to believe (i) allegations in the petition are true and (ii) no other reasonable means is available to protect the juvenile.</p> <p>In addition, court must find one of the following:</p> <ol style="list-style-type: none"> 1. Child has been abandoned. 2. Child has suffered physical injury or sexual abuse. 3. Child is exposed to substantial risk of physical injury or sexual abuse. 4. Child is in need of medical treatment. 5. The parent, guardian, or custodian consents to nonsecure custody. 6. The juvenile is a runaway and consents to nonsecure custody. 	<p>Court should either see and read the petition or, if request is by phone, confirm that it has been filed and have it read aloud.</p> <p>If clerk's office is closed, petition is filed with magistrate.</p> <p>Order for nonsecure custody must be in writing.</p> <p>Order made by telephone must include name/title of person authorizing custody; name, title, and signature of person entering order; hour/date of authorization.</p>	<p>Applying statutory factors, court must determine:</p> <ul style="list-style-type: none"> • whether child should be removed from custody of the parent, guardian, custodian, or caretaker pending a court hearing, and if so, • where the child should be placed. <p>[Note that social worker or law enforcement may assume temporary custody under 7B-500 and 7B-501, without a court order, where the child might be injured or it might be impossible to take the child into custody if it were first necessary to obtain a court order. Child must be released unless petition is filed and nonsecure custody order is entered within 12 hours (24 hours if weekend or holiday is involved) after child was taken into custody.]</p>
Hearings on Need for Continued Non-secure Custody 7B-506. See also 7B-502, 7B-503, 7B-504, 7B-505, 7B-506, 7B-507, 7B-905.1	<p>Hearing must be within 7 days after removal-sooner if order signed by delegee.</p> <p>Second hearing within 7 days, then within 30-day intervals.</p> <p>Order must be entered within 30 days after hearing.</p>	<p>The court must:</p> <ul style="list-style-type: none"> • apply same criteria as above, from 7B-503. • make findings as to reasonableness of DSS's efforts to prevent or eliminate need for placement. • inquire as to identity and location of a missing parent, whether paternity is at issue, efforts to identify or locate and serve missing parent or establish paternity. • inquire about other children in the home. • inquire about efforts to identify and notify relatives and, if continued placement is necessary, determine whether a relative is willing and able to provide proper care. (If not placed with relative, may consider willing and able nonrelative kin for placement.) • if continued placement is necessary, address visitation. 	<p>Burden of proof is on DSS, and standard of proof is clear and convincing evidence.</p> <p>Nonsecure custody hearings may be informal, and the formal rules of evidence do not apply.</p>	<p>The court must determine:</p> <ul style="list-style-type: none"> • whether the child should remain in nonsecure custody and, if so, • where the child should be placed. <p>Court must make specific findings as to whether reasonable efforts have been made and whether they should continue.</p> <p>Order must contain findings and conclusions.</p>

Statute/Event	Timing	Criteria or Factors Considered	Procedural Requirements	Decisions to be Made
Adjudicatory Hearing 7B-800.1, 7B-801, 7B-802, 7B-805, 7B-807	<p>Must be held within 60 days of filing of the petition unless court finds good cause for continuance.</p> <p>Any order granting a continuance should be in writing.</p> <p>Order must be entered within 30 days after hearing.</p>	<p>Prior to conducting adjudication hearing, court must consider factors in G.S. 7B-800.1 in pre-adjudication hearing which may be combined with nonsecure custody hearing.</p> <p>Court must determine that it has subject matter jurisdiction.</p> <p>The question of whether the juvenile is abused, neglected, or dependent must be answered in relation to the definitions of those terms in G.S. 7B-101.</p> <p>The burden of proof is on the petitioner, DSS.</p>	<p>Rules of Evidence for civil cases apply. A Rule of Civil Procedure will apply to fill a gap if the Juvenile Code is silent when consistent with Code purposes.</p> <p>Court should inquire about need for appointment of counsel, GAL for the child, or GAL for a parent.</p> <p>The hearing must be recorded and is open to the public unless the court makes findings to support closing the hearing.</p>	<p>Court must determine:</p> <ul style="list-style-type: none"> • whether allegations in the petition are proven by clear and convincing evidence, and • whether evidence supports findings from which the court can conclude that the child is abused, neglected, or dependent. <p>Court adjudicates the existence or nonexistence of the condition(s) alleged in the petition and either (i) adjudicates the juvenile abused, neglected, or dependent or (ii) dismisses the petition.</p> <p>After adjudication, the court decides whether to proceed to disposition or set a date for a dispositional hearing.</p>
Dispositional Hearing 7B-901. <i>See also 7B-507, 7B-900, 7B-900.1, 7B-903 through 7B-905.1</i>	<p>Should be heard immediately following adjudication, but must be concluded within 30 days after the adjudication hearing.</p> <p>Order must be entered within 30 days after the hearing.</p>	<p>The court must hear evidence relating to and consider:</p> <ul style="list-style-type: none"> • the child's needs, • family and community resources available to meet those needs, • the child's best interest, • the state's objectives (a safe, permanent home for the child within a reasonable period of time), and • statutorily authorized dispositional alternatives. <p>In addition:</p> <ul style="list-style-type: none"> • The court must inquire about efforts to locate any missing parent, resolve any paternity issue, and locate and notify relatives. • If the child is placed outside the home, the court must address visitation pursuant to 7B-905.1. • If the child is out of the home, the court must determine whether reasonable efforts have been made to prevent or eliminate the need for the child's placement and whether reunification efforts should be made prospectively. 	<p>Dispositional hearings may be informal (strict adherence to the rules of evidence is not required).</p> <p>Disposition is in the court's discretion; the statute does not assign a burden of proof.</p>	<p>The court must design an appropriate plan to meet the child's needs and the state's objectives. The court must set out precise terms of the disposition, including:</p> <ul style="list-style-type: none"> • who should have legal custody of the child, • where the child should be placed or who should be authorized to make that decision, • a visitation plan if the child is out of the home, • the court's directives to the parties, • the date of the next hearing.

Statute/Event	Timing	Criteria or Factors Considered	Procedural Requirements	Decisions to be Made
Review Hearings 7B-906.1 <i>See also 7B-507, 7B-905.1</i>	<p>If child is removed from the home, must be held within 90 days after dispositional hearing, then at least every six months.</p>	<p>Court must consider all relevant criteria set out in G.S. 7B-906.1(d).</p>	<p>Same as for dispositional hearings (above).</p> <p>Court may waive reviews only after making findings required by G.S. 7B-906.1(n).</p> <p>Clerk must give 15 days' notice of hearing pursuant to 7B-906.1(b).</p> <p>Reviews are not required if custody is placed with a parent.</p>	<p>Similar to dispositional hearing (above).</p> <p>Court must determine:</p> <ul style="list-style-type: none"> • whether child's placement should continue or change, • whether provisions in prior order should be changed, and • pursuant to 7B-906.1(f), applicability of circumstances requiring initiation of TPR, or an exception to the requirement.
Permanency Planning Hearing 7B-906.1 <i>See also 7B-507, 7B-905.1</i>	<p>If child is removed from the home, must be held within 12 months after initial order for removal, then at least every 6 months.</p> <p>Also required within 30 days after a court's decision that reunification efforts are not required or shall cease.</p>	<p>Court must consider all relevant criteria in 7B-906.1(d) & (e) and determine:</p> <ol style="list-style-type: none"> 1. whether the juvenile can be returned home immediately or within 6 months, and if not (or unlikely), <ul style="list-style-type: none"> • whether guardianship or custody should be ordered, and if so, what rights and responsibilities should remain with the parents. • whether adoption should be pursued, and if so, whether there barriers to the child's adoption. • whether the child should remain in the current placement, and why or why not. 2. whether DSS has made reasonable efforts to reunify or to implement the permanent plan, and whether those efforts should continue. 	<p>Same as for review hearings (above).</p> <p>May be combined with regular review hearing.</p>	<p>The court may make any authorized disposition.</p> <p>The court must:</p> <ul style="list-style-type: none"> • make specific findings as to best plan of care to achieve a safe, permanent home for the child within a reasonable period of time; • determine whether DSS has made reasonable efforts and whether they should continue; • if child is not returned home, order DSS to carry out the plan and document the steps in the plan. <p>Pursuant to 7B-906.1(f), the court should determine the applicability of circumstances requiring initiation of TPR or an exception to the requirement.</p>

Statute/Event	Timing	Criteria or Factors Considered	Procedural Requirements	Decisions to be Made
Termination of Parental Rights Hearings 7B-1100 through 7B-1112.1	<p>Hearing on petition/motion for tpr must be heard within 90 days after filing unless court for good cause continues the hearing pursuant to G.S. 7B-1109(d).</p> <p>Any order for a continuance should be in writing.</p> <p>Order must be entered within 30 days after the hearing.</p>	<p><u>Adjudication.</u> The petitioner or movant attempts to prove by clear and convincing evidence that one or more grounds for termination in 7B-1111(a) exist. Rules of Evidence for civil cases apply.</p> <p><u>Disposition.</u> If the court adjudicates one or more grounds for termination, the court conducts a dispositional hearing at which the court may consider any evidence, including hearsay, that is relevant, reliable, and necessary to determine the best interests of the child. There is no burden of proof, and the decision whether to terminate the parent's rights is in the court's discretion. The court must consider factors set out in 7B-1110, make written findings on those that are relevant, and determine whether terminating the parent's rights is in the child's best interest.</p>	<p>A Rule of Civil Procedure will apply to fill a gap if the Code is silent and applying the rule is consistent with the Code's purposes.</p> <p>Court should inquire about need for appointment of counsel, GAL for the child, or GAL for a parent. Court must appoint GAL for child who does not already have one if the parent contests material allegations of the petition or motion.</p>	<p>The court must determine whether grounds for termination have been proven by clear and convincing evidence, and if the court adjudicates one or more grounds, whether it is in the child's best interest to terminate parental rights.</p> <p>If the court determines that no ground has been proved by clear and convincing evidence or that it is not in the child's best interest to terminate parental rights, the court must dismiss the petition or motion.</p>
Post-termination of Parental Rights Placement Court Review 7B-908	<p>Within 6 months after the termination hearing and at least every 6 months thereafter until entry of final order of adoption.</p>	<p>Court must consider criteria set out in 7B-908(c) and make written findings regarding those that are relevant, including:</p> <ol style="list-style-type: none"> 1. adequacy of the plan for a permanent placement and efforts to implement the plan, 2. whether child has been listed for adoptive placement with the N.C. Adoption Resource Exchange, the N.C. Photo Adoption Listing Service (PALS), or other specialized adoption agency, and 3. efforts previously made by DSS or other agency to find a permanent home for the child. 	<p>Procedural requirements are the same as in dispositional and review hearings.</p>	<p>The court, after making findings of fact, must either affirm the agency's plan for the child or, if the child is not placed with prospective adoptive parents, order a new placement or a different plan after considering DSS's recommendations.</p> <p>The court may require specific additional steps necessary to accomplish a permanent placement that is in the child's best interests.</p>

Appendix 2

The Chief District Court Judge and Juvenile Court*

Leadership and Case Management

Time limits in the Juvenile Code specify when certain hearings must be held and require that most orders in abuse, neglect, dependency, and termination of parental rights cases be entered within 30 days after the hearings from which they result. The timelines are aimed at avoiding undue delay in making decisions about children's placements and futures. Because juvenile cases may continue for years, require ongoing judicial oversight, and affect constitutionally protected family interests, the chief judge's role in the management of these cases is especially significant. The chief judge has a leadership role in determining how well statutory requirements are met, defining the priority juvenile cases receive, and conveying expectations for those who practice or participate in juvenile court.

Local Rules

The Court Improvement Program in the Administrative Office of the Courts (AOC) has developed model rules for abuse, neglect, and dependency cases. These may be useful to chief district court judges who seek to develop or update local juvenile court rules. The [model rules](#) can be accessed on the Court Improvement Program pages of the NC Court System website. [For additional information, contact Kiesha D. Crawford, Court Improvement Program Manager at the AOC, at (919) 890-1281 or at kiesha.d.crawford@nccourts.org.] [Local rules](#) of a number of districts can also be accessed on the NC Court System website.

Statutory References

1. Permanency Mediation

G.S. 7B-202 directs the Administrative Office of the Courts (AOC) to establish a statewide Permanency Mediation Program, consisting of local district programs, to provide services for resolving issues in abuse, neglect, dependency, and termination of parental rights cases. Few such programs exist, and funding to phase the program in statewide has not been forthcoming. Should that change, the director of the AOC is authorized to "approve contractual agreements for such services as executed by order of the Chief District Court Judge of a district court district." The statute exempts the contracts from the competitive bidding procedures in G.S. Chapter 143. There are "[Uniform Rules](#) Regulating Mediation of Child Custody and Visitation Disputes and Permanency Mediation under the North Carolina Child Custody and Visitation Mediation Program," accessible from the "Child Custody and Visitation Mediation Program" section of the AOC's website.

*This appendix includes only responsibilities that relate to abuse, neglect, dependency, and termination of parental rights proceedings.

2. Authority of Medical Professionals in Abuse Cases

G.S. 7B-308 establishes a procedure by which the chief district court judge (or the judge's designee) may authorize a medical professional to keep temporary physical custody of a child who may have been abused.

3. Magistrate's Authority when Clerk's Office is Closed

G.S. 7B-404 provides that in emergency situations in abuse, neglect, and dependency cases, when the clerk's office is closed, a magistrate may be authorized by the chief district court judge to "draw, verify, and issue petitions."

4. Delegation of Authority to Issue Secure and Nonsecure Custody Orders

G.S. 7B-502 authorizes the chief district court judge, by administrative order, to delegate the court's authority to issue nonsecure custody orders to persons other than district court judges. The administrative order (i) must specify the person(s) to whom the authority is delegated and (ii) must be filed in the clerk's office. Note that under G.S. 7B-506, entry of the order by someone other than a district court judge accelerates the time within which the first hearing on the need for continued custody must be held. This delegated authority to make decisions about nonsecure custody should not be confused with the role of an official, usually a magistrate, who performs the ministerial act of entering a nonsecure custody order pursuant to a judge's order conveyed by telephone. See G.S. 7B-508.

5. Discovery and Information Sharing

Pursuant to G.S. 7B-700, the chief district court judge may adopt local rules or enter an administrative order addressing parties' sharing of information and the use of discovery in juvenile cases.

6. Scheduling Adjudicatory Hearings

G.S. 7B-801(c) (abuse, neglect, and dependency cases) and 7B-1109(a) (termination of parental rights cases) state that adjudicatory hearings are to be held in the district at the time and place the chief district court judge designates.

7. Rule or Order for Sharing Predisposition Reports

G.S. 7B-808(c) specifically authorizes a chief district court judge to make a local rule or enter an administrative order addressing the sharing of predisposition reports among parties. The rule or order may prohibit disclosure of reports to the juvenile. It may not (i) prohibit a party entitled by law to receive confidential information from receiving it, or (ii) allow disclosure of a confidential source protected by statute.

8. Transfer of Case to Another District

Under G.S. 7B-900.1(d), before ordering a post-adjudication transfer of an abuse, neglect, or dependency case to a different district, the transferring court must communicate with the chief district court judge or a judge presiding in juvenile court in the district to which the case is to be transferred. If the judge in that district makes a timely objection, the case may be transferred only if the court in the original district makes detailed findings of fact supporting a conclusion that the juvenile's best interests require that the case be transferred.

9. Guardian ad Litem Program

G.S. 7B-1201(a) requires the AOC, in cooperation with each chief district court judge and other personnel in the district, to implement and administer a guardian ad litem program.

10. Juvenile Records

The Juvenile Code addresses the confidentiality of several kinds of juvenile records and specifies the few people who are authorized to view and obtain copies of the records without a court order. Otherwise, the following sections state, these juvenile records may be examined "only by order of the court":

G.S. 7B-2901(a) – clerk's records

G.S. 7B-2901(b) – social services records for juveniles in the agency's custody

G.S. 7B-2901(d) – court records in abortion consent waiver proceedings

The clear implication is that people other than those listed in the statutes may examine these records *with* a court order. The Juvenile Code gives no guidance, however, about when judges should grant requests to examine juvenile records or the procedures to be used by someone making the request. (The information-sharing rules issued by the Division of Juvenile Justice in the Department of Public Safety pursuant to G.S. 7B-3100 do not apply to court records.) The chief district court judge should consider whether local rules or policies are an appropriate way to provide guidance and encourage uniformity when requests are made to access juvenile records.

11. Agency Information-Sharing Rules

G.S. 7B-3100 directs the Division of Juvenile Justice, *after consulting with the Conference of Chief District Court Judges*, to adopt rules designating agencies that are authorized to share certain information about juveniles. The rules issued pursuant to that directive, in 14B NCAC 11A .0301 and .0302, list specific agencies and also any "local agency designated by an administrative order issued by the chief district court judge of the district court district in which the agency is located." Chief judges do not have authority to issue broad rules or orders regarding agency information sharing as they did under an older version of the statute. They may only add local agencies to the list set out in the administrative rule.

12. Community Child Protection Team

G.S. 7B-1407(c) provides that the membership of a Community Child Protection Team that also serves as the local Child Fatality Prevention Team must include a district court judge appointed by the chief district court judge in the district.

13. Juvenile Crime Prevention Council

As a condition for a county's receiving funding for juvenile court services and delinquency prevention programs, G.S. 143B-846 requires the board of commissioners to appoint a Juvenile Crime Prevention Council for the county. Each county council must consist of not more than 26 members and should include, if possible, specified individuals, including the chief district court judge or a judge designated by the chief district court judge.

Appendix 3

JWise: The Automated Information System for North Carolina Juvenile Courts¹

JWise is an automated information system implemented by the North Carolina Administrative Office of the Courts (NCAOC) Technology Services Division in 2004. The primary purpose of JWise is to serve as the official index of juvenile cases and to improve outcomes for children in the child welfare and juvenile justice systems by providing case management tools. JWise is a unique computer application in that it is used by multiple court officials and court staff.

Clerks use JWise to record information that serves as the official court index for juvenile abuse, neglect, dependency, TPR, emancipation, delinquency, and undisciplined cases. The clerk enters codes in JWise based on information that appears in paper filings or is recorded in court minutes.

Judicial staff such as Juvenile Case Coordinators use JWise as their case management tool; they enter event data in JWise and use JWise to manage juvenile abuse, neglect, dependency, and TPR cases.

Guardian Ad Litem (GAL) staff use JWise as their case management tool for juvenile cases.

Judges have access to view information in JWise, but do not enter information into JWise.

Official Court Index

Since JWise is the official court index for juvenile cases, clerks are exclusively responsible for entering and maintaining basic juvenile case information. This information includes:

- Demographic information on juveniles—name, address, telephone, race, gender, and date of birth;
- Case related information—file number, initial filing date, names, and demographic information for parties related to the case (parents, attorneys, social workers, court counselors, victim/witness, caretakers, etc.); and
- Information about legal allegations that are sworn in petitions—the date the allegation was entered and data on how the allegation was adjudicated and disposed. For example, a clerk would enter that a juvenile petition for neglect was filed on 1/1/09 and the juvenile was adjudicated neglected on 3/1/09.

Tracking Tool for Court Events

JWise is also a tracking tool for court events such as court hearings that are the basis for producing juvenile calendars, juvenile forms, and statistical reports. Events recorded in JWise

1. Information in this appendix was provided by North Carolina Administrative Office of the Courts.

are not the official court record for juvenile cases. All reports generated by JWisE events contain the following disclaimer in the footer: *This Event Time Line is for informational purposes only and not the official court record.* In the future, JWisE will contain a similar disclaimer on the event screen so that if court users print an event screen that contains the history of court activity, it will be clear from the disclaimer that the events are not the official court record.

JWisE events are not the official juvenile record because they can be added to, edited, and deleted by multiple court employees—clerks, family court, and GAL staff. Although not an official record, JWisE events are very important for the effective and efficient management of juvenile cases. JWisE events serve as the basis for:

- Recording the nature of the court event (e.g., adjudication hearing), as well as the date, time, name of judge, and any notes related to that event;
- Recording the outcome of the court event (e.g., resolved, continued);
- Generating juvenile calendars;
- Generating all NC Key Time Standard Reports and Permanency Reports.

GAL Management Tool

Since JWisE is a shared tool for all Judicial Branch staff who work in juvenile court, GAL staff benefit from having both current information on juvenile cases that is entered by clerks and by sharing information with other JWisE users (e.g. guardian ad litem appointments).

How Judges Can Use JWisE

In order for JWisE to produce accurate and complete calendars, forms, and reports, it must have accurate and complete data. Judges have a critical role in ensuring that meaningful and complete information about court hearings is entered into JWisE about court hearings. It is important for judges to announce (or document) three things for the clerk at the conclusion of every court hearing:

1. Outcome, or result of each hearing that appears on the court calendar;
2. Date the judge's order is due if the court hearing results in an order; and
3. The future court event that should appear on the next court calendar.

JWisE Reports

As of July 2009, there are three abuse, neglect, and dependency time standard reports: adjudication hearings, disposition hearings, and the first permanency planning hearings. Additional time standard reports will be available in the future.

All North Carolina Key Time Standard Reports contain the following data:

- The number of cases that met the statutory time standard,
- The number of cases that exceeded the statutory time standard, and

- The number of cases “in the queue” that have reached the time standard, but have not had the hearing that is the subject of the report.

In addition to the time standard information, these reports also contain the following data on each juvenile case: file number, juvenile name, date of birth, age of juvenile (at time of report), gender, race, and case status (pending or completed). Because these reports are available in Microsoft Excel, court managers are able to sort the data in any number of ways to evaluate information such as:

- The number of abuse, neglect, dependency petitions filed within any time period;
- The number of adjudication and disposition hearings a certain judge heard during a given time period;
- The time standard goals for juvenile cases per judge; and
- The average age of juveniles adjudicated.

For additional information, the NCAOC’s intranet site has a brief orientation and sample reports from JWisE.

Appendix 4

Rules of Recordkeeping

The North Carolina Administrative Office of the Courts (AOC) issues rules that govern recordkeeping in the offices of clerks of superior court. Only the rules applicable to juvenile records are reproduced here. These rules were last revised, effective July 6, 2015 and could be revised again at any time.

- *Other court employees can access the rules on the AOC Intranet. (Go to <https://cis1.nccourts.org/singlesignon/forward.dx>; scroll down and click on “Clerks of Court” at the bottom left; at the bottom left again, click on “Records and Recordkeeping.”)*
- *Others can obtain the rules from the clerk of court or other court employees.*

Rule 12.1 - CASE FILE FOLDER ESTABLISHED: The clerk shall establish and maintain one case record for each juvenile who is the subject of one or more of the actions listed below. The case record shall consist of both a file folder, to house all original paper documents relating to the actions, and the electronic data entered into the automated J Wise System as provided by the NCAOC. Electronic data shall be entered into the J Wise System as prescribed by the user's manual.

1. An abuse, neglect, or dependency proceeding [G.S. 7B-100 through 7B-1004]
2. A proceeding under the Interstate Compact on the Placement of Children [G.S. 7B-3800 through 7B-3806] (Example: placing a child from another state into foster care within this state)
3. A proceeding involving judicial consent for emergency surgical or medical treatment [G.S. 7B-3600]
4. A proceeding to review a voluntary foster care placement
5. A proceeding in which a person is alleged to have obstructed or interfered with an investigation of abuse, neglect, or dependency [G.S. 7B-303]
6. A proceeding to review an agency's plan for the placement of a child when one or both parents have surrendered the child for adoption or when a child returns to foster care after an adoption is dismissed or withdrawn [G.S. 7B-909]
7. A delinquency or undisciplined juvenile proceeding [G.S. 7B-1500 through 7B-2706]
8. A proceeding under the Interstate Compact on Juveniles [G.S. 7B-2800 through 7B-2827]
9. A **termination** of parental rights (TPR) proceeding whether initiated by petition or motion [G.S. 7B-1100 through 7B-1112] including any motions to **reinstate** the rights of a parent whose parental rights have been previously terminated [G.S. 7B-1114]
10. An emancipation proceeding [G.S. 7B-3500 through 7B-3509]

The case file shall be divided into sub-folders:

- *Subfolder A* shall contain all documents relating to proceedings 1-6 above.
- *Subfolder B* shall contain all documents relating to proceedings 7 and 8 above.
- *Subfolder T* shall contain all documents relating to proceedings in 9 above.
- *Subfolder E* shall contain all documents relating to proceedings in 10 above.
- *Subfolder P* shall hold **copies** of newly filed petitions and other pre-adjudication documents, such as those relating to service of process. The file numbers on these documents should be "blacked out" before presenting the file to the judge. Upon adjudication or dismissal of the petition, all "blacked out" copies housed in Subfolder P should be discarded.

The first petition filed involving a juvenile shall establish the case file, and all subsequent petitions or related documents for any of the proceedings listed above shall receive the same file number and be placed in the appropriate subfolder. The juvenile's name, date of birth, and case file number shall appear on the top tab of the juvenile file folder and subfolder(s), that are labeled "A", "B", "T", or "E" according to the type of documents they contain. Only the juvenile's name and date of birth shall appear on Subfolder P.



NOTE: Under no circumstances should any documentation relating to a Judicial Waiver of Parental Consent be placed in the juvenile file. (See Rules of Recordkeeping 18).

COMMENTS:

A. Subfolders may be held together in a larger folder or simply filed next to each other.

B. If a juvenile petition names several juveniles, each juvenile should have a separate case file. Copies of any petition, order, or other document that involves multiple juveniles, should be placed in each juvenile's file.

C. A TPR petition should never be filed as a civil action. TPR should be initiated only by the filing of

- a juvenile petition; or,
- a motion in the cause in a pending abuse, neglect, or dependency proceeding.

Normally, TPR documents should not be placed in a CVD case file. An order based on a TPR may be necessary to terminate a child support obligation, but the TPR order itself should not be placed in the CVD child support file.

If the Court does allow a party to pursue a TPR in a domestic relations or other civil (CVD) case, the clerk should place the original TPR documents in subfolder T of the existing juvenile file for the child; or, if there is no a juvenile file the Clerk shall create one.

D. The judge should only be provided the entire file on the juvenile after adjudication. Once the petition has been adjudicated the duplicate copy of the petition and supporting documents may be discarded, and any new orders or other filings shall be placed in subfolder A, B, T or E as appropriate. Once this is done, subfolder P may be retained in case another petition is filed.

E. Subfolder P should be used only for pending petitions and related documents, not for any documents filed subsequent to adjudication.

F. All documentary evidence offered and entered into evidence during a juvenile proceeding should remain in the file until the juvenile file is destroyed.

G. Fingerprint cards should not be accepted for filing. If these cards are submitted to the clerk, the clerk should return them to the agency responsible for taking the fingerprints. [G.S. 7B-2102(d)]

H. Parents may be ordered to appear and show cause why they should not be held in criminal contempt in a juvenile case. (G.S. 7B-904 and 7B-2706) The document finding the parent in criminal contempt should be used as the initiating document for establishing a criminal file. The file should be given the next available CR number and



entered into the Automated Criminal Information System (ACIS). (Note: Please see form AOC-CR-390 Direct Criminal Contempt/Summary Proceedings/Findings and Order as an initiating document to be used by the court.)

Parents who fail to appear in court for a juvenile proceeding, as required, may be served with a show cause order to appear in court on a certain date to show cause why the parent should not be held in indirect criminal contempt. If the parent is served with the show cause order, but fails to appear for the show cause hearing, the court may issue an order for the parent's arrest. A separate criminal file should be established using a copy of AOC-J- 155 or AOC-J-344 as the initiating document. All references to the juvenile should be removed from the AOC-J-155 or AOC-J-344. If the court enters a criminal contempt order on AOC-J- 156 or AOC-J-345, place the form in the criminal file after removing all references to the juvenile.

Parents may be ordered to appear and show cause why they should not be held in civil contempt for failing to comply with an order or directive entered by the juvenile court. The show cause order and any subsequent orders should be placed in the originating juvenile case file. This civil contempt information shall not be entered into ACIS or VCAP.

Rule 12.2 - DATE STAMP ON FILINGS: The clerk shall record the actual date of filing on all copies of the petition or any other filings in juvenile proceedings.

COMMENTS:

A. The best practice for the clerk in stamping the date and time of filing is to place his or her initials by the date and time stamp. While initialing the date and time stamp is not required, it is useful in tracking errors in filing and preventing the filing of papers without the clerk's control or knowledge.

B. When there is an emergency situation and the clerk's office is closed, magistrates may accept juvenile petitions for filing. [See G.S. 7B-404 and 7B-1804]. Petitions received by a magistrate must be delivered to the clerk's office as soon as the office is opened for business. The clerk shall record the date it is actually received in the office as the date of filing.

Rule 12.3 - FILE NUMBERS: The first petition filed relating to a juvenile shall be assigned the next available file number from the juvenile series for that year. The format for the juvenile series is: year of filing (i.e., 06); court designation "J" for juvenile; and, the unique sequence number that begins with "1" at the beginning of each calendar year, (1, 2, 3, 4, etc.). Examples of complete file numbers are; 06J1, 06J2, 06J3, etc.

COMMENTS:

A. The designation of A, B, T, E or P for the subfolders of the case file are not considered part of the case number. They are merely used to separate different types of case documents within the file.



B. If a petition involves more than one juvenile, a number must be assigned to each individual juvenile. (See Comment B following Rule 12.1)

C. If using the J-Wise system the file number will appear in the following format: 06JA1 (abuse, neglect, dependency), 06JB1 (undisciplined or delinquency) 06JT1 (TPR), or 06JE1 (emancipation).

Rule 12.4 - INDEX TO JUVENILE CASES: The clerk shall maintain an Index To Juvenile Proceedings. This index shall indicate the name of the juvenile, the nature of the case [i.e., abuse, neglect, dependency, undisciplined, delinquency, emancipation or TPR], the file number, and whether the case has been appealed to the Court of Appeals. If a TPR or an adjudication of delinquency is contained in the file, this should be noted on the index. The Index to Juvenile Proceedings is not open to public inspection.

Rule 12.5 - ACCESS TO FILES: Abuse, neglect and dependency cases are not open to public inspection. The record includes the summons, petition, any custody order, court order, written motion, electronic or mechanical recording of the hearing, and other papers filed in the proceeding. (See 7B-2901). The following persons may review the record and obtain copies of the written parts of the record without a court order:

- A. The person named in the petition as the juvenile;
- B. The guardian ad litem;
- C. The county department of social services; and
- D. The juvenile's parent, guardian, or custodian, or attorney for the juvenile or the juvenile's parent, guardian, or custodian.

Undisciplined and delinquency cases are not open to public inspection. The record includes the summons and petition, any secure or nonsecure custody order, any electronic or mechanical recording of hearings, and any written motions, orders or papers filed in the proceedings. (See 7B-3000). In undisciplined and delinquency cases, the following persons may examine the juvenile's record and obtain copies of written parts of the record without a court order:

- E. The juvenile or the juvenile's attorney;
- F. The juvenile's parent, guardian, or custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;
- G. The prosecutor;
- H. Court counselors; and
- I. Probation officers in the Section of Community Corrections of the Division of Adult Corrections, as provided by 7B-3000(e1).

COMMENTS:

A. The court may direct the clerk to "seal" any portion of the juvenile's record. The clerk shall secure any sealed portion of a juvenile's record in an envelope clearly marked **"SEALED: MAY BE EXAMINED ONLY BY ORDER OF THE COURT."** The sealed information may be examined only by court order. (See G.S. 7B-3000 (c))



B. Law enforcement officers are only allowed to review documents in subfolder B if accompanied by the prosecuting attorney. The district attorney may make copies of information contained in subfolder B, but law enforcement officers are not entitled to copies.

C. An electronic recording of the juvenile proceedings shall only be transcribed when notice of appeal has been timely given. The electronic recording can only be copied electronically or mechanically by order of the court. 7B-3000(d) (G.S. 7B-806 and 7B-2410).

D. Entry of a TPR changes the legal relationship between a parent and child. The parent should not have access to documents filed subsequent to the TPR even if the TPR is on appeal unless the court has stayed the TPR order on appeal. These documents should be bound together, placed within the appropriate sub-folder, and removed prior to providing the file to a parent for review. (See G.S. 7B-1112)

Rule 12.6 - EXPUNCTION OF RECORDS: Certain records of juvenile delinquency/undisciplined proceedings can be expunged upon an order from the juvenile court in which the adjudication or proceeding occurred. G.S. 7B-3200 provides for expunction of these records in subsections:

- (a) – expunction of adjudications of undisciplined status
- (b) – expunction of certain adjudications of delinquency
- (h) – expunction of dismissed allegations of delinquency or undisciplined status

This rule covers only the basics of filing and disposing of juvenile expunction petitions. For detailed procedures to carry out this rule, see the “Expunction Guide for Clerks” from NCAOC’s Court Services Division, available on the NCAOC intranet site.

Filing: An expunction petition for juvenile records is to be filed in the “JB” subfolder containing the records of the allegation/adjudication addressed by the petition. If the JB subfolder already has been destroyed pursuant to the retention schedule, create a new JB subfolder for the expunction petition and related filings.

Expunction Order Appealed: If the court’s order granting or denying the expunction is appealed, retain all documentation related to the petition until final resolution of the appeal. If the order was granted and appealed by the State, treat the order as granted while the appeal is pending, unless the court orders otherwise, remove the expunged records from the primary juvenile file, keeping them in a secure location that is unavailable to persons who otherwise may have access to the juvenile files (*e.g.*, court counselors).

Petition Denied: If the proceeding results in a denial of the petition, whether after an appeal or by the trial court and not appealed, place the denial order in the JB subfolder, but destroy all attachments (*e.g.*, affidavits of good character). If the JB subfolder is later destroyed pursuant to the retention schedule, destroy the denied order with the subfolder. If the JB subfolder was destroyed pursuant to the retention schedule prior to the filing of the petition, then the petition (and its temporary subfolder) may be destroyed upon NCAOC approval.



Petition Granted: (Note: Detailed procedures for each of the steps below are provided in the “Expunction Guide for Clerks.”)

1. Give notice of the granted order to the petitioner. If the petition was filed on the AOC-J-909M for dismissed allegations of undisciplined status or delinquency, notice of the granted petition may be given on the same form. If the petition was filed in any other format, use AOC-J-906M to provide notice to the petitioner.
2. Expunge only the allegations/adjudications specified in the expunction order.
 - a. If records of other delinquency/undisciplined proceedings exist in the petitioner’s JB subfolder, retain those other records.
 - b. If the petitioner had no other delinquency/undisciplined proceedings, expunge the entire JB subfolder.
 - c. If the JB subfolder is expunged and constituted the petitioner’s only juvenile proceeding for the county, expunge the entire juvenile file and remove the petitioner’s name from the Index to Juvenile Actions (*i.e.*, J Wise).
3. Expunge the paper and electronic records as directed in the “Expunction Guide for Clerks.”
4. Do not expunge civil records arising from the juvenile proceeding, such as civil judgments for attorney fees against a parent or guardian. See Rule 12.17.
5. Notify State and local law enforcement agencies as directed in the “Expunction Guide for Clerks,”
6. **The clerk must send a certified copy of the expunction order to the NCAOC at the address in the guide.** Note that if the expunction was for a dismissed allegation of delinquency or undisciplined status, provide a certified copy to the court counselor, also.
7. See the “Expunction Guide for Clerks” for “Other Cases & Special Situations” in juvenile expunction proceedings, such as juveniles whose names are recorded on the former, manual index to juvenile actions (the “green book”), expunging the verbatim recording of juvenile proceedings, and cases in which there was a change of venue to another county.

COMMENTS:

A. The NCAOC provides template forms for juvenile expunction proceedings. See AOC-J-903M, J-904M, J-906M, and J-909M. While parties are not required to use NCAOC forms for these proceedings, the forms cover all of the components of the expunction proceeding, so clerks should encourage petitioners to use them.

B. As custodian of the record, the clerk’s function in the expunction process is to receive petitions for filing, schedule the petitions for hearing when required, and then file and



carry out any order entered by the court. Questions such as whether or not a particular juvenile case qualifies for expunction, whether or not the correct form has been used, and whether or not any affidavits or other materials required by the expunction statute have been included are not of concern to the clerk's office. The court before which the petition is heard must determine any questions of its adequacy. Occasionally, a court may enter an order for expunction that appears questionable on its face. When such an order has been entered (*e.g.*, expunction of adjudication of a Class A - E felony, prohibited by G.S. 7B-3200(b)), the clerk may wish to confirm with the judge who entered the order that the order is what the court intended. If the judge indicates that the order is as intended, then the clerk should carry the order out.

Rule 12.7 - CHANGE OF VENUE, OR TRANSFER OF CASE TO ANOTHER COUNTY: The clerk shall ask the judge for instructions regarding whether the entire case or portions thereof are being transferred and what specifically the clerk should send to the other county. The clerk should transfer only those documents ordered transferred by the judge. Upon the filing of an order of the court transferring a case from one county (venue) to another the clerk in the original county shall prepare a certified copy of the order of transfer and forward it along with all original papers in the file related to the juvenile proceedings specified in the order, to the clerk in the receiving county by certified mail or other secure method. The clerk in the original county shall retain the original order of transfer along with photocopies of all the papers transferred.

COMMENT:

Transfers of abuse/neglect/dependency proceedings after adjudication shall occur within three business days of the entry of the order transferring venue (7B-900.1). Transfers of other cases should be done as rapidly as possible.

Upon receiving a case that has been transferred from another county, the clerk shall promptly assign an appropriate file number to the case, ensure that any necessary appointments of new attorneys or guardians ad litem are made; and calendar the next court action as set forth in the order transferring venue and give appropriate notice to all parties.

Rule 12.8 - TRANSFER OF A CASE TO SUPERIOR COURT: The record of a juvenile case remains confidential even after jurisdiction over the juvenile is transferred to superior court. Form AOC-J-442, Juvenile Order Transfer Hearing, is the initiating document in the superior court file. This is the only document from the juvenile file that may become part of the public record of the superior court proceedings, along with all documents made part of the record after transfer. A copy of the transfer order should be kept in the juvenile case file. Do not create a CRS file or enter information in ACIS for 10 days after entry of the transfer in order to allow opportunity for appeal.

When a transfer order is appealed, the appeal is heard in Superior Court. Notice of the appeal may be given in open court during the hearing or in writing within 10 days after the entry of the order. (Note: Entry means reduced to writing, signed by the judge, and filed with the clerk.) The clerk shall also provide a copy of the written notice of appeal filed by the juvenile's attorney to the district attorney. The appeal should be included on the superior court calendar as an add-on hearing/case using the title "In the Matter of 06JB1492" and listing only the issue of "Appeal of Transfer". The offense or the



juvenile's name may not be entered on the calendar. The clerk completing the case transfer shall add the case into ACIS only when the superior court judge denies the transfer appeal. If the appeal is granted, and thus the transfer does not move forward, all related documents are filed in the juvenile folder and no entry is made in ACIS.

Rule 12.9 - NOTIFICATION OF APPOINTED ATTORNEY: Where an attorney is appointed by the court to represent a juvenile or parent(s) in a juvenile proceeding the clerk shall send the Notice of Appointment to the attorney in a sealed envelope. (Note: You may also place the sealed envelope in the attorney's mailbox located within the courthouse, if this is the established practice in your county.)

A. Court appointed attorneys may be appointed by either a District Court Judge or the clerk. If an abuse, neglect or dependency petition is filed, the clerk must appoint provisional counsel at the time of filing.

B. An attorney should not be appointed for a juvenile alleged to be undisciplined.

C. A juvenile does not need to prove indigence to receive a court-appointed attorney. However, parents seeking court appointed representation must go through the indigence screening process.

D. When the parents are eligible for court appointed attorneys separate attorneys should be appointed for each parent.

E. In all TPR cases, a parent who is indigent is entitled to an appointed attorney unless the parent waives the right to counsel (Note: It does not matter whether the petition to terminate was filled by DSS or a private petitioner.)

Rule 12.10 - CALENDARS: The clerk shall tightly control the distribution of juvenile calendars to insure the confidentiality of the information listed on the calendar. In all juvenile proceedings, the presiding judge and the courtroom clerk shall each receive a copy of the juvenile calendar.

Delinquency Sessions of Court. One copy of the juvenile calendar shall be given to the district attorney, the chief court counselor and any attorney representing a juvenile on the calendar.

Abuse/Neglect/Dependency Sessions of Court. One copy of the juvenile calendar shall be given to the DSS attorney, the GAL Program Administrator, the GAL Attorney Advocate and any attorney representing a parent on the calendar.

A juvenile calendar shall never be provided to the juvenile or the juvenile's parents.

COMMENTS:

A. The clerk may want to write the name of the person receiving the juvenile calendar on the calendar provided to the person.



B. If the calendar is not handed directly to the person authorized to receive the calendar, for example, the calendar is placed in the attorney's mail box located in the clerk's office, it should be placed in a sealed envelope.

Rule 12.11 - MINUTES: The clerk shall record the minutes of the juvenile court proceedings by making brief notations on the court calendar showing the disposition of each case heard during the session. Juvenile court minutes shall be kept confidential.

Rule 12.12 - AUTOMATED AUDIT REPORTS: These reports are confidential and should not be distributed. The reports should be stored in a secured manner as any other juvenile record.

Rule 12.13 - MICROFILM: No part of the juvenile case file shall be microfilmed, including the attorney fee judgments.

Rule 12.14 - EMANCIPATION ORDERS: The certificate of emancipation shall be filed as a Registration and treated as any other filing of that type.

COMMENT:

Only the certificate of emancipation order shall be filed as a Registration. The petition and all other supporting documents shall remain in the juvenile file. Emancipation proceedings are as confidential as any other juvenile proceeding. However, where an order of emancipation has been entered the juvenile may receive a Form AOC-J-902M, Certificate Of Emancipation, at any time to verify that status.

Rule 12.15 - RECORDING JUVENILE HEARINGS: All adjudicatory, dispositional, probable cause, and transfer to superior court hearings shall be recorded. The court may order that other hearings be recorded.

COMMENTS:

A. The log of what is recorded is considered part of the minutes and should be physically attached to it.

B. When a case is heard out-of-county the recording should remain in the county of hearing.

Rule 12.16 - PETITIONS FOR JUDICIAL REVIEW: DHHS LIST OF "RESPONSIBLE INDIVIDUALS": The clerk shall establish a case file for each petition filed under G.S. 7B-323 seeking judicial review of a determination that the petitioner is a responsible individual. The clerk shall use one sequential number series for all responsible individual petitions filed. Each petition will be assigned the next available number from that JRI series.

The format for the responsible individual series is: Year of filing and case type designator (i.e., 07JRI); and the unique sequence number that begins with "1" at the beginning of each calendar year, (1, 2, 3, 4, etc.). Examples of complete file numbers are; 07JRI-1, 07JRI-2, 07JRI-3, etc.



JRI files are to be maintained by the Juvenile Department in the clerk's offices. However, they are to be kept separate from the juvenile files. Each hearing shall be recorded to a CD with no other cases or hearings on the same CD. The CDs are to be held in the JRI file folder for one year after the hearing. After that the file and CD may be destroyed without AOC approval.

No index is to be maintained for these cases.

Rule 12.17 - PROCESSING FEE APPLICATIONS WITH JUDGMENT ORDERED: If the court enters a judgment on side two of the Fee Application/Judgment Order the original judgment shall be placed in a file titled, "Juvenile Fee Apps Reduced to Judgment", in case number order. A copy of this judgment shall be placed in the related juvenile file.

If the court did not enter a judgment on side two of the Fee Application/Judgment Order, the original judgment shall remain in the related juvenile file.

Periodically the clerk may compare the judgments in the Juvenile Fee Apps Reduced to Judgment file against VCAP to determine if any have been satisfied. If so they may be destroyed one year after the satisfaction date, without NCAOC approval. Fee Application/Judgment Orders held in the "Fee Applications Reduced to Judgment" folder continue to be maintained in as confidential a manner as any other documents filed in a juvenile proceeding.

Rule 12.18 - NOTIFICATION OF FOSTER PARENTS: The foster parent of a juvenile must be given 15 days' notice of all review hearings. The Department of Social Services must provide the clerk with the name and address of the foster parent providing care for the juvenile or provide written documentation to the clerk that the foster parent was sent notice of the hearing. If the clerk sends the notice, the clerk should not include the foster parent's name and address on the same notice sent to the juvenile's biological parents.

A notice to a foster parent should be housed separately from the juvenile file. The clerk should retain the notice in a suitable repository associated with the court calendar referred to in the notice. Access to this repository should be limited to the clerk of superior court.



Appendix 5

Case Management for Abuse, Neglect, Dependency, and Termination of Parental Rights Cases in North Carolina Juvenile Courts¹

Juvenile court case management is a primary responsibility of family court staff for abuse, neglect, dependency (AND) and termination of parental rights (TPR) juvenile cases. Districts without family court or those that previously received CIP funds for a CIP Director position do not have case managers for juvenile cases, but may have other staff such as judicial assistants that manage these cases. Juvenile clerks have an important role in juvenile court, but their role does not include case management.

While family court districts have staff to provide juvenile case management, these case managers work at the direction and supervision of the Chief District Court Judge (CDCJ). In addition, juvenile case management is directed by judges assigned to AND/TPR courts. Judicial leadership in juvenile court is the key to effective juvenile court case management. Therefore, judges in districts without family court can benefit from case management techniques described below; however, they will typically not have dedicated judicial staff to generate statistical reports so that the judge can analyze the data and develop recommendations to improve court efficiency and effectiveness. However, some judges, in an effort to make juvenile court a priority and as effective as possible for children and families, have designated other judicial staff (i.e., Judicial Assistants, Trial Court Coordinators, etc.) to review and maintain statistics.

The following are strategies for effective case management in juvenile court:

- **Court Schedule.** Inform the CDCJ about the amount of court time needed for the juvenile AND/TPR caseload. Case managers have various ways to assess whether there is sufficient bench time assigned for juvenile court. For example, keeping a Calendar Productivity Log for a period of time can track the number of cases resolved, continued and not reached because of insufficient court time. In addition, case managers can monitor the number of juvenile petitions and motions filed and adjust the court schedule as needed.
- **Court Calendar or Docket.** Clerks are generally responsible for generating and producing the juvenile calendar in all judicial districts. However, in family court districts, case managers assume this function because the efficiency of juvenile court can be improved when a case manager organizes the cases, provides notes with important information to judges and other court partners on the calendar, and disseminates the calendars (sometimes in draft form first) to appropriate court partners.
- **Scheduling and Facilitating Child Planning Conferences.** Child Planning Conferences or Day One Conferences are a best practice for AND courts. These conferences help families and court partners identify issues, resolve problems, and develop action plans by sharing information and making recommendations about child placement, visitation, health and education services, paternity, and child support. See CPC Best Practices and Procedures on the [Court Improvement Program](#) section of the NC Courts website.
- **Entering and/or Monitoring J Wise Data.** Case managers are local experts on J Wise data since they are responsible for making certain that accurate and complete information is entered into the automated system in a timely manner. J Wise is a unique computer application in that it is used by

1. Information in this appendix provided by North Carolina Administrative Office of the Courts.

multiple court officials and court staff. Because reports generated from J Wise are only as accurate as the data entered, case managers, on behalf of the judge(s), take the lead in monitoring data and troubleshooting any problems.

- **Generating and Sharing J Wise Statistical Reports.** Case managers have the ability and knowledge to generate multiple reports from J Wise. As of July 2009, there are three AND Time Standard Reports: Adjudication Hearings, Disposition Hearings, and the First Permanency Planning Hearing. Additional time standard reports will be available in the future. More information on J Wise is available in Appendix 3.
- **A Central Point of Contact.** Because juvenile court involves so many court partners that are required to be present in court, a juvenile case manager develops a good communication system where he or she is a central point of contact for judges and other court partners with pertinent information so court can proceed in a timely and efficient manner.

Hearings Checklists

- Checklist 1: Hearing on the Need for Continued Nonsecure Custody**
- Checklist 2: Any Order Placing Child in DSS Custody (G.S. 7B-507 Requirements)**
- Checklist 3: Adjudication Hearing**
- Checklist 4: Disposition Hearing**
- Checklist 5: Review and Permanency Planning Hearings**
- Checklist 6: Hearing on Termination of Parental Rights (TPR)**
- Checklist 7: Post-TPR Review Hearing**

Checklist 1. Hearing on the Need for Continued Nonsecure Custody	Applicable Statutes and Forms
Purpose To determine whether a child who has been placed in nonsecure custody should remain in nonsecure custody pending the adjudication hearing.	7B-506 AOC-J-151
Timing <i>First hearing:</i> <ul style="list-style-type: none"> • <i>When initial nonsecure order was entered by a judge</i>—within 7 calendar days of the time the juvenile is taken into nonsecure custody; may be continued up to 10 business days with consent of parents and child’s GAL; may not be waived. • <i>When initial order was entered by person with delegated authority</i>—on day of next regularly scheduled session of court but within 7 calendar days; may not be waived. <i>Second hearing:</i> within 7 business days of the first hearing. <i>Subsequent hearings:</i> at least every 30 calendar days thereafter. <i>Waivers and continuances:</i> after the first hearing, waiver allowed with consent of child’s parent, guardian, or custodian and GAL; court may require consent of additional parties and may schedule a hearing even if parties consent to waiver or continuance.	7B-506 7B-502
Preliminary Inquiries and Determinations (if not already addressed) <i>Proper petition and jurisdiction</i> <ul style="list-style-type: none"> ___ Have the parties been properly served or waived service? ___ Is the petition properly signed and verified? ___ Is the information required by G.S. 50A-209 contained in the petition or an attached affidavit? ___ Does the court have jurisdiction under the UCCJEA on the basis that: <ul style="list-style-type: none"> ___ N.C. is the juvenile’s home state? ___ N.C. has exclusive continuing jurisdiction? ___ N.C. has jurisdiction to modify another state’s order? ___ N.C. has temporary emergency jurisdiction? ___ Is venue proper? If petition is not filed in county of the child’s legal residence, has DSS in that county been given notice as required by G.S. 7B-402? <i>Representation</i> <ul style="list-style-type: none"> ___ If a parent has provisional counsel, should the appointment be confirmed or should counsel be dismissed? ___ If a parent is present and does not have counsel, does the parent want counsel and, if so, is the parent indigent? ___ If a parent is under age 18 and not emancipated, has a Rule 17 GAL for the parent been appointed as required by G.S. 7B-602(b)? ___ Is there a need to conduct a hearing to determine whether a Rule 17 GAL should be appointed for a parent due to incompetence, as authorized by G.S. 7B-602(c)? ___ If abuse and/or neglect is alleged, have a GAL and attorney advocate been appointed for the juvenile? ___ If only dependency is alleged, should a GAL and attorney advocate be appointed for the juvenile? 	7B-400 7B-402 7B-406 7B-407 50A(UCCJEA) AOC-J-141 AOC-J-142 AOC-J-130 7B-601 7B-602 AOC-J-143 AOC-J-207 AOC-CR-226

<p>Required Findings and Considerations if Court Orders Child to Remain in Nonsecure Custody</p> <p>___ Has DSS made reasonable efforts to prevent or eliminate the need for the child's placement? (See Checklist 2: Any Order Placing Child in DSS Custody.)</p> <p>___ What efforts have been made to identify and notify relatives and custodial parents of the child's sibling as potential resources for placement or support?</p> <p>___ Is a relative or custodial parent of the child's sibling willing and able to provide care for the child, and if so, is placement with the relative consistent with or contrary to the child's best interest?</p> <p>___ If the court does not place the juvenile with a relative, is any "nonrelative kin" willing and able to provide care and supervision of the juvenile in a safe home?</p> <p>___ If the juvenile is a member of a state-recognized Indian tribe as set forth in G.S. 143B-407(a), should the court order DSS to notify the juvenile's state-recognized tribe of the need for nonsecure custody for the purpose of locating relative or kinship placement resources?</p> <p>___ If the child is (or is eligible to be) a member of a federally recognized Indian tribe, does the placement comply with the Indian Child Welfare Act (ICWA)?</p> <p>___ Does the placement comply with the Multiethnic Placement Act?</p> <p>___ If the placement is out of state, does it comply with the Interstate Compact on the Placement of Children (Art. 38, G.S. Ch. 7B) if applicable?</p> <p>___ Is it in the child's best interest to remain in the community? Have the child's community ties, e.g., to siblings, relatives, friends, school, church, activities, special services, etc., been considered in making placement determinations?</p>	<p>7B-503 7B-505 7B-506 7B-507</p>
<p>Other Considerations when Child Remains in Nonsecure Custody</p> <p><i>The court also may consider and address the following issues as appropriate:</i></p> <p>___ visitation must be ordered with parent if the child is not placed with parent;</p> <p>___ visitation may be ordered with siblings;</p> <p>___ efforts to ensure that the child is not required to change schools;</p> <p>___ services the child and parents should be receiving prior to adjudication and how, when, and by whom the services should be provided or arranged;</p> <p>___ financial support for the child;</p> <p>___ authorization for caregiver to consent to health care or other treatment.</p>	<p>G.S. 7B-905.1</p>
<p>Requirements for Order Continuing Nonsecure Custody</p> <p>An order for continued nonsecure custody must be in writing and must be entered (signed and filed with the clerk) within 30 days after the hearing.</p> <p><i>The order must include findings</i></p> <ul style="list-style-type: none"> • based on clear and convincing evidence, to support a conclusion that continued nonsecure custody is necessary; • to support a conclusion that criteria in G.S. 7B-503 for nonsecure custody are satisfied; • about the evidence relied on in reaching the decision; • about the purposes of continued nonsecure custody. <p><i>If the order places the juvenile in the nonsecure custody of DSS, the order must include</i></p> <ul style="list-style-type: none"> • a finding that continuation in or return to the child's own home would be contrary to the child's best interest; 	<p>7B-506 7B-507</p> <p>AOC-J-151</p>

- reasonable efforts findings—both
 - whether such efforts have been made (unless the court has ordered that they are not required) and
 - whether they should continue;
- a statement that the child's placement and care are the responsibility of DSS.

If the court provides for a specific placement that differs from DSS's recommendation, the order should reflect that the court gave bona fide consideration to DSS's recommendation.

If the order terminates DSS's obligation to make reunification efforts, it must include one of the findings specified in G.S. 7B-507(b). (Most often, the finding is that efforts clearly would be futile or inconsistent with the child's health, safety, and need for a safe, permanent home within a reasonable period of time.)

Whenever possible, the order should address visitation consistent with G.S. 7B-905.1.

Checklist 2. Any Order Placing Child in DSS Custody (G.S. 7B-507 Requirements)

When the court orders a child to be placed in DSS custody or to remain in DSS custody (or gives DSS “placement responsibility”), the hearing and the resulting order must address the following:

- **Best interest.** The order must include a finding that the child’s continuation in or return to his or her own home would be contrary to the child’s best interest.
- **Reasonable efforts—past.** The order must include specific findings to support a conclusion as to whether DSS has made reasonable efforts to prevent or eliminate the need for placement (unless the court has determined that efforts are not required). Where efforts to prevent the need for placement were precluded by an immediate threat of harm to the child, the court may find that placement in the absence of such efforts was reasonable.
- **Reasonable efforts—future.** The order must address whether DSS should continue to make reunification efforts.
 - The court may order that efforts to reunify the family be made concurrently with efforts to plan for another permanent arrangement.
 - The court may order that reunification efforts are not required or must cease, but *only if* the court makes written findings
 - that efforts would be futile or inconsistent with the child’s health, safety, and need for a safe permanent home within a reasonable period of time; or
 - that a court has terminated involuntarily the parent’s rights to another child; or
 - that a court has determined that the parent has subjected the child to “aggravated circumstances,” as defined by G.S. 7B-101; or
 - that a court has determined that the parent committed murder or voluntary manslaughter of another child of the parent; aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; committed a felony assault resulting in serious bodily injury to the child or another child of the parent; committed sexual abuse against the child or another child of the parent; or has been required to register as a sex offender on any government-administered registry.
- **Schedule permanency planning hearing.** If the court ceases reunification efforts, it must direct that a permanency planning hearing be held within 30 days and schedule the hearing if practicable.
- **DSS responsibility.** The order must state that the child’s placement and care are the responsibility of DSS. (If the court directs a specific placement that differs from DSS’s recommendation, DSS must be given an opportunity to be heard and the order should reflect that the court gave bona fide consideration to DSS’s recommendation.)
- **Health and safety.** The child’s health and safety must be the paramount concern in determining reasonable efforts.
- **Other services and efforts.** The court may order services or other efforts aimed at returning the child home or achieving another permanent plan.
- **Required finding.** If custody to DSS is ordered or continued pursuant to G.S. 7B-903(a)(2) at a disposition or review hearing, the order must contain a finding that the child needs more adequate care or supervision or needs placement. *See In re S.H.*, 217 N.C. App. 140 (2011).

Checklist 3. Adjudication Hearing	Applicable Statutes and Forms
Purpose To adjudicate the existence or nonexistence of the conditions alleged in a petition for abuse, neglect, or dependency.	7B-802
Timing Must be held within 60 days from the time the petition is filed. A continuance is permissible only <ul style="list-style-type: none"> • for good cause, for as long as is reasonably required to receive additional evidence, reports, or assessments the court has requested, or other information needed in the best interests of the child; or • to allow a reasonable time for the parties to conduct expeditious discovery; or • in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the child. Pending criminal charges arising from the same incident may not be the sole extraordinary circumstance. 	7B-801 7B-803
Preliminary Inquiries and Determinations (if not already addressed) <i>(Note: The requirements in G.S. 7B-800.1 for a Pre-adjudication Hearing must be met; some, but not all, of those requirements relate to the following factors.)</i> Proper petition and jurisdiction ___ Have the parties been properly served or waived service? ___ Is the petition properly signed and verified? ___ Is the information required by G.S. 50A-209 contained in the petition or an attached affidavit? ___ Does the court have jurisdiction under the UCCJEA on the basis that ___ N.C. is the child's home state? ___ N.C. has exclusive continuing jurisdiction? ___ N.C. has jurisdiction to modify another state's order? ___ N.C. has temporary emergency jurisdiction? ___ Is venue proper? If petition is not filed in the county of the child's residence, has DSS in that county been given notice as required by G.S. 7B-402? Representation ___ If a parent has provisional counsel, should the appointment be confirmed or should counsel be dismissed? ___ If the parent is present and does not have counsel, does the parent want counsel? If so, is the parent indigent? ___ If a parent is under age 18 and not emancipated, has a Rule 17 GAL for the parent been appointed as required by G.S. 7B-602(b)? ___ Is there a need to conduct a hearing to determine whether a Rule 17 GAL should be appointed for a parent due to incompetence, as authorized by G.S. 7B-602(c)? ___ If abuse and/or neglect is alleged, have a GAL and attorney advocate been appointed for the child?	7B-800.1 7B-400 7B-402 7B-406 7B-407 50A(UCCJE A) AOC-J-141 AOC-J-142 AOC-J-130 7B-601 7B-602 AOC-J-143 AOC-J-207 AOC-CR-226

<p>___ If only dependency is alleged, should a GAL and attorney advocate be appointed for the child?</p> <p><i>Servicemembers Civil Relief Act</i></p> <p>___ Has each respondent appeared in the case?</p> <p>___ If not, has the affidavit addressing the non-appearing respondent's military status been filed with the court, or is there a provision in the verified petition that addresses each respondent's military status?</p> <p>___ If the affidavit or verified petition shows the respondent is in the military, has the court appointed an attorney for that respondent?</p> <p>___ If respondent is in the military, has a stay been requested?</p>	<p>50 U.S.C. app. § 521 50 U.S.C. app. § 522</p> <p>AOC-G-250</p>
<p>Evidence and Burden of Proof</p> <ul style="list-style-type: none"> • DSS has the burden of proving the allegations in the petition by clear and convincing evidence. • The rules of evidence apply. • No default judgment or judgment on the pleadings is permitted; the court must hold a hearing. • All parties have the right to present evidence and cross-examine witnesses. • Evidence is limited to that which relates to the allegations in the petition; however, evidence of paternity being established after the petition was filed may be introduced. • Predisposition reports may not be submitted to or considered by the court until after adjudication. 	<p>7B-802 7B-804 7B-805</p>
<p>Outcomes</p> <ul style="list-style-type: none"> • The court must adjudicate the existence or nonexistence of the condition(s) alleged in the petition. • If the court does not adjudicate the child to be abused, neglected, or dependent, the court must dismiss the petition and release a child who is in nonsecure custody to his or her parents, custodian, guardian, or caregiver. • If the court adjudicates the child to be abused, neglected, or dependent, the court must immediately proceed to a disposition hearing or set a date for the disposition hearing to be concluded within 30 days. 	<p>7B-802 7B-807 7B-901</p>
<p>Additional Issues for Hearing and Order</p> <p>If the court adjudicates the child to be abused, neglected, or dependent but does not proceed immediately to disposition, the court should address the following:</p> <p>___ Custody and placement of the child pending disposition.</p> <p>___ Visitation and communication between the child and parent or siblings pending disposition.</p> <p>In effect, the court should enter a "temporary disposition" order pending a full hearing on disposition. (See Checklist 4. Disposition Hearing.)</p>	
<p>Requirements for Adjudication Order</p> <p>An adjudication order must</p> <ul style="list-style-type: none"> • be in writing; • contain appropriate findings of fact (supported by evidence in the record); • contain appropriate conclusions of law (supported by the findings of fact); and 	<p>7B-807</p> <p>AOC-J-153</p>

- be entered (reduced to writing, signed, and filed with the clerk) no later than 30 days following completion of the hearing.

If the order adjudicates abuse, neglect, or dependency, it must state that the facts were found by clear and convincing evidence.

If the petition alleged more than one condition (abuse, neglect, dependency), the order should make findings and conclusions about each. The order may not adjudicate a condition that was not alleged in the petition.

Consent Order: A consent order is permissible only if all parties are present or represented by counsel who is present and authorized to consent, the child is represented by counsel, and the court makes sufficient findings of fact. The order must comply with all other requirements for adjudication orders.

7B-801

Checklist 4. Disposition Hearing (Initial disposition hearing following adjudication)	Applicable Statutes and Forms
Purpose To design an appropriate plan to meet the needs of the child that takes into account the child's need for safety, continuity, and permanence while respecting family autonomy and avoiding unnecessary separation of children and parents.	7B-100 7B-900
Timing Immediately following adjudication or when the court receives sufficient social, medical, psychiatric, psychological, and educational information but must be concluded within 30 days after the adjudication hearing. Continuance: <ul style="list-style-type: none"> to allow the parent, guardian, custodian, caretaker, or others to take appropriate action; to receive additional evidence, reports, assessments, or other information needed in the best interests of the child; or to address extraordinary circumstances when necessary for the proper administration of justice or in the best interest of the child. 	7B-901 7B-808(a) 7B-803
Evidence and Burden of Proof <ul style="list-style-type: none"> Hearing may be informal, and the rules of evidence are relaxed. Any evidence, including hearsay, is allowed if reliable, relevant, and necessary to determine the child's needs and best interests. Cumulative testimony may be excluded. No burden of proof on any party, but sufficient evidence must be presented to allow the court to make required determinations. All parties may present evidence. DSS must prepare and submit a report, and other parties may submit reports. 	7B-901 7B-808
Available Dispositions The following dispositional options are available to the court: <ul style="list-style-type: none"> _____ Dismissal: appropriate when no purpose would be served by continuing to exercise jurisdiction; legal status of the child and parents reverts to the status that existed prior to the filing of the petition. _____ In-home supervision and services (<i>requires a finding that the child needs more adequate care or supervision or needs placement</i>): The court may require that the child be supervised by DSS (or other personnel available to the court but not the GAL) while remaining at home, subject to any conditions placed on the parent, guardian, custodian, or caretaker. (If an alleged abuser had a history of violent behavior, the court must consider the opinion of the mental health professional who performed an evaluation required by G.S. 7B-302(d1) before returning the child to the custody of the alleged abuser.) 	7B-903

<p>Available Dispositions <i>(continued)</i></p> <p>— Out-of-home placement (<i>requires a finding that the child needs more adequate care or supervision or needs placement</i>):</p> <p><i>Specific placement alternatives:</i></p> <p>— placement in the custody of DSS in the county of the child's residence (or, if the child's residence is in another state, in the county where the child is found for return to appropriate authorities in the child's home state);</p> <p>— placement in the custody of a parent, relative, agency offering placement services, or other suitable person;</p> <p>— appointment of a guardian pursuant to G.S. 7B-600.</p> <p><i>Considerations and findings for all out-of-home placements:</i></p> <ul style="list-style-type: none"> • If a relative is willing and able to provide care, the child must be placed with the relative unless the placement is contrary to child's best interest. • The court must consider whether it is in the child's best interest to remain in his or her community. (Factors may include ties related to siblings, relatives, friends, school, church, activities, special services, etc.) • If the child is (or is eligible to be) a member of a federally recognized Indian tribe, compliance with the Indian Child Welfare Act (ICWA) is required. If the child is a member of a state-recognized tribe, the court may contact the tribe as a means of identifying placement resources. • The placement must comply with the Multiethnic Placement Act (MEPA). • An out-of-state placement must comply with the Interstate Compact on the Placement of Children (Art. 38, G.S. Ch. 7B) when applicable. • The court must verify that any person (other than a parent or DSS) receiving custody or guardianship understands the legal significance of the placement and will have adequate resources to care for the child appropriately. • If placement is in another county, in some cases the court should consider whether a transfer of venue under G.S. 7B-900.1 is appropriate. • The court should consider whether the parent is able and should be ordered to pay a reasonable portion of the cost of the child's care. 	<p>7B-903 7B-904 7B-905 7B-507 7B-600</p>
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<p>Available Dispositions <i>(continued)</i></p> <p>— Evaluation and Treatment for Children and Parents</p> <p><i>The court may order the following:</i></p> <p>— evaluation of the child by a physician, psychiatrist, psychologist, or other qualified expert, to determine the needs of the child;</p> <p>— treatment for the child, after a hearing for which notice has been given to the county manager or person designated by the chair of the board of county commissioners;</p> <p>— participation in child's treatment by a parent, guardian, custodian, stepparent, adult member of the child's household, or an adult relative caring for the child, if found to be in the child's best interest;</p> <p>— evaluation and treatment for parents (or guardian, custodian, stepparent, adult member of the child's household, or an adult relative caring for the child), if found to be in the child's best interests and directed toward remediating or remedying behaviors or conditions that led to or contributed to the child's adjudication or the court's decision to remove custody</p> <p>— custody or placement conditioned on parent's (or other person's) receipt of treatment;</p> <p>— Payment of cost of evaluation or treatment</p> <ul style="list-style-type: none"> • for treatment of child (and participating adult), by the parent or other responsible parties or, if the parent is unable to pay, by the county; • for treatment of the parent or other adult, by that person or, if unable to pay, court may order treatment currently available from local mental health program; • if court has conditioned custody on receipt of treatment, by the adult receiving treatment or, if unable to pay, by the county. 	<p>7B-903 7B-904</p>
<p>Orders Directed to Parents or Others</p> <p>The court may order a parent, guardian, custodian, or caretaker who has been served with a summons (or has otherwise submitted to the court's jurisdiction) to:</p> <p>— attend and participate in parenting classes if classes are available in the judicial district where he or she lives;</p> <p>— provide transportation for the child to keep appointments for any treatment ordered by the court (if the child is in the home and to the extent the person is able to provide transportation);</p> <p>— take appropriate steps to remedy conditions in the home that led or contributed to the adjudication or to removal of the child from the home;</p> <p>— order a parent to pay child support, which is a reasonable portion of the cost of the child's care based on the parent's ability to do so.</p>	<p>7B-904</p>
<p>Disposition Order</p> <p>A disposition order:</p> <ul style="list-style-type: none"> • must be entered (reduced to writing, signed, and filed with the clerk) within 30 days of completion of the disposition hearing; • must contain appropriate findings of fact and conclusions of law; • must address the required findings (detailed above in checklist) for the specific dispositional options the court orders; • must state the precise terms of the disposition, including the person(s) responsible for carrying out whatever is required in the disposition, as well as the person or agency in whom custody is vested; 	<p>7B-905 7B-507</p> <p>AOC-J-154</p>

<h2>Checklist 5: Review and Permanency Planning Hearings</h2>	<h3>Applicable Statutes and Forms</h3>
<p>Purpose</p> <p>At review hearings, including permanency planning hearings, the court reviews and evaluates the child's circumstances and makes any needed changes to prior disposition or review orders. A <i>permanency planning hearing</i> is a review hearing that may be held at any time, but an initial permanency planning hearing must be held within one year after the child's removal from the home. Parties must be given notice that the court will be making or reviewing a permanent plan for the child. After the initial permanency planning hearing, all subsequent review hearings are permanency planning hearings.</p> <p><i>Note:</i> Most review hearings are held pursuant to G.S. 7B-906.1. However, reviews also may be held on motion of a party pursuant to G.S. 7B-1000. If guardianship has been made the permanent plan for the child, G.S. 7B-600(b) also will apply. The court should specify at the hearing and in its order the statute(s) under which the review is held.</p>	<p>7B-906.1 7B-1000 7B-600</p>
<p>Timing</p> <p><i>First review hearing:</i> When custody is removed from the parent at disposition, a review hearing must be held within 90 days from the date of the disposition.</p> <p><i>Subsequent review hearings:</i> At least every six months.</p> <p><i>First permanency planning review hearing:</i> Within one year after child's initial removal from the home, even if removal was before disposition, pursuant to nonsecure custody.</p> <p><i>Waiver of review hearings:</i> The court may waive further review hearings, require written reports in lieu of review hearings, or have review hearings less frequently than every six months if:</p> <ul style="list-style-type: none"> • custody of the child is placed with parents, or • the court finds all of the following by clear, cogent, and convincing evidence: <ul style="list-style-type: none"> ___ 1. The child has lived with a relative or been in the custody of another suitable person for at least one year; ___ 2. The placement is stable and continuation of the placement is in the child's best interests; ___ 3. Neither the child's best interests nor any party's rights require that review hearings be held every six months; ___ 4. All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and ___ 5. The court order has designated the relative or other suitable person as the child's permanent caretaker or guardian of the person. • A review hearing must be held if a party files a motion seeking review. • Placement of the child in the custody or guardianship of someone other than a parent, even if the placement is the permanent plan, does not affect the requirement for review hearings. They must continue unless waived as described above. 	<p>7B-906.1 7B-1000</p> <p>AOC-J-140</p>

<p>The Hearing; Evidence; and Burden of Proof</p> <ul style="list-style-type: none"> • The clerk must give notice to the parents, the child if 12 or older, the guardian, the person providing care for the child (who may be given notice by DSS), the custodian or agency with custody, the guardian ad litem, and anyone else the court specifies. • The hearing may be informal, and the rules of evidence are relaxed. • Any evidence, including hearsay, is allowed if relevant, reliable, and necessary to determine the child's needs and the most appropriate disposition. Cumulative testimony may be excluded. • The court may consider evidence or testimony from any person or agency that will aid the court in its review. • No burden of proof on any party, but sufficient evidence must be presented to allow the court to make required determinations. • All parties must have an opportunity to present evidence. 	<p>7B-906.1</p>
<p>Specific Criteria</p> <p><i>At every hearing.</i> The court is required to consider the following criteria and to make <i>written findings concerning any that are relevant</i>:</p> <ul style="list-style-type: none"> ___ 1. Services that have been offered to reunite the child with either parent, regardless of whether the child resided with the parent at the time of removal, or with the guardian or custodian from whom the child was removed. ___ 2. Reports on visitation and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with G.S. 7B-905.1. ___ 3. Whether efforts to reunite the child with either parent clearly would be futile or inconsistent with the child's safety and need for a safe, permanent home within a reasonable period of time. The court must consider reunification efforts. If the court determines further efforts would be futile or inconsistent with the child's welfare, the court must consider a permanent plan of care for the child or schedule a permanency planning hearing to do so. ___ 4. Reports on placements the child has had, the appropriateness of the child's current placement, and the goals of the child's foster care plan, including the role the current foster parent will play in the planning for the child. ___ 5. If the child is 16 or 17 years of age, a report on an independent living assessment and, if appropriate, an independent living plan. ___ 6. Whether termination of parental rights should be considered and if so when. ___ 7. Any other criteria the court deems necessary. <p><i>In addition, at any permanency planning hearing where the child is not placed with a parent.</i> The court must consider the following criteria and make <i>written findings about those that are relevant</i>:</p> <ul style="list-style-type: none"> ___ 1. Whether it is possible for the child to be placed with a parent within the next six months and, if not, why such placement is not in the child's best interests. ___ 2. Where placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, rights and responsibilities the parents should retain. ___ 3. Where the child's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the child's adoption. ___ 4. Where the child's placement with a parent is unlikely within six months, whether the child should remain in the current placement, or be placed in another permanent living arrangement and why. 	<p>7B-906.1 7B-507</p>

<p><i>In addition, at any permanency planning hearing where the child is not placed with a parent (continued)</i></p> <p>___ 5. Whether the county department of social services, since the initial permanency planning hearing, has made reasonable efforts to implement the permanent plan.</p> <p>___ 6. Any other criteria the court deems necessary.</p> <p><i>If any of the following circumstances exist, the court must determine whether there is an exception to the requirement that DSS initiate a proceeding to terminate parental rights. See G.S. 7B-906.1(f).</i></p> <p>___ Is the child now in the custody or placement responsibility of DSS, and has the child been in placement outside the home for 12 of the most recent 22 months?</p> <p>___ Has a court of competent jurisdiction determined that the parent has</p> <ul style="list-style-type: none"> • abandoned the child, or • committed murder or voluntary manslaughter of another child of the parent, or • aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent? <p><i>If the answer to either question above is yes, DSS is required to initiate a proceeding to terminate parental rights unless the court finds one of the following:</i></p> <ul style="list-style-type: none"> • The permanent plan for the child is guardianship or custody with a relative or some other suitable person. • Filing of a petition for termination of parental rights is not in the child's best interests, based on specific findings of fact and stated reasons. • DSS has not provided the child's family with services DSS deems necessary when reasonable efforts are still required to enable the child's return to a safe home. 	
<p>Available Dispositions</p> <p>See Checklist 4: Disposition Hearing. <i>The dispositional options available to the court, along with required considerations and findings for those options, are the same as those available at disposition.</i></p>	<p>7B-903 7B-906.1 7B-803</p>
<p>Order</p> <p>* If the child is placed or continued in the placement of DSS, see Checklist 2: Any Order Placing Child in DSS Custody.</p> <p>* The order must comply with requirements for any disposition order. See Checklist 4: Disposition Hearing.</p> <p>* If the court orders a permanent plan of guardianship or custody to someone other than a parent, the order must include a finding that the parents are unfit or have acted inconsistently with their constitutionally protected parental status. (This finding may not be necessary if the parent consents to the child's custody with a third party.)</p> <p><i>A review hearing or permanency planning review hearing order</i></p> <ul style="list-style-type: none"> • must include findings about any of the criteria listed above that are relevant; • must include specific findings as to the best plan of care to achieve a safe, permanent home for the child within a reasonable time; • must include appropriate conclusions of law; 	<p>7B-903 7B-904 7B-905 7B-906.1 7B-507 7B-902</p>

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| <ul style="list-style-type: none">• must be entered (signed and filed with the clerk) within 30 days after the review hearing;• if another review hearing is required within the next 6 months, must set the date for that hearing if practicable;• if the court orders that reunification efforts cease, the court must direct that a permanency planning hearing be held within 30 days and should set the date for the hearing if practicable;• if custody is restored to a parent, the order should specify whether the court retains or terminates jurisdiction. | |
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Checklist 6. Hearing on Termination of Parental Rights (TPR)	Applicable Statutes and Forms
Purpose To determine whether any of the statutory grounds for termination of parental rights (TPR) as alleged in the petition exist and, if so, whether termination of parental rights is in the child's best interest.	7B-1109 7B-1110
Timing Must be held within 90 days after the TPR petition or motion is filed, unless the court orders that it be held at a later time. <ul style="list-style-type: none"> • Continuance up to 90 days from the date of the initial petition may be permitted for good cause, to receive additional evidence, or to allow parties to conduct expeditious discovery. • Continuance beyond 90 days permitted only in extraordinary circumstances, when necessary for the proper administration of justice, and court must enter a written order stating grounds for the continuance. • Continuance permitted for reasonable extension of time where counsel for parent is first appointed and needs time to prepare. 	7B-1109
Evidence and Burden of Proof <ul style="list-style-type: none"> • During the adjudication phase, the court must determine the existence or nonexistence of any alleged ground(s) for TPR. The standard of proof is clear, cogent, and convincing evidence, and the burden of proof is on the petitioner or movant. The rules of evidence apply. • At the disposition phase the court may hear additional evidence to make a discretionary determination as to whether TPR is in the child's best interest. There is no burden of proof on any party at disposition. • The court may not rely solely on documentary evidence, and default proceedings are not permitted. The court must take evidence, including some live testimony. 	7B-1109 7B-1110
Preliminary Inquiries and Determinations <i>Pretrial hearings, motions or agreements</i> ___ Has the pretrial hearing required by G.S. 7B-1108.1 been conducted, or is the pretrial hearing being combined with the adjudication hearing? ___ Do any prehearing motions need to be decided? ___ If the name or identity of a parent is unknown, has there been a hearing pursuant to G.S. 7B-1105 to determine the parent's name or identity? <i>Proper petition and jurisdiction</i> ___ Have the parties been properly served or waived service? ___ Did the respondent file an answer or response to the petition or motion? ___ Did the petitioner/movant have standing to initiate the action? ___ Is the petition/motion verified? ___ Is the information required by G.S. 50A-209 contained in the petition/motion or an attached affidavit? ___ Does the court have jurisdiction under the UCCJEA on the basis that: ___ N.C. is the child's home state? ___ N.C. has exclusive continuing jurisdiction? ___ N.C. has jurisdiction to modify another state's order?	7B-1108.1 7B-1105 7B-1103 7B-1104 7B-1106 7B-1106.1 7B-1108 7B-1101 50A-209 AOC-J-208 AOC-J-210

<p><i>Representation and participation</i></p> <p>___ If respondent is present, is he or she represented by counsel? If not, does the respondent want counsel? Is respondent indigent?</p> <p>___ If provisional counsel was appointed, has the appointment been confirmed or should provisional counsel be dismissed pursuant to G.S. 7B-1101.1(a)?</p> <p>___ If respondent wants to waive the right to counsel, has the court examined the respondent on the record and made findings to show that the waiver is knowing and voluntary?</p> <p>___ If respondent is under age 18 and not emancipated, has a Rule 17 GAL been appointed as required by G.S. 7B-1101.1(b)?</p> <p>___ Is there a need for a hearing to determine whether a Rule 17 GAL should be appointed for a respondent based on incompetence, as authorized by G.S. 7B-1101.1(c)?</p> <p>___ If an answer or response was filed denying material allegations in the petition or motion, have a GAL and attorney advocate been appointed for the child?</p> <p>___ If no answer or response denying material allegations has been filed, should a GAL and attorney advocate be appointed for the child?</p> <p><i>Servicemembers Civil Relief Act</i></p> <p>___ Has the respondent appeared in the case?</p> <p>___ If not, has the affidavit addressing the non-appearing respondent's military status been filed with the court, or is there a provision in the verified petition/motion that addresses the respondent's military status?</p> <p>___ If the affidavit or verified petition/motion shows the respondent is in the military, has the court appointed an attorney for that respondent?</p> <p>___ If respondent is in the military, has a stay been requested?</p>	<p>50 U.S.C. app. § 521</p> <p>50 U.S.C. app. § 522</p> <p>AOC-G-250</p>
<p>Adjudication</p> <p>For an adjudication of a ground for termination of parental rights, the petitioner or movant must present clear, cogent, and convincing evidence that supports findings of fact sufficient to support a conclusion of law that the alleged ground exists.</p>	<p>7B-1109</p> <p>7B-1111</p>
<p>Dispositional Determination of Best Interest</p> <p>___ If one or more grounds for termination are adjudicated, is it in the child's best interest to terminate parental rights? The court is required to consider the following factors and <u>make findings of fact</u> about those that are relevant:</p> <p>___ the child's age;</p> <p>___ likelihood of the child's being adopted;</p> <p>___ whether termination will help achieve the permanent plan for the child;</p> <p>___ the bond between the child and the parent;</p> <p>___ quality of the relationship between the child and the proposed adoptive parent, guardian, or custodian; and</p> <p>___ any other relevant factor.</p>	<p>7B-1110</p>
<p>Order</p> <p>___ Dismissal. If the court concludes that grounds have not been proved by clear, cogent, and convincing evidence OR that it is not in the child's best interest to terminate parental rights, the court must dismiss the petition or deny the motion but must first make findings of fact and conclusions of law.</p>	<p>7B-1109</p> <p>7B-1110</p> <p>7B-1111</p> <p>7B-1112</p>

— **Address grounds.** The court must find facts and adjudicate (i.e., make a conclusion of law regarding) the existence or nonexistence of each ground alleged in the petition or motion.

— **Standard of proof.** Any order that adjudicates a ground must state that the findings are based on clear, cogent, and convincing evidence.

— **Address best interest.** If one or more grounds are adjudicated, the court must determine whether TPR is in the child's best interests. The order must include findings of fact about relevant dispositional factors listed above.

— **Entry.** The order must be entered (signed by the judge and filed with the clerk) within 30 days following completion of the hearing.

Findings Relating to Particular Grounds

Following are reminders of *some* of the necessary findings of fact relating to three of the most frequently alleged grounds.

Neglect (or abuse)

Requires findings of

1. current neglect (or abuse) or
2. past neglect (or abuse) and a likelihood of repetition of neglect (or abuse) if the child were returned home.

Willfully leaving the child in foster care or other placement for more than a year without making reasonable progress under the circumstances to correct conditions that led to the child's removal

- Requires findings sufficient to support a conclusion of willfulness, which requires findings about what the parent did in relation to what the parent was capable of doing.
- Findings must address a parent's failure to make reasonable progress in relation to the conditions that led to the child's removal from the home.
- Findings must show that the child's placement outside the home for at least a year has been pursuant to a court order.

Nonsupport

If the child is in the custody of DSS or another child placing agency, findings must include:

- nonpayment of a reasonable portion of the cost of the child's care for at least six months before the filing of the petition or motion and
- facts about employment, earnings, assets, etc., to support a conclusion that the parent was physically and financially able to pay and that the parent's failure to pay was willful.

In a private termination of parental rights action, findings must include:

- that one parent has custody of the child pursuant to a court order or a custody agreement between the parents;
- that the court order or agreement requires the respondent to pay for the care, support, and education of the child;
- that for at least one year before the filing of the petition or motion respondent failed to pay support as required by the court order or agreement; and
- that the nonpayment was willful and without justification.

Checklist 7. Post-TPR Review Hearing	Applicable Statutes and Forms
<p>Purpose</p> <p>To ensure that every reasonable effort is being made to provide a permanent placement for the child consistent with the child's best interests.</p>	7B-908
<p>Timing</p> <p><i>This hearing is required when:</i></p> <ul style="list-style-type: none"> parental rights have been terminated pursuant to a petition brought by one of the following: (i) a guardian of the person of the child, (ii) DSS or other licensed agency, or (iii) a person with whom the child has lived continuously for at least two years immediately preceding the filing of the action; <i>and</i> the child is in the custody of DSS or another licensed child-placing agency. <p><i>The first post-TPR review hearing must be conducted within six months of the date of the hearing at which parental rights were terminated.</i></p> <p><i>Subsequent post-TPR review hearings must be conducted at least every six months after the first hearing until the child is adopted.</i></p> <p><i>Cancellation of a post-TPR review hearing is permissible only if the juvenile is the subject of a final decree of adoption prior to the date of the review hearing.</i></p>	7B-908(b), (e)
<p>Preliminary Considerations</p> <p>___ Was notice of the hearing sent to the following persons?</p> <ul style="list-style-type: none"> the child, if the child is 12 years of age or older; a legal custodian of the child; the person who is providing care for the child; the child's guardian ad litem, if there is one; a parent whose rights have been terminated <i>but only if</i> the parent has appealed the order terminating the parent's rights and a court has stayed the order pending the appeal; and any other person or agency the court specified. <p>___ Was a GAL appointed previously to represent the child in the TPR proceeding? (If so, determine whether the GAL will continue to represent the child.)</p> <p>___ If a GAL was not appointed previously or has been relieved, should a GAL be appointed to represent the child? If so, should the hearing be continued to give the GAL time to prepare?</p>	7B-908(b)(1), (2)
<p>Evidence</p> <ul style="list-style-type: none"> The court may consider any evidence, including hearsay, that the court finds to be relevant, reliable, and necessary to determine the needs of the child and the most appropriate disposition. The court may consider information from DSS or a licensed child placing agency, 	7B-908(a)

from any other participants, and from any other person or agency the court determines is likely to aid in the review.	
<p>Considerations</p> <p><i>The court is required to consider the following:</i></p> <p>___ Is the DSS or agency plan for permanent placement adequate and in the child's best interests?</p> <p>___ What efforts have been made to implement that plan, and have efforts been adequate?</p> <p>___ Has the child been listed for adoption with the N.C. Adoption Resource Exchange, the N.C. Photo Adoption Listing Service (PALS), or any other specialized adoption agency?</p> <p>___ What previous efforts have been made by DSS or the agency to find a permanent home for the child?</p> <p><i>The court should also consider:</i></p> <p>___ Is there any other information that should be obtained or taken into account to determine whether reasonable efforts are being made to provide a permanent placement for the child or whether another plan or additional steps are necessary to provide a permanent placement for the child?</p>	7B-908(c)
<p>Order</p> <p><i>The court must make findings of fact and conclusions of law, and the order must either:</i></p> <ul style="list-style-type: none"> • affirm the DSS's (or other agency's) plans, or • require specific additional steps that are necessary in order to accomplish a permanent placement that is in the child's best interest. 	7B-908(d)