CHAPTER 1
THE PRE-ADJUDICATION STAGE

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§ 1.1 Summary

Once a report for abuse, neglect, or dependency is investigated and substantiated, DSS may determine it is necessary to file a petition in juvenile court. When a petition is filed for abuse or neglect, a guardian ad litem (GAL) must be appointed for the child and when the petition is for dependency a GAL may be appointed.[1] When a petition is filed, often a child is removed from the home and a nonsecure custody order is sought. Sometimes, however, a child is left in the home or voluntarily placed with a relative or friend and a petition is filed, but a nonsecure custody order is not sought. In an emergency situation, a child may be removed from the home with neither a court order nor a petition and placed into temporary custody, but a petition and nonsecure custody order must be obtained immediately thereafter. A nonsecure custody hearing must then be conducted and subsequent ones will be held periodically prior to adjudication. A prehearing conference may be required in some districts (and is recommended prior to all hearings), and negotiating for a consent order occurs at this stage. This is the stage at which the GAL volunteer does the bulk of the investigative work to prepare for adjudication and disposition. During the pre-adjudication stage, attorneys involved in the case deal with the legal matters surrounding the petition and summons, jurisdiction and venue, as well as pretrial motions. Everyone involved will deal with issues of confidentiality and discovery in this and all stages of the case.

> **Caveat:** It is important to remember that the attorney advocate represents the best interests of the child as part of a team effort with the GAL volunteer. The two should strive to work as a team to ensure that legal actions taken by the attorney reflect recommendations agreed upon by the attorney and volunteer. To function as an effective team, the volunteer and attorney advocate must have the same information regarding both the case and one another's actions in order to avoid independent, conflicting actions in the case.[2]

§ 1.2 Front-Loading the Process to Improve Efficiency and Cooperation

A. Nonsecure Custody Hearings as Tools for Information and Preparation

In some districts, nonsecure custody hearings are brief, with only minimal evidence presented to the court. The case is so new that parties are uninformed and unprepared, and few issues other than the child's immediate placement are considered. However, it is possible to utilize the nonsecure custody hearing as a tool for parties to learn about the case, to assess needs, begin to address them, and to generally expedite the entire process. Holding nonsecure custody hearings that are well attended by persons who can provide information about the case, setting aside enough time for such hearings, and having a courtroom format that allows for everyone to share information as well as their perspective maximizes everyone's time. Some districts in North Carolina, especially those that are part of the Court Improvement Project, already utilize nonsecure hearings this way. Some districts, usually family court districts, also have "day-one" or "child planning" conferences in which all parties and service providers gather within twenty-four hours after a petition is filed for a conference (not a hearing) to begin putting

[1] For a detailed description of the roles and responsibilities of DSS; appointment, roles and responsibilities of the GAL volunteer and GAL attorney, as well as a description of the juvenile court process in general, please see Chapters 10, 8, and 9, respectively, in this manual. These chapters provide background information for the reader who has had limited exposure to this field of practice, but they also contain valuable information for readers who are experienced in this field.
[2] See § 12.3 in this manual for further discussion on this matter.

a plan into action.[3] These districts report that this type of nonsecure custody hearing and day-one conferencing benefits everyone involved. In fact, such collaborative efforts in day-one conferencing have often eliminated the need for a 7-day nonsecure hearing and actually shorten the time span of the case overall.[4]

The National Council of Juvenile and Family Court Judges, in the book *Resource Guidelines*, addresses the benefits of front-loading the system. In the section on Preliminary Protective Hearings (the equivalent of nonsecure custody hearings), the book states the following:

> When preliminary protective hearings are thorough and timely, some cases can be resolved with no need for subsequent court hearings and reviews. In other cases, a thorough and early preliminary protective hearing can help simplify and shorten early hearings and can move the case more quickly to the later stages of adjudication, disposition, and review. This not only preserves court resources but reduces the cost and harm of unnecessary, prolonged out-of-home placement of children.
>
> A timely and thorough preliminary protective hearing can shorten the time of foster care and speed the judicial process. By ensuring speedy notice of all parties, the hearing avoids delays due to difficulties with service of process. By ensuring early, active representation of parties, the hearing avoids trial delays due to scheduling conflicts and the late appointment of unprepared advocates. By clearing the trial (adjudication) date at a very early time, the hearing avoids later scheduling conflicts that otherwise would delay trial dates. By thoroughly exploring all issues at the preliminary protective hearing, the court can resolve and dismiss some cases on the spot, move quickly on some pretrial issues (such as discovery or court-ordered examination of parties), encourage early settlement of the case, encourage prompt delivery of appropriate services to the family, and monitor agency case-work at a critical stage of the case.[5]

B. Prehearing Conferences: Saving Time, Improving Preparation, and Promoting Consent

In many districts, parties speak to one another prior to adjudication as necessary, but there is no formal prehearing conference. Parties often come to court expecting to negotiate and discuss their position with their own client and with other parties, assuming that some court time will be devoted to recesses that will give them this opportunity. Under these circumstances, parties sometimes do not reach a consent agreement simply because they haven't had enough time to thoroughly discuss the issues. In addition, they are less likely to be prepared to present the best possible case to the court and are more likely to either ask for a continuance or sacrifice on quality in their courtroom presentation. Prehearing conferences attended by all parties have been shown to increase the likelihood of consent, allow the parties to be better prepared for court, promote a more efficient use of court time, and soften the adversarial nature of the proceedings.[6] Devoting more time and effort to nonsecure custody hearings and having day-one conferencing and pre-hearing conferences "front-loads" the system such that far less is required in later stages. Everyone benefits from the improved efficiency and an increased ability

[3] Examples of service providers would include those in mental health, public health, public education, child support and law enforcement.

[4] Source: Kirk, Raymond S. and Griffith, Diane P. Final Reassessment Report, Final Evaluation of the North Carolina Family Courts Sites, 2006, p. 37-38.

[5] The National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, 1995, p. 31.

[6] Source: Martha Sue Hall, Court Improvement Project Director, District 20; Deborah Nealy, Court Improvement Project Director, District 25.

to address the needs of those involved.

Benefits of Prehearing Conferences

- An outcome reached by agreement is often superior to one reached through litigation.
- Parties are better informed about the case.
- Parties are better able to perform in court.
- Conferences are especially useful in courts where many attorneys habitually delay negotiations until shortly before trial.
- Conferences encourage early preparation.
- Unlike contested hearings, settlement conferences create a nonadversarial atmosphere that may foster a cooperative relationship among parents, social services, and attorneys, causing parties to feel more like allies and less like adversaries in solving serious problems.
- Parents may be more likely to work with the agency when they believe they were part of the solution, instead of feeling that the outcome of the case was imposed on them, and may therefore have an increased commitment to the success of the case plan.
- Misunderstandings and misperceptions can be corrected.
- Court workloads are reduced and case management improved because the court is better able to anticipate the content of a court calendar.

Source: Drawn from Resource Guidelines (**See *supra* note 5,** p. 132).

§ 1.3 The Process: Appointment of GAL and the Petition and Summons

A. Receipt of Petition, Appointment Orders, Summons, Custody Order

[See Volume 2, Chapter 8 of this manual for explanation of GAL's role and statutes related to appointment and duties of GAL.]

Once a petition is filed, the GAL volunteer and attorney advocate (or "AA," a term used in this manual to refer to the guardian ad litem attorney) receive their appointment orders along with a copy of the petition, summons, and any nonsecure custody order. The volunteer begins investigation immediately.

1. The appointment of the Guardian ad Litem shall terminate when the permanent plan has been achieved for the juvenile and approved by the court. The court may reappoint the GAL pursuant to a showing of good cause upon motion of any party, including the GAL, or of the court. **[7B-601]**

2. Whenever a nonattorney GAL is appointed, an attorney advocate will also be appointed to protect the child's legal rights throughout the proceeding.[7] **[7B-601]**

[7] Between 1995 and 1999, the attorney's responsibilities were limited to being through disposition and after disposition when necessary to further the best interests of the juvenile.

B. Responsibilities of the AA Commence Once Appointment Order Is Entered

Once the GAL and AA are appointed and the AA receives the file, the AA may take immediate action in the case:

1. Begin conversations with GAL staff and GAL volunteer to obtain any additional information about the case. The AA must talk to the volunteer and staff to gather information about the case. [See "The Attorney Advocate's Role and Relationship with the Volunteer" in § 8.5 of this manual.] The summons, petition, other court documents, and even the GAL court report will not contain all of the information the AA needs to know. To get complete information, the AA needs to begin conversations with the volunteer and staff and continue those conversations throughout the course of the proceedings.

2. Review petition for legal defects and factual inaccuracies. Once some preliminary investigation has occurred and the results are conveyed to the attorney, the petition must also be reviewed for factual and legal accuracy. For example, juvenile petitions must be verified or the court does not obtain subject matter jurisdiction. (**See E.** ***infra***) If the AA believes there could be defects or inaccuracies, the AA should alert the DSS attorney. (Also see subsection D, below, on Answers, Amendments, and Dismissals by DSS.)

[Information regarding preparation for nonsecure custody hearings is contained in this chapter in § 1.7. Information regarding preparation for adjudication hearings is contained in Volume 1, § 2.7.]

C. Requirements of the Petition

1. The petition must contain the following [7B-402]: the name, date of birth, and address of the juvenile; name and last known address of parent, guardian, or custodian; and facts containing allegations that invoke jurisdiction over the juvenile.

a. 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.

b. The petition may contain information on more than one juvenile if they are from the same home and are before the court for the same reason.

c. The petition, or attached affidavit, must contain information required by G.S. 50A-209. Information includes the places and with whom the child has resided in the past five years, and whether there are currently any other judicial proceedings pending.

d. Copies of the petition shall be available for each parent if living separate and apart, for the social worker, for the guardian, for the custodian, for the caretaker, for the guardian ad litem, and for any person determined by the court to be a necessary party.

2. The petition must be drawn and verified [7B-403].

a. The petition must be drawn by the director of DSS, or designee, verified before an official authorized to administer oaths, and filed by the clerk. See *In re Green*, 67 N.C. App. 501 (1984) (stating that the petition must be signed and verified).

b. Ordinarily, a petition will not be void for lack of being signed or verified when there is no

express statutory requirement. *See State v. Higgins*, 266 N.C. 589 (1966); *Alford v. McCormac*, 90 N.C. 151 (1884). However, the Juvenile Code has specifically mandated that the petition's validity depends on compliance with prerequisite subscription and verification. G.S. 7B-403. **Failure to properly verify the juvenile petition fails to invoke subject matter jurisdiction**. See *In the Matter of T.R.P.*, 173 N.C. App. 541 (2005). But **remedial action may be taken to cure this defect**. See *In the Matter of L.B.*,--- N.C. App. ---, 639 S.E.2d 23 (2007) in which the Court of Appeals held that subject matter jurisdiction was invoked where the verified petition was filed and summons issued two days after the entry of the nonsecure custody order.

D. Answers, Dismissal by DSS, and Amendments

1. Answers to abuse, neglect, and dependency petitions are not provided for by statute and are not generally filed.

2. DSS dismissal of petition

Since DSS is the petitioner, DSS has the power to voluntarily dismiss its own petition. When this happens, the GAL may or may not be in favor of the dismissal. It has been suggested that a counterclaim might be a tool for the AA to use when DSS dismisses a petition that the GAL believes should not be dismissed. However, caselaw has not addressed whether a counterclaim would be appropriate for a Guardian ad Litem in a juvenile case. [8]

3. Amending the petition [7B-800]: The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based.

E. Requirements for the Content and Service of the Summons

1. The summons in general [7B-406]: The summons must be issued to the parent, guardian, custodian, or caretaker immediately following the filing of a petition . The content requirements of the summons are set out in **7B-406** (at the end of this section). The preprinted summons form (AOC-J-142) supplied by the Administrative Office of the Courts complies with the statutory requirements. A copy of the petition shall be attached to the summons. The court obtains jurisdiction over the parent when the summons is served.[9] No summons is required for any person whose actions resulted in a conviction under G.S. 14-27.2 (first-degree rape) or G.S. 14-27.3 (second-degree rape) and the conception of the juvenile.

2. Service of the summons [7B-407]

[8] Counterclaims are governed by Rule 13 of the Rules of Civil Procedure. Counterclaims in general are brought against the "opposing party" but the relationships of the parties in abuse, neglect and dependency proceedings is unclear given the unusual nature of representation. In addition, there is question about the GAL's authority to bring a "counterpetition," because the GAL essentially would be standing in the shoes of DSS. Nonetheless, it has been done but has never been sanctioned by statute or case law and may or may not withstand attack on appeal. For a case that involved a counterclaim by a GAL but did not address the appropriateness of the counterclaim, see *In the Matter of Baby Boy Scearce*, 81 N.C. App. 531 (1986). Also see *In re Botsford*, 75 N.C. App. 72 (1985). Another possible way to deal with a dismissal by DSS that the GAL finds objectionable is through the use of a preliminary injunction under Rule 65 of the Rules of Civil Procedure, which may or may not be successful.

[9] But see § 1.5 below on jurisdiction for exceptions.

a. **Time for service**: Must be served not less than five days prior to the date of the scheduled hearing upon parent, guardian, custodian, or caretaker. The time for service may be waived in the discretion of the court.

b. **Type of service**: Service can be made by mail or publication if the parent (or guardian, custodian, caretaker) cannot be found by diligent effort and the court authorizes it. Service by publication is governed by Rule 4 (j1) of the North Carolina Rules of Civil Procedure.

c. **Contempt for failure to appear**: A parent, guardian, custodian, or caretaker who is personally served and fails to appear without reasonable cause may be held in contempt of court.

3. Service and jurisdiction [10]

a. It is the service of summons, rather than the return of the officer, that confers jurisdiction. *In re Leggett*, 67 N.C. App. 745 (1984); *In re Arends*, 88 N.C. App. 550 (1988).

b. Service on one parent is sufficient for the court to have jurisdiction over the **subject matter** in a proceeding involving dependency and neglect. *In re Arends*, 88 N.C. App. 550 (1988).

c. Where a summons is not issued, the trial court will not acquire jurisdiction (neither personal nor subject matter) over the proceeding. *In re Mitchell*, 126 N.C. App. 432 (1997). In *Mitchell*, the court stated that the parents had not submitted to jurisdiction of the court merely by their appearance at the initial nonsecure hearing because they made a timely oral motion to dismiss the petition based on a lack of summons.

F. Right to Counsel and Parties to the Proceeding

1. Parent's right to counsel [7B-602(a)]:

"In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right." The statute further provides for the appointment of provisional counsel by the clerk. At the first hearing, the court dismisses provisional counsel if 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. Otherwise, the court reaffirms the appointment of counsel. The court also has the authority to reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceedings.

2. Right to counsel applies only to parents:

Grandparents, foster parents, and other caretakers do not have a right to appointed counsel. The statute (**7B-602**) only specifies "parent" and does not state that anyone else is entitled to appointed counsel.[11]

3. Who is a "party"?

[10] Also see § 1.5 below on jurisdiction.

[11] According to Danielle Carmen, Assistant Director of Indigent Defense Services (IDS), the "unofficial" policy is slightly broader than the plain language of the statute to include legal guardians and legal custodians.

The parents or caretakers named in the petition, DSS, and the juvenile via the GAL (volunteer and attorney) are all parties to the proceeding.[12] Grandparents, foster parents, and others are not parties as there are no statutory provisions giving them party status.

4. Parent's right to Rule 17 GAL in certain circumstances [13]

Parent is a Minor [7B-602(b)]

In addition to the right to appointed counsel, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent under the age of 18 years who is not married or otherwise emancipated. Note that if the minor parent is subject of a juvenile petition, the appointment of a Rule 17 guardian ad litem does not affect entitlement to a guardian ad litem pursuant to G.S. 7B-601.

Parent has Diminished Capacity [7B-602(c)-(e)]

Instead of an automatic appointment based on a pleading of dependency pursuant to G.S. 7B-101 due to substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition, appointment of a Rule 17 guardian ad litem is by motion of any party or the court. Upon motion, the court considers whether there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own best interest.

Behaviors, psychological evaluations, social security disability benefits should be alerts for juvenile court practitioners to consider whether it is appropriate to make a motion for a Rule 17 guardian ad litem.[14]

The statute specifically provides that the parent's counsel shall not be appointed as the Rule 17 guardian ad litem. However, communications between the guardian ad litem and parent's counsel is privileged and confidential to the same extent that communications between counsel and client are privileged.

The is some guidance as to the role of the appointment in that the guardian ad litem may in engage in the following: (1) helping the parent enter consent orders; (2) facilitating service of process on the parent; (3) assuring that necessary pleadings are filed; and (4) assisting the parent and the parent's counsel, if requested, to ensure that procedural due process requirements are met. Note: a guardian ad litem appointed under this subsection in accordance with G.S. 1A-1, Rule 17, does not fulfill the same role as representing best interests pursuant to G.S. 7B-601. The trial court should always keep in mind that appointment of a guardian ad litem divests the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. *In re J.A.A.*, 175 N.C. App. 66, 71 (2005).

§ 1.4 Paternity, Missing and Unknown Parents

[12] See 7B-601, which clearly states that the juvenile is a party.
[13] Amendments to this statute were enacted by Session Laws 2005-398 effective October 1, 2005.
[14] The Court of Appeals held that the clear mandate of the statute does not require reversal where the court makes an appointment sometime after the actual commencement of the action unless the appointment is so untimely that it results in prejudice to the incompetent person's case. *In re H.W.*, 163 N.C. App. 438, 448 (2004)(decided under former statute).

[Please see the "Putative Father Checklist" and the "Missing Parent Checklist" at the end of Chapter 4 of this manual.]

A. Serving Missing or Unknown Parents [7B-407]

Service of a summons in a case of abuse, neglect, or dependency can be made by mail or publication if the parent (or guardian, custodian, caretaker) cannot be found through diligent effort and the court authorizes it. Service by publication is made pursuant to G.S. 1A-1, Rule 4(j1) of the Rules of Civil Procedure (see that rule for detailed requirements). Among other things, such service consists of publishing notice once a week for three successive weeks.

Other ways to locate a missing parent include searching the Internet, military records, law enforcement records, or by referring the case to child support enforcement if appropriate.

B. Why Locate an Uninvolved Parent?

If the petition has allegations involving only one parent and the other is not involved, nowhere to be found, or even unknown, it is still necessary to attempt to locate the uninvolved parent. Even though theoretically DSS should attempt to locate the missing parent, a GAL volunteer may be able to get information that assists in locating or naming the missing parent. There are several reasons it is necessary to try to locate an uninvolved parent, including the following:

1. **The uninvolved parent or family may be a decent placement option** should one be necessary.

2. **The parent should probably be paying child support** to child's custodian.

3. **It is wise to establish paternity in the earliest possible stage** of a case, because uncertainty regarding paternity can complicate or even "undo" a case down the road. By statute, the court is required to examine whether paternity is an issue as well as the efforts undertaken to establish paternity, and to make findings regarding to paternity in its order. **[7B-506(h)]**

   a. **A "putative father"** refers to the person alleged to have fathered the child but whose parentage is at issue and is not married to the mother. This term comes up frequently in this field of practice. It the mother was married at the time of the child's birth, it is possible that the child have two fathers: the "legal" father to whom the mother was married and the putative biological father. It is necessary to identify both fathers in this situation.

   b. **If a father has been named but the parents are unmarried**, it is often wise to push to get a blood test ordered to establish paternity if the putative father can be located. This can become very important later should termination of parental rights become the best option. For a case on paternity, see *Brown v. Smith*, 137 N.C. App. 160, 526 S.E.2d 686 (2000).

§ 1.5 Jurisdiction and Venue

A. Jurisdiction [7B-200]

1. For the purposes of GAL representation, North Carolina district court has exclusive, original jurisdiction over any case involving the following:

- A juvenile who is alleged to be *abused, neglected, or dependent*
- Proceedings under the *Interstate Compact on the Placement of Children*
- Proceedings involving judicial *consent for emergency medical treatment* for a juvenile when juvenile's parent, guardian, custodian or adult with custody refuses to consent to the treatment
- *Emancipation* proceedings
- *Termination of Parental Rights* proceedings
- Proceedings to review *foster care placement* pursuant to an agreement between DSS and parents or guardians
- Proceedings in which a person is alleged to have *obstructed or interfered with an investigation of abuse, neglect, or dependency* under **7B-302**
- Proceedings involving consent for an abortion on an unemancipated minor
- Proceedings involving an underage party seeking to marry
- Petitions for expunction of an individuals name from the responsible individuals list under Article 3A of Chapter 7B

2. The court has personal jurisdiction over the parent of a juvenile who has been adjudicated abused, neglected, or dependent if the parent has been properly served pursuant to 7B-406. Jurisdiction over the parent attaches upon service of the summons, and the court can issue an order to show cause for contempt if the parents fail to comply with any order of the court that was made pursuant to 7B-904. **[For cross-statutory reference, see 7B-406(c)]**

a. **Where no summons is issued to the parents**, the court has neither personal nor subject matter jurisdiction over the action. But service of the summons on only one parent is sufficient to confer subject matter jurisdiction. *In re Arends*, 88 N.C. App. 550 (1988).

b. The parents cannot be said to have 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).

c. Cases have discussed the requirement of minimum contacts with parent in TPR proceedings but not in adjudication of abuse, neglect, or dependency (*see, e.g.*, *In re Trueman*, 99 N.C. App. 579 (1990); *In re Finnican*, 104 N.C. App. 157 (1991), *disc. rev. denied*, 330 N.C. (1992), *In re Dixon*, 112 N.C. App 248 (1993)).

3. Relation to other civil custody actions

a. **Stay of proceedings.** When the court obtains subject matter jurisdiction over a juvenile petition alleging abuse, neglect or dependency, any other pending civil custody action is automatically stayed, unless the actions are consolidated or the stay is dissolved. The court may then decide whether to proceed with the juvenile proceeding while the civil action is stayed; or stay the juvenile proceeding to allow the civil custody action to proceed. **[7B-200(c)(1) & (d)]**

b. **Consolidation of proceedings.** The juvenile court may order that any custody action or

claim filed in the same district be consolidated with the juvenile proceedings. If the action or claim is in another district, for good cause and in consultation with the our-of-district court, the civil action may be transferred to the district in which the juvenile proceeding is filed; or venue may be changed in the juvenile proceeding to allow for transfer to the other district. **[7B-200(d)]**

c. **Conflicting orders.** If an order in a civil custody action conflicts with a juvenile order, the juvenile order controls so long as the juvenile court continues to exercise jurisdiction. **[7B-200(c)(2)]**

4. Age of the child and jurisdiction

a. **There is no minimum age** set out in the statute for juveniles alleged to be abused, dependent, or neglected. **[7B-200]**

b**. Once obtained, jurisdiction continues until terminated by the court, until the juvenile reaches age 18, or until the juvenile is otherwise emancipated, whichever occurs first.** [**7B-201(a)].** See *In re Shue*, 311 N.C. 586 (1984); *In re Stedman*, 305 N.C. 92, 98 (1982); See also *In re N.C.L.*, 89 N.C. App. 79, *disc. rev. denied*, 322 N.C. 481 (1988), stating that "once jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined."]

c. **Termination of jurisdiction** provides that the court may not modify or enforce any previously entered court order relating to custody, placement, or guardianship and the legal status of the juvenile and custodial rights of the parties reverts to pre-petition status quo. However, termination of juvenile court jurisdiction does not affect the following: (1) civil custody order entered pursuant to G.S. 7B-911; (2) termination of parental rights order; (3) a pending action to termination parental rights, unless the court orders otherwise; (4) delinquency or undisciplined proceedings; or (5) jurisdiction pursuant to a new juvenile petition that is filed.[15] **[7B-201(b)]**

B. Other States' Involvement

When there is a possibility that another state has been or will be involved in the case, there are three sets of laws that may be applicable and should be examined. *All of the following are set out in further detail in Volume 2, Chapter 11 of this manual, which should be consulted whenever another state is involved.*

1. Interstate Compact on the Placement of Children (ICPC) N.C.G.S. § 7B-3800, et seq.
This federal law, codified in the North Carolina General Statutes, governs interstate placement of children between North Carolina and other jurisdictions. The ICPC applies to interstate placement by a "sending agency" but not to the sending or bringing of a child into a receiving state by his parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or nonagency guardian in the receiving state. This means that anytime DSS (or another agency) from another state sends a child here or vice versa, the ICPC will govern the placement. *For more detailed information, please refer to § 11.5 in this manual.*

[15] Session Laws 2005-320 effective October 1, 2005 enacted subsection (b) relating to termination of jurisdiction However, this amendment is in accordance with appellate decisions holding that once a juvenile case is "closed" and the court ceases to exercise jurisdiction, the juvenile court has returned the parents to their pre-petition status. See *In re Dexter*, 147 N.C. App. 110 (2001) and *In re A.P.*, 361 N.C. 344 (2007) (decided under former version of 7B-200).

2. Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) N.C.G.S. 50A-101 through 50A-317 *and* Parental Kidnapping Prevention Act (PKPA) 28 U.S.C.A. Sec. 1738A. These are both federal laws, and the UCCJEA is codified in the North Carolina General Statutes. Whenever more than one state will be or has been involved in issues of child custody, it may become necessary to deal with the provisions of the UCCJEA and the PKPA. These laws do apply to child dependency, neglect, and abuse proceedings (*see In the matter of Van Kooten*, 126 N.C. App. 764, 768-69 (1997)). The PKPA was passed after the UCCJA (predecessor to the UCCJEA) and relates more to custody than to kidnapping. Both acts seek to prevent forum shopping by parents, ensure proper jurisdiction, and require states to honor orders of other states. *For more detailed information, please refer to §§ 11.1 – 11.4 in this manual.*

C. Venue [7B-400]

1. Venue refers to the proper court in which the proceeding should be brought

a. **Location:** Child abuse, neglect, or dependency cases are commenced in the district in which the juvenile resides or is present.

Venue is not jurisdictional and is subject to waiver. *In re J.P.*, 2006 N.C. App. LEXIS 715 (Unpublished); *See also Jones v. Brinson*, 238 N.C. 506 (1953).

b. **Transfer:** If the action is commenced in a jurisdiction other than where the juvenile resides, the court may transfer the case—at any time—to where the juvenile resides.

In the case of *In re Phillips,* 99 N.C. App. 159 (1990), the court held that a trial court incorrectly transferred custody of a minor child to Cumberland County, even though the trial court had found that the distance from the child's home county of Bladen to the treatment facility where the child was receiving treatment was prohibitive to the provision of services by Bladen County and the GAL. Neither the distance nor her parents' incarceration affected the minor child's residence.

D. Children Born in Other Countries

Special Issues arise when the children who are the subject of a petition were born outside of the U.S. *For these situations, please consult § 13.7 of this manual for more detailed information.*

§ 1.6 Temporary and Nonsecure Custody

A. Underlying Purpose

Section 7B-100 of the General Statutes states that 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 juveniles' needs for safety, continuity, and permanence." Although returning the child to his or her home is ideal, it often becomes an unrealistic or unsafe option, which is why 7B-503 and 7B-506 set out criteria under which the court may continue to keep the child in nonsecure custody; and is also why 7B-507 allows the court to

consider ceasing reunification efforts at this early stage under certain circumstances.

B. Temporary Custody

1. Circumstances [7B-500]

If there are "reasonable" grounds to believe that a juvenile is abused, neglected, or dependent and that the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order, the juvenile may be taken into *temporary custody* until a court order for nonsecure custody can be obtained. [Note the distinction between secure and nonsecure custody: secure custody is within a locked facility, while nonsecure custody is not locked–and therefore not "secure." G.S. 7B-503 specifically provides that a juvenile alleged abused, neglected, or dependent *may never be placed in secure custody*.]

The task at the temporary custody or removal stage (temporary custody is different from nonsecure custody generally) is to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection. *In re Evans*, 81 N.C. App. 449 (1986).

2. Length of temporary custody [7B-501(b)]

Once the juvenile is taken into temporary custody***, he or she cannot be held there 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.

3. Medical professionals [7B-308]

Medical professionals are entitled to seek authorization by the chief district court judge or the judge's designee to retain physical custody of a suspected abused juvenile when the medical professional examines the juvenile and certifies in writing that he or she 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. This statute is detailed and should be consulted.

C. Nonsecure Custody

Once DSS files a petition, a child often will be placed in nonsecure custody. Sometimes a child will be voluntarily placed outside the home without a nonsecure custody order (called a Voluntary Placement Agreement—see subsection D *infra*). Other times, the child is simply not removed despite the filing of a juvenile petition. If the GAL or AA consider the child's current temporary placement pending adjudication unsatisfactory or unsafe, the AA should make this clear to the court either in the nonsecure hearing or by filing a motion for a hearing to request a change in placement. If DSS has not removed the child and has not filed to obtain a nonsecure custody order and the GAL believes that the child should be removed and has evidence to support the removal, the AA should seek to obtain a nonsecure custody order.

1. Requirements for a nonsecure custody order: After a petition is filed, nonsecure custody orders can be issued in writing by the judge or the judge can delegate (via administrative order filed with the clerk) the authority to issue such orders to other people. **[7B-502]** A judge's authority to enter a nonsecure custody order depends upon the following findings:

a. there is a *reasonable factual basis* to believe matters alleged in the petition are true;

b. there are *no other reasonable means available to protect the juvenile*;

c. that *release* of the juvenile to his or her parent, relative, guardian, custodian, or other responsible adult is first considered; and

d. the *juvenile meets one of the following criteria* [see statute, **7B-503**]:

i. has been **abandoned**; or

ii. has suffered **physical injury or sexual abuse**; or

iii. is exposed to a **substantial risk** of physical injury or sexual abuse because the parent, custodian, guardian, or caretaker has created conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision and protection; or

iv. is in need of **medical treatment** to cure, alleviate, or prevent suffering serious physical harm that may result in death, disfigurement, or substantial impairment of bodily functions and his parent, guardian, custodian, or caretaker is unwilling or unable to provide or consent to the medical treatment; or

v. the **parent, guardian, custodian, or caretaker consents** to the nonsecure custody order; or

vi. the **juvenile is a runaway and consents** to nonsecure custody.

An order for nonsecure custody (and other certain orders) can be made by telephone if other means of communication are impractical. **[7B-508]**

2. Place of nonsecure custody [7B-505]

a. In placing a juvenile in nonsecure custody, 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 shall order placement of the juvenile with the relative *unless* the court finds that placement with the relative would be contrary to the best interests of the juvenile. Unfortunately, the language in the statute stating that the child need not be placed with a willing and able relative *if it is not in the child's best interest* is sometimes ignored. *It is important that the AA argue this best interest language in the statute when it is in fact not in the child's best interest to be placed with a relative.* Whether it is in the child's best interest to remain in the community of residence is also considered.

b. If there is no appropriate relative for placement, nonsecure custody may be placed with DSS or a person designated in the order for temporary residential placement in one of the following:

- a licensed foster home or home authorized to provide foster care; or
- a DSS facility; or

- any other home, or facility, including a relative's home, approved by the court and designated in the order. **[7B-505]**

c. In placing a juvenile in nonsecure custody, the court shall consider the Indian Child Welfare Act, Pub. L. No. 95-608, 25 U.S.C. sec. 1901, *et seq*., as amended, and the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056, as amended, as they may apply.[16]

d. Placement of a juvenile with a relative *outside of this state* must be in accordance with the Interstate Compact on the Placement of Children.[17] **[7B-505]**

3. Violent Caregivers

Requirement of Background Check. When a child is removed from a home due to physical abuse, DSS must conduct a thorough review of the background of the alleged abuser or abusers. "This review shall include a criminal history check and a review of any available mental health records. If the review reveals that the alleged abuser or abusers have a history of violent behavior against people, the director shall petition the court to order the alleged abuser or abusers to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist." **[7B-302(d1)]**[18]

Relation to Criteria for Nonsecure Custody. "Whenever a petition is filed under 7B-302(d1), the court shall rule on the petition prior to returning the child to a home where the alleged abuser or abusers are or have been present. If the court finds that the alleged abuser or abusers have a history of violent behavior against people, the court shall order the alleged abuser or abusers to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist. The court may order the alleged abuser or abusers to pay the cost of any mental health evaluation required under this section." **[7B-503(b)]**

Relation to Hearing to Determine Need for Continued Nonsecure Custody. "In determining whether continued custody is warranted, the court shall consider the opinion of the mental health professional who performed an evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual." [**7B-506(c1**), also see **7B-903(b)** relating to violent caregivers and the dispositional phase of the case][19]

D. Placement Outside the Home Without Nonsecure Custody ("Voluntary Placement")

In some cases, DSS may prefer to attempt voluntary placement with a relative or friend outside the home rather than seek a nonsecure custody order, even when a petition is filed. G.S. 7B-910 governs the review of voluntary placements and requires a hearing within 90 days of the placement. Although such an arrangement may work out, only if a petition is filed is a GAL appointed, and it often puts the

[16] See Chapter 11 of this manual for more information on the Indian Child Welfare Act and the Multiethnic Placement Act.
[17] See Chapter 11 of this manual for more information on the Interstate Compact.
[18] All statutory language related to "violent caregivers" (the term used by the legislature to refer to an alleged abuser with a history of violent behavior against people) contained in G.S. 7B-302(d1), 7B-503(b), 7B-506(c1), 7B-903(b), and 7B-1003 were created by 1999 legislation.
[19] For a provision relating to disposition pending appeal when a violent caregiver is the perpetrator, see 7B-1003.

GAL in a worse position due to the following factors:

- Seven-day hearings are not required in such a situation; thus there is no built-in mechanism for court review. (The court therefore lacks the power to provide for preadjudication hearings or preadjudication services, and it is harder to obtain information about the case without the hearings.)
- Such voluntary placements may make it more likely that the children will be taken to see the parent's attorney without GAL knowledge or that the children will be influenced not to disclose information that would aid in adjudication.
- Children with special needs will not have those needs addressed.
- The children will have unauthorized contact with parents or perpetrators without GAL knowledge (e.g., the caretaker may be a grandparent who raised the parent who is the perpetrator).

Other disadvantages of a voluntary placement without the filing of a juvenile petition include the lack of procedural safeguards, no counsel for parents, and minimal, infrequent court involvement. If DSS chooses voluntary placement and files a petition, the GAL should begin an independent investigation to determine the appropriateness of the agreed-upon placement. If the GAL considers a nonsecure custody order more appropriate or the placement contrary to the juvenile's best interest, the GAL can seek to obtain a nonsecure custody order. *For additional information, see § 10.2 (G.1) in this manual, regarding voluntary placement.*

E. Others Talking to the Child

State Bar ethics opinions RPC 249 and RPC 61 make it clear that attorneys are prohibited from talking to a child who is represented by an attorney [advocate] without authorization from that attorney.[20] Many attorneys do not realize that they should not talk to the child about the case without the authorization of the child's attorney (GAL attorney advocate). Parents' attorneys, DSS attorneys, law enforcement officers (when acting as agents of prosecutors), criminal defense attorneys, and prosecutors all have been known to have such unauthorized conversations. In addition, parents and caretakers with physical custody of the child often do not realize that they cannot give consent for the child to talk to an attorney.

Parents can be informed by their own attorney (at the suggestion of the attorney advocate) that the child should not be talking to an attorney without his or her attorney's authorization. The parent could also be so informed in the courtroom, on the record, if the judge allows it.

Attorneys, parents, and law enforcement personnel can be informed by way of a routine letter, sent out at the beginning of a case, simply explaining that the attorney advocate represents the child and must be contacted if they want to talk to the child. (See sample letters in appendix to this manual.) RPC 249 and RPC 61 address these issues directly and can be cited in a letter to attorneys, as can the statutory authority for the attorney advocate's representation of the child.

§ 1.7 The Hearing to Determine Need for Continued Nonsecure Custody

A. Assessment, Consent, and Preparation for Hearing [21]

1. Assess positions: If possible, the AA can attempt to determine the position of DSS and of the parents concerning nonsecure custody. If the parents and GAL agree, a consent order may be obtained

[20] See Chapter 12 for more information on this topic and to reference these ethics opinions

[21] The checklist at the end of this chapter in the manual can be used as a preparation tool for nonsecure custody hearings.

for waiver of the nonsecure custody hearing (except for initial hearing) but the court may require additional consent or schedule the hearing anyway. **[7B-506(f)]** If there is no consent, the AA must assess whether he or she will need to present evidence at the nonsecure custody hearing, which will depend on the positions taken by DSS and the parents, whether appropriate preadjudication services are being provided, whether the placement is appropriate, and what evidence DSS will be presenting. Obviously, the timing may be such that the GAL and AA have not had the opportunity to collect much information prior to a nonsecure hearing. However, every attempt should be made to get information prior to the hearing and to utilize the hearing to gain information and begin taking steps to move the case forward. Please refer to § 1.2 in this chapter on "Frontloading the System," which explains more about how to make good use of nonsecure custody hearings, with or without a lot of information.

The AA should prepare to advocate for appropriate services and placement and to cross-examine witnesses. If necessary, he or she should be prepared to present evidence to the court concerning the need for continued custody or change in placement as well as evidence concerning reasonable efforts.

2. Subpoena witnesses: If the AA believes that it is necessary to supplement the evidence DSS intends to present, the AA should collect any information and subpoena any witnesses who will need to be present at the hearing to support the GAL's position. If the subpoena is unlikely to be served in time for the hearing, or in time for adequate notice, the AA should call the witness and ask him or her to be present and then get a subpoena to be served by phone so that it is official. A document subpoena (subpoena *duces tecum*) must be served in person and cannot be served by law enforcement by telephone. Also, only a public official may serve a summons, but any person eighteen years or older who is not a party may serve a subpoeana. Remember that a copy of each subpoena must be served upon each party to the proceeding. For other specifics, see Rule 45 of the North Carolina Rules of Civil Procedure and form AOC-G-100.

B. Procedural Issues for Nonsecure Custody Hearing [7B-506]

1. Timing

a. The court must conduct a hearing within seven days of the time the juvenile is taken into nonsecure custody. If an designee and not a judge issues the custody order, a hearing must be conducted on the day of the next regularly scheduled district court session. **[7B-506(a)]**

b. Such a hearing may be continued up to ten business days with consent of the parent and GAL, but the court may require additional consent or decided to schedule the hearing anyway despite agreement for a continuance. **[7B-506(a)]**

c. Pending the adjudicatory hearing and after the initial custody hearing, there must be another custody hearing within seven business days and then every thirty calendar days thereafter, unless waived with the consent of the juvenile's parent, guardian, custodian, or caretaker and guardian ad litem. **[7B-506(e) & (f)]**

2. Burden/standard of proof/criteria: The State (DSS) bears the burden to provide clear and convincing evidence that the juvenile's placement in custody is necessary. **[7B-506(b)]** A nonsecure custody order (or an order to continue custody) shall be made only when:

- there is a reasonable factual basis to believe the matters alleged in the petition are true,

- one of the seven criteria in 7B-503 is met, and
- there is no other reasonable means available to protect the juvenile.
  [See 7B-503 and 7B-506]

3. Relaxed evidentiary rules: The court is not bound by the usual rules of evidence at nonsecure custody hearings. **[7B-506(b)]**

4. Court's inability to dismiss petition at nonsecure stage: The court has the authority to continue nonsecure custody or return the child to the parent but not to dismiss the petition. *In re Guarante*, 109 N.C. App. 598 (1993).

5. Court may not grant permanent custody at a nonsecure hearing: The court does not have the authority to grant permanent custody to a non-custodial parent or other person without an adjudicatory hearing on the merits. *In re O.S.*, 175 N.C. App. 745 (2006).

6. Sources of information: The court shall receive testimony and shall allow the Guardian ad Litem or juvenile, and the juvenile's parent, guardian, custodian, or caretaker an opportunity to introduce evidence, to be heard in the person's own behalf, and to examine witnesses. **[7B-506(a)]**

C. Requirements for Nonsecure Custody Court Orders [7B-506(d)]

1. A judge's order to continue custody should be **in writing**.

2. The order should have **findings of fact** that include the evidence relied upon in reaching the decision and the **purpose achieved** by continued custody.

3. The order shall be **signed** and **entered** within **30 days** of the completion of the hearing.

4. See "Reasonable Efforts," below.

D. Reasonable Efforts [7B-507] [22]

1. All orders placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, shall contain the following: **[7B-507(a)]**

a. **Best interest:** a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;[23]

[22] Federal Regulations on the Adoption and Safe Families Act (ASFA) took effect on March 27, 2000, and have a number of requirements pertaining to reasonable efforts. These requirements, along with information on ASFA, can be found in Volume 2, Chapter 11 of this manual, which the reader is strongly urged to consult for important ASFA information. Lack of compliance with these regulations seriously jeopardizes federal funding to state programs. Specifically, these regulations state that there must be a finding that continuation of the child in the home is contrary to the welfare of the child and there must be findings that there have been reasonable efforts both to prevent placement and to finalize a permanent placement home. Source for ASFA information: *New Federal Regulations on ASFA: Detailed Court Findings Concerning "Reasonable Efforts" and "Contrary to the Welfare" Findings*, by Mark Hardin, National Child Welfare Resource Center on Legal and Judicial Issues, April, 2000.

[23] The "contrary to the welfare" requirement in the ASFA Regs (see previous footnote) is met if the court finds that the placement is in "the child's best interest." 65 Fed. Reg. 4055. However, the court should not depart from the specific language in such phrases since other phrases may not be considered to have the same meaning as the phrase "contrary to

b. **Findings of reasonable efforts:** findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined that such efforts are not required or shall cease;[24]

i. A finding that reasonable efforts have not been made by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds placement is necessary for the protection of the juvenile. Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable.

ii. For a case discussing reasonable efforts, see *In re Helms*, 127 N.C. App. 505 (1997).

c. **Continuation of reasonable efforts:** findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile unless the court has previously determined or determines that such efforts are not required or shall cease;

d. **DSS responsibility for child:** a statement specifying that the juvenile's placement and care are the responsibility of the county department of social services and that the agency is to provide or arrange for the foster care or other placement of the juvenile; and

e. **Services:** Possible provision for services or other efforts aimed at returning the juvenile to a safe home or at achieving another permanent plan for the juvenile.

2. **Ceasing reunification:** In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, *the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease* if the court makes written findings of fact that: **[7B-507(b)]**

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

(2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

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the welfare."

[24] The Federal Regulations on ASFA require that findings that there were reasonable efforts to prevent placement must be made within 60 days following the removal of the child from home. "Contrary to welfare" findings must be made in the first court order authorizing the children's removal from home. The ASFA regulations say there are three types of reasonable efforts: 1) reasonable efforts to prevent placement; 2) reasonable efforts to reunify families following placement; and, 3) reasonable efforts to arrange and finalize a new permanent home after reunification is no longer the goal. 45 C.F.R § 1356.21(b). The only required judicial findings of reasonable efforts, however, are 1) the court must find that there have been reasonable efforts to prevent placement; and 2) there have been reasonable efforts to finalize a permanency plan. 45 C.F.R. § 1356.21(b)(2).

(3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or

(4) A court of competent jurisdiction has determined that the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent**.**

3. **Permanency Planning Hearing when reunification is ordered to cease:** At any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by G.S. 7B-907 be held within thirty (30) calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing. **[7B-507(c)]**

4. **Child's health and safety is paramount concern:** In determining reasonable efforts to be made with respect to a juvenile and in making such reasonable efforts, the juvenile's health and safety shall be the paramount concern. **[7B-507(d)]**

5. **Concurrent planning is appropriate:** Reasonable efforts to preserve or reunify families may be made concurrently with efforts to plan for the juvenile's adoption, to place the juvenile with a legal guardian, or to place the juvenile in another permanent arrangement. **[7B-507(d)]** See *In re J.J.L.*, 170 N.C. App. 368 (2005), holding that a concurrent plan of reunification and adoption was appropriate.

E. Issues the Court Shall and Should Consider in Nonsecure Custody Hearings [25]

1. The primary purpose of a nonsecure custody hearing is for the court to determine whether the child should be returned home or placed elsewhere pending adjudication. The court must also examine reasonable efforts by DSS to prevent removal of the child.

2. In any hearing to determine the need for continued custody, the court *must* also inquire about and address the following issues: **[7B-506(h)]**

a. the identity and location of any missing parent;

b. whether there is a relative who is willing and able to provide proper care and placement temporarily in a safe home. If so, the court shall order temporary placement with the relative unless the court finds that such placement would be contrary to the best interests of the juvenile. (The court must consider and apply the Indian Child Welfare Act, the Multiethnic Placement Act, and the Interstate Compact, all explained in Chapter 11 of this manual.);

c. whether there are other juveniles remaining in the home and their status;

d. whether paternity is at issue, and efforts undertaken to establish paternity.

3. **The court should also consider the following** issues in the best interest of the child:

[25] See, generally, The National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, 1995, p. 37.

a. terms of **visitation** for parents and siblings;

b. where the child will attend **school** if child's temporary placement is in a different district;

c. **services** that the parent and child should be receiving prior to adjudication, and clarification as to how, when, and by whom such services should be initiated – note that the court does not have authority over parents if there is no nonsecure custody order. Visitation with the child might be made conditional upon the parent doing certain things (e.g., a mental health evaluation or beginning substance abuse treatment where there is strong evidence that the problem is caused by mental illness or substance abuse);

d. financial support for the child;

e. the potential need to impose conditions to protect a child from being exposed to an allegedly abusive person. (For example, when a child is placed with the mother in a case in which an abusive boyfriend or father is no longer in the home or the mother has moved, a request could be made that the judge make return of the child to the mother conditional on getting a restraining order against the abusive person in order to protect the child.) Note that the court has no jurisdiction to issue orders to a person not named as a party or not served in the matter. The court can, however, address this issue with DSS and the parent so that they can look into taking action.

[**Note regarding 50B Orders**: It is also important to be aware of existing or potential domestic violence proceedings under Chapter 50B of the North Carolina General Statutes.]

f. Is the proposed placement the **least disruptive and most family-like** setting that meets the needs of the child?

§ 1.8 Working Toward Consent and the Prehearing Conference

Getting enough court time for juvenile cases is a problem throughout the state. In addition, court officials admit that sometimes court time is utilized neither wisely nor efficiently, with too many continuances, recesses for negotiation, or just plain "dead time." Perhaps the single best solution to the problem of inefficient use of court time is to work toward consent and insist on prehearing conferences.

A. Consent Orders [7B-902]

Consent is beneficial in minimizing the adversarial nature of the proceedings, in promoting cooperation to achieve the best results for everyone, and in reducing court time spent on a trial.

1. Consent under the statute: The Juvenile Code makes it clear that the judge can enter a "consent order or judgment on a petition for abuse, neglect or dependency when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel and sufficient findings of fact are made by the court."

2. Working toward consent with good communication: If all parties have an opportunity to clearly and thoroughly communicate their perspectives on the case, their goals, their problems, and their ideas, they are much more likely to reach a consent agreement. Taking the time to communicate in order to have an adequate understanding of one another may save time and effort in the long run by avoiding

lengthy court hearings. Such conversations also may increase the chances of parental success by allowing the parent to have a say in the solution.

Please see § 2.4 for case law and more detailed information on consent agreements.

B. Prehearing Conferences*

1. Format for conference: In some districts, prehearing conferences are formally scheduled and attended by the judge; some districts utilize Rule 16 in the Rules of Civil Procedure, which provides for pretrial conferences. In other districts, prehearing conferences are informal, scheduled by the parties, and the judge does not attend. At the beginning of this chapter in § 1.2, the benefits of prehearing conferences are discussed under the heading "front-loading the system." The list of purposes and goals below relates less to the benefits and more to the practical substance of prehearing conferences.

2. The purpose and goals of a prehearing conference [26]

- To share appropriate information about the case that will aid the parties in their investigative efforts.
- To share perspectives on the case that will allow the parties to identify the issues on which they agree and those on which they cannot agree.
- To make stipulations as to those facts and/or issues that parties can agree on and establish the content of a potential consent order.
- To share witness lists, exhibit lists, and exhibits to expedite the discovery process and help parties prepare for the evidence they will need to present in court.
- If there is a missing parent or if paternity is in issue, to establish the steps that are to be taken to identify the parent, locate the parent, or establish paternity.
- Identify and discuss the services needed by the child and parents.
- Identify pretrial motions that may be made by any party.

**Please see the prehearing conference checklist at the end of this chapter.*

§ 1.9 Confidentiality and Discovery

A. Discovery

1. Utilizing regular discovery tools

Parties in abuse, neglect, and dependency matters may utilize the discovery tools available in any civil case except when otherwise stated by the Juvenile Code. Rules 26 through 37 of the North Carolina Rules of Civil Procedure address discovery. But traditional civil discovery often moves far too slowly for child protection cases. **G.S. 7B-803** allows a judge to grant continuances for a reasonable time to allow for "expeditious discovery."

There may be times when obtaining information via discovery motions is preferable to other methods. Social Security and medical records, for example, may be requested in discovery

[26] Originated from draft of proposed revisions to the Juvenile Code by the Court Improvement Project Juvenile Code Revision Committee.

from the parent. If a simple request for records or a discovery motion does not work, attorney advocates may subpoena the records or issue a subpoena duces tecum so that the custodian of the records must bring them.

Under 7B-700(a), "[u]pon written motion of a party under a finding of good cause, the court may at any time order that discovery be denied, restricted, or deferred." Under 7B-700(b), the court may permit the party seeking relief under subsection (a) to submit supporting affidavits or statements for in-camera inspection.

2. Medical records protected by federal substance abuse records regulations

See Chapter 11 of this manual on federal laws for detailed information on 42 CFR Part 2, and the appendix to this manual for sample forms relating to this issue.

a. 42 CFR generally: All medical records that identify or diagnose a person as a substance abuser, a term that includes alcoholics, or which contain substance abuse treatment records are protected by federal regulations in Section 42, Part 2, of the Code of Federal Regulations (42 CFR 2). Section 42 Part 2 prohibits the release of such records without an executed consent to release records form that conforms to the federal regulations or through court proceedings under the federal regulations. These regulations supersede the state statutory investigatory powers of DSS and the GAL and standard discovery procedures. State courts do not have authority to override these regulations through court orders except as specifically provided by 42 CFR Part 2.

b. Procedure for seeking substance abuse records via hearing: To seek a court order for the release of substance abuse records when consent cannot be obtained, the following procedures outline one possible approach:

- An attorney makes a motion to have a hearing on release of substance abuse records.
- The attorney provides the motion and notice of the hearing to all parties and to the mental health agencies that may possess the records being sought.
- The attorney must be aware that there is an issue regarding preservation of the anonymity of the person whose records are sought (one could argue that the confidentiality of juvenile records in general would preserve the anonymity). The motion can refer to the patient as "John Doe." The way an attorney chooses to treat the issue of anonymity will depend on local practice and the potential for exposure of such records. This issue should be addressed and dealt with on the record.
- At the hearing (closed to the public), the attorney will argue the relevance of such records in the hearing where the records would be introduced in evidence (such as adjudication or disposition), and ask for an order to produce such records. Such an order would compel production on a certain date when the judge would review the records.
- The mental health agency or professional should receive the order, showing that they are authorized and compelled to release the information, along with a subpoena for the records for purposes of the hearing on the motion. Note that a subpoena must be issued to each director of medical records from whom substance abuse records are sought. The subpoena must accompany the order to produce records for review. A mental health agency or professional may choose to mail such records to allow the judge to review them on the date in the order (often on a

juvenile court date) set for a hearing on the motion.

- The judge examines the records based on the requirements in 42 CFR part 2 and may make a ruling as to who is authorized to see such records but not as to admissibility in the actual hearing in which a party will attempt to admit the records.
- The mental health professionals involved in creating the substance abuse records should be subpoenaed for hearing at which documents may be introduced, and a subpoena should also issue for the records themselves.
- At the hearing, the attorney seeking to introduce the records will follow regular procedure to admit such records into evidence, but other parties may still object to introduction. (Unless something has occurred in the hearing to change relevance of the records, the prior determination of relevance is likely to stand.)

3. Education records and "FERPA" [20 U.S.C. Sec. 1232g]

FERPA is the Family Educational Rights and Privacy Act, a federal law that protects the privacy interests of parents and students with regard to education records. [27] It applies to public elementary and secondary schools and virtually every postsecondary institution in the country. FERPA protects educational records unless a parent of a child under eighteen or a student eighteen or older consents to release. The law lists a number of exceptions, however, under which educators do not need prior consent to release. FERPA does not govern educators' decisions to share information concerning students based on their personal knowledge or observation, provided the information does not rely on the contents of an education record.

More detailed information on FERPA can be found in Chapter 11 on Federal Laws.

B. Confidentiality

1. Disclosure of information concerning the child generally prohibited

Juvenile information is protected well beyond the scope of the attorney-client relationship and is vital to the protection of the child. Sections 7B-2901 to 7B-2902 emphasize the strict confidentiality of juvenile records. In addition, **s**ection 7B-601 allows the GAL access to confidential information but states that "[t]he 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 judge or unless otherwise provided by law."

2. Disclosure in child fatality or near-fatality cases

It is important to note that the rules of disclosure are different when there is a child fatality or near fatality. Such disclosure is governed by **7B-2902,** set out in the statute at the end of this chapter.

3. Juvenile Court records and hearings

[27] Resource for FERPA information: Shay Bilchik, Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs, Program Report released by the U.S. Department of Justice and the U.S. Department of Education, June 1997, portions of which can be found in Volume 2, Chapter 11 of this manual.

a. **The clerk's record**: The clerk of superior court, and typically an assistant or deputy clerk designated as clerk of juvenile court, is responsible for maintaining all records pertaining to juvenile cases. This constitutes the "juvenile record," which is confidential and may be examined only by order of the court.[28] However, the following persons may examine the juvenile's record maintained by the clerk and obtain copies of written parts of the record without an order of the court:

- 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. **[7B-2901]**

b. **Juvenile court proceedings are recorded** but are reduced to writing only when notice of appeal has been filed. **[7B-2901]**

c. **In the case of a child victim**, the court may order the sharing of information among such public agencies as the court deems necessary to reduce the trauma to the victim. **[7B-2901(c)]** *(Also see subsection E. 2., below, on agency sharing of information.)*

d. **Determining whether juvenile proceedings are open or closed [7B-801]**

i. The court determines whether the hearings are open or closed and considers the circumstances of the case including, but not limited to, the following factors:

- the nature of the allegations against the juvenile's parent, guardian, custodian, or caretaker;
- 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(1) and G.S. 7B-2901 will be compromised by an open hearing.

ii. No hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open.

C. DSS Records and Access to Information

[28] Between July 1, 1999 and January 1, 2002, this statute did not have provisions relating to who was permitted to examine the clerk's record. These provisions were contained in the predecessor to 7B-2901(a), 7A-675, and it seemed they may have been inadvertently left out when abuse, neglect, and dependency provisions were separated from delinquency provisions. Legislative changes in 2001 put such provisions back. ***However, the GAL's appointment order and 7B-601(c) allow the GAL to obtain information whether or not confidential, and this provision should be sufficient authority for inspection of the clerk's records by the GAL in any event.***

1. **DSS record:** DSS is to maintain a record of the cases of juveniles under protective custody by the department or under placement by the court. The record "shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; interviews with the juvenile's family; or other information which the court finds should be protected from public inspection in the best interests of the juvenile. The records maintained pursuant to this subsection may be examined only by order of the court except that the guardian ad litem, or juvenile, shall have the right to examine them." DSS records also are confidential. **[7B-2901(b)]**

2. **Confidentiality in the investigative process: Sections 7B-302 and 7B-303** both speak to confidentiality issues related to the investigative process by DSS (see the statutes at the end of Volume 2, Chapter 10 of this manual). DSS is entitled to any information or reports, whether or not confidential, that may be relevant to the investigation of or the provision for protective services. Exceptions include information protected by the attorney-client privilege and criminal investigative information that may jeopardize investigation or the rights of the State or defendant (in which case a protective order must be sought).

> **Exception: Federal substance abuse records and educational records:** See exceptions described above in § 1.9.A. for medical records protected by federal substance abuse records regulations (42 CFR Part 2) and for educational records protected by FERPA.

D. Access to Information by the GAL

1. GAL's entitlement to confidential information: A GAL has the authority, by way of court order typically contained in the GAL's appointment order, to have access to any information or reports that he or she believes relevant to the case, even if such information is confidential. **[7B-601].** Both the GAL and Attorney Advocate need one or more certified true copies of the appointment order. Some record custodians require a certified true copy for their records before allowing access or copies; others accept a copy of a certified true copy or simply look at the appointment form to verify appointment before allowing access to records. Some record custodians may also require a subpoena to be issued for the records, in which case the AA can simply issue the subpoena.[29]

> **Casenote**: The GAL is entitled to confidential information concerning the adoptive process. *See In the Matter of N.C.L.*, 89 N.C.App. 79 (1988*), In re Wilkinson v. Riffel*, 72 N.C.App. 220 (1985).

2. **Privileges not available:** The physician-patient privilege and the husband-wife privilege are not available to persons from whom the information is sought. **[7B-601]**

[29] Most of the time, individuals and organizations do not require subpoenas in order to turn over confidential information since the statute and appointment order make it clear that they are likely to loose any battle to fight release of the information. The language in the statute and appointment order stating that the GAL is entitled to obtain confidential information does not provide the same function as a subpoena. A subpoena is the appropriate legal mechanism for requesting information and some records custodians require this formal document prior to releasing information even if they do not intend to contest or quash the subpoena. While the statute and appointment order make it clear that the GAL is entitled to obtain the confidential information, the appointment order does not contain a formal request or order directed specifically to a particular individual or agency to turn over specific records. The records holder cannot be compelled to turn something over without the opportunity to be heard (due process) and the subpoena provides that mechanism if they choose to fight it.

3. **Exception—Federal substance abuse records and educational records:** See exceptions described above in § 1.9.A. for medical records protected by federal substance abuse records regulations and for educational records protected by FERPA.

E. Access to Information from the GAL

1. **The GAL must keep all information regarding the case confidential,** and no disclosure may be made except by court order or unless provided by law in Chapter 7B. **[7B-601]**

casenote: In the case of *In re Guynn*, 113 N.C.App. 114 (1993), a father claimed he was prejudiced by the GAL's refusal to give him information that the GAL considered confidential. The court disagreed, saying he was not prejudiced by the GAL's refusal to provide a list of services offered to him, because he obtained that information from DSS.

2. Exception: agencies authorized to share information

Under section **7B-3100,** the Office of Juvenile Justice, after consultation with the Conference of Chief District Court Judges, shall adopt rules codified in the North Carolina Administrative Code designating certain local agencies that are authorized to share information concerning juveniles in accordance with the provisions of 7B-3100. [30] Such agencies shall share with one another, upon request, information in their possession that is *relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent,* undisciplined, or delinquent and shall continue to do so until the juvenile is no longer subject to the jurisdiction of juvenile court. Any information shared pursuant to 7B-3100 *must remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile and others or to improve the educational opportunities of the juvenile.* The Family Educational and Privacy Rights Act still applies to such information. Disclosure of information concerning any such juvenile that would reveal the identity of that juvenile is prohibited – except the publication of pictures of runaways with parental permission.

Agencies that may be designated include:

- local mental health facilities
- local health departments
- local departments of social services
- local law enforcement agencies
- local school administrative units
- district attorney's office (but statute says DA is not required to release any information)
- Office of Juvenile Justice
- GAL Office

3. If a GAL were to receive a request to share information pursuant to 7B-3100, the request should be handled as follows: [31]

a. The GAL must determine whether it is in the **child's best interest** to share such information. If so,

[30] See 28 N.C.A.C. 1A.0301 and 28 N.C.A.C. 1A.0302 (2007) under "Statutes" at the end of this chapter.

[31] *Note:* this discussion of the proper way to handle such a request is based on what appears to be logical and lawful. There is no caselaw as of the printing of this manual to support this interpretation.

i. The attorney advocate must refer to the statute, 7B-3100, find out whether there are any local administrative orders in effect related to agency sharing. If there is authority for certain agencies to share information, the AA should make sure that the type of information sought and the person seeking it fall within the parameters of the statutory provisions of 7B-3100 and whatever rules are in effect.

ii. Although all information relevant to the abuse, neglect, or dependency case must be shared (if there is authority for agency sharing), attorney work-product, GAL work-product (thoughts, impressions, and notes regarding process as opposed to facts and findings), are not likely to be considered relevant and therefore need not be shared.

b. If the GAL believes it is in the best interest of the child that certain information *not* be shared, the GAL should express this to the person seeking the information and should to file a motion to obtain a protective order (under 7B-700 or civil discovery statutes) to justify not sharing it.

c. If the GAL believes it is in the best interest of the child to share information that goes beyond the authority of 7B-3100, or the person seeking it is not a designated agency, or there is any question as to whether there is authority for agency sharing, the GAL should be cooperative and lend assistance to the party seeking such information in getting a court order, which would allow the GAL to release such information.

4. When the GAL receives a subpoena

a. When information is subpoenaed: If information is requested from the GAL by way of subpoena, and he or she believes it is not in the best interest of the child to release such information or that it would be a breach of confidentiality to release it, the attorney advocate must make a motion to quash the subpoena. The motion to quash should cite to Rule 45(c)(3) & (5) of the North Carolina Rules of Civil Procedure and specify reasons for objecting to the subpoena. If it is in the best interest of the child to comply with the subpoena and there are no problems with confidentiality, the GAL should comply. It is necessary for the attorney advocate to be aware of any subpoenas or requests for information and to assist the GAL in determining an appropriate response.

b. When the GAL is subpoenaed to testify: If a GAL volunteer is subpoenaed by anyone to testify about GAL involvement in a case, the volunteer should be reminded of the obligation of confidentiality. Although a volunteer is obligated to respond to a subpoena, a motion to quash may also be utilized. If the motion is denied and the volunteer is called to the stand to testify, he or she must remind the court of the statutory duty of confidentiality and therefore, is not at liberty to discuss any information about a specific case without a court order. After the volunteer voices the obligation of confidentiality, a judge may order the GAL to testify, in which case the GAL must do so because such testimony is permissible pursuant to court order. A GAL can testify as to general matters relating to work as a GAL volunteer but may not testify about a specific case without a court order. Please consult the GAL Volunteer Training Manual to obtain more detailed guidance for volunteers testifying in court.

5. Search warrants for GAL files: Law enforcement officers at times may attempt to access GAL information for a criminal case by obtaining a search warrant for GAL files. Asserting confidentiality, work-product, or the availability of such information elsewhere may or may not protect the records from

a search warrant. However, due to the agency-sharing statute and the fact that a GAL is often in the position of wanting to cooperate with local law enforcement to further the best interests of the child, local law enforcement should not need a search warrant to get what they need from the GAL.

6. Subpoena for child to testify: Upon receipt of a subpoena for the child to testify, the first determination of the AA and GAL is whether it is in the child's best interest to testify and, specifically, whether testifying would harm the child. This determination is based on a number of factors including any professional evaluations of the child. [*More detail on whether the child should testify and child witnesses generally can be found in §§ 2.7.H. and 7.2 of this manual*] The AA and GAL may determine that making a motion to quash the subpoena is necessary for the protection of the child, or may determine that the child may be able to testify but only in a non-traditional courtroom setting. If a motion to quash the subpoena or a motion to have the child testify in a nontraditional setting is made, such motions should be made with accompanying affidavits and/or a request for a hearing on the motion so that there is an opportunity for the court to hear from witnesses the reasons that the child should not testify or should testify in a different setting. If the AA and GAL believe that the child can testify in a traditional setting, they should prepare the child for the courtroom situation.

See § 7.2.E. in this manual for more information on non-traditional courtroom settings.

CHECKLISTS AND WORKSHEETS

§ 1.10 Nonsecure Custody Hearing Checklist*

Preparing for the nonsecure custody hearing:

_____ Receipt of petition
_____ Receipt of summons
_____ Receipt of custody order
_____ Talked to GAL volunteer
_____ Talked to GAL staff
_____ Reviewed petition for legal defects, factual inaccuracies
_____ Reviewed petition for jurisdiction/venue problems
_____ Motion to amend petition? (yes/ no)

Is the child's current placement acceptable? (yes/no) _____

Motion to change placement or for nonsecure custody? Explain:
_____
_____

Position of DSS concerning nonsecure custody:
_____
_____
_____

Position of parent(s) concerning nonsecure custody:
_____
_____
_____

Do all parties consent to nonsecure custody placement? _____

Evidence (witness names, exhibits) expected to be presented by DSS at nonsecure custody hearing:

_____
_____
_____
_____
_____

Additional evidence GAL needs to present at nonsecure custody hearing (witnesses, exhibits):

_____
_____
_____

At the Nonsecure Custody Hearing

Persons who should be present:

Role	**Name**
Judge	_____
Parents (not term.)	_____
Relatives w/legal standing	_____
Other custodial adults	_____
DSS caseworker	_____
GAL volunteer	_____
GAL attorney advocate	_____
Court reporter	_____
Security personnel	_____
	_____

Persons whose presence may be needed:

Role	**Name**
Children	_____
Extended family members	_____
Adoptive parents	_____
Law enf. Officers	_____
Service providers	_____
Juv. ct. counselor	_____
Prob/parole officer	_____
Other witnesses	_____
	_____

**Note: Portions of this checklist may not be applicable to the initial nonsecure hearing when information is limited*

Issues to Address in the Nonsecure Custody Hearing

Placement of the child pending adjudication:

_____

Has DSS made reasonable efforts to avoid placement outside the home?

_____
_____

Are there relatives or other adults that could be considered for placement?

_____
_____

Is this placement the least disruptive and most family-like alternative?

_____
_____
_____

Under this placement, will the child have to change schools and, if so, can this be avoided?

_____
_____

Under this placement, will the child be taken away from any regular activities or appointments and, if so, can this be avoided?

_____
_____

Services to be provided to parent(s) before adjudication:

_____
_____
_____

Services to be provided to child/ren before adjudication:

_____
_____

What are the terms and conditions of visitation between parent and child?

_____
_____
_____

What are the terms and conditions of visitation between siblings or others?

_____
_____

Will the parent be paying any child support?

_____

Missing parent and paternity issues:

_____
_____
_____

Other Matters

Were any motions filed?

_____

Actions to be taken by GAL/AA:

_____
_____
_____
_____

Have parties been served? _____

Were there admissions to the court concerning the allegations contained in the petition?

_____
_____

Date and time of next hearing:

_____

Other notes:

_____

§ 1.11 Pre-Hearing Conference Checklist and Worksheet

THE PRE-ADJUDICATION STAGE

Case name _____ Date _____

Persons present:

_____ _____ _____

_____ _____ _____

New investigative information learned (include source): _____

_____

_____

_____

_____

_____

_____

New investigative information GAL shared: _____

_____

_____

_____

_____

_____

Issues agreed on and stipulated to (identify which parties agree):

_____

_____

_____

_____

_____

_____

_____

Issues parties do not agree on: _____

_____

_____

_____

_____

_____

_____

_____

Witnesses and exhibits intended for presentation by each party in court:

GAL	DSS	Parent's Attorney(s)
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Substance of potential consent order:

_____
_____
_____
_____
_____
_____

Steps to be taken to identify and locate a missing parent or to establish paternity:

_____
_____
_____

Pretrial motions to be made by any party (including GAL):

_____
_____
_____

Services already being provided for child and parents: _____
_____
_____

Services needed for child and parents: _____
_____
_____

Other information: _____
_____
_____
_____
_____
_____
_____
_____

STATUTES

VENUE, PETITIONS, SUMMONS, AND JURISDICTION

§ 7B-400. Venue; pleading

A proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district in which the juvenile resides or is present. When a proceeding is commenced in a district other than that of the juvenile's residence, the court, on its own motion or upon motion of any party, may transfer the proceeding to the court in the district where the juvenile resides. A transfer under this section may be made at any time.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-401. Pleading and process

The pleading in an abuse, neglect, or dependency action is the petition. The process in an abuse, neglect, or dependency action is the summons.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-402. Petition

(a) The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of the juvenile's parent, guardian, or custodian, and allegations of facts sufficient to invoke jurisdiction over the juvenile. 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. The petition may contain information on more than one juvenile when the juveniles are from the same home and are before the court for the same reason.

(b) The petition, or an affidavit attached to the petition, shall contain the information required by G.S. 50A-209.

(c) Sufficient copies of the petition shall be prepared so that copies will be available for each parent if living separate and apart, the guardian, custodian, or caretaker, the guardian ad litem, the social worker, and any person determined by the court to be a necessary party.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2004-128, § 11, eff. Dec. 1, 2004; S.L. 2005-320, § 3, eff. Oct. 1, 2005.

§ 7B-405. Commencement of action

An action is commenced by the filing of a petition in the clerk's office when that office is open or by the issuance of a juvenile petition by a magistrate when the clerk's office is closed, which issuance shall constitute filing.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-406. Issuance of summons

(a) Immediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to the parent, guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons. No summons is required for any 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. A copy of the petition shall be attached to each summons. Service of the summons shall be completed as provided in G.S. 7B-407, but the parent of the juvenile shall not be deemed to be under a disability even though the parent is a minor.

(b) A summons shall be on a printed form supplied by the Administrative Office of the Courts and shall include:

(1) Notice of the nature of the proceeding;

(2) Notice of any right to counsel and information about how to seek the appointment of counsel prior to a hearing;

(3) Notice that, if the court determines at the hearing that the allegations of 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; and

(4) Notice that the dispositional order or a subsequent order:

a. May remove the juvenile from the custody of the parent, guardian, or custodian.

b. May require that the juvenile receive medical, psychiatric, psychological, or other treatment and that the parent participate in the treatment.

c. 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 that person.

d. May order the parent to pay for treatment that is ordered for the juvenile or the parent.

e. May, upon proper notice and hearing and a finding based on the criteria set out in G.S. 7B-1111, terminate the parental rights of the respondent parent.

(c) The summons shall advise the parent that upon service, jurisdiction over that person is obtained and that failure to comply with any order of the court pursuant to G.S. 7B-904 may cause the court to issue a show cause order for contempt.

(d) A summons shall be directed to the person summoned to appear and shall be delivered to any person authorized to serve process.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 1, eff. Oct. 1, 2000; S.L. 2001-208, § 1, eff. Jan. 1, 2002; S.L. 2004-128, § 12, eff. Dec. 1, 2004.

§ 7B-407. Service of summons

The summons shall be served under G.S. 1A-1, Rule 4(j) upon the parent, guardian, custodian, or caretaker, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the court.

If the parent, guardian, custodian, or caretaker entitled to receive a summons cannot be found by a diligent effort, the court may authorize service of the summons and petition by publication under G.S. 1A-1, Rule 4(j1). The cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the court may direct.

If the parent, guardian, custodian, or caretaker is served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, the parent, guardian, custodian, or caretaker may be proceeded against as for contempt of court.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2003-304, § 1, eff. July 4, 2003.

§ 7B-408. Copy of petition and notices to guardian ad litem

Immediately after a petition has been filed alleging that a juvenile is abused or neglected, the clerk shall provide a copy of the petition and any notices of hearings to the local guardian ad litem office.

Added by S.L. 2003-140, § 11, eff. June 4, 2003.

§ 7B-200. Jurisdiction

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent. This jurisdiction does not extend to cases involving adult defendants alleged to be guilty of abuse or neglect.

The court also has exclusive original jurisdiction of the following proceedings:

(1) Proceedings under the Interstate Compact on the Placement of Children set forth in Article 38 of this Chapter.

(2) Proceedings involving judicial consent for emergency surgical or medical treatment for a juvenile when

the juvenile's parent, guardian, custodian, or other person who has assumed the status and obligation of a parent without being awarded legal custody of the juvenile by a court refuses to consent for treatment to be rendered.

(3) Proceedings to determine whether a juvenile should be emancipated.

(4) Proceedings to terminate parental rights.

(5) Proceedings to review the placement of a juvenile in foster care pursuant to an agreement between the juvenile's parents or guardian and a county department of social services.

(6) Proceedings in which a person is alleged to have obstructed or interfered with an investigation required by G.S. 7B-302.

(7) Proceedings involving consent for an abortion on an unemancipated minor under Article 1A, Part 2 of Chapter 90 of the General Statutes.

(8) Proceedings by an underage party seeking judicial authorization to marry under Article 1 of Chapter 51 of the General Statutes.

(9) Petitions for expunction of an individual's name from the responsible individuals list under Article 3A of this Chapter.

(b) The court shall have jurisdiction over the parent or guardian of a juvenile who has been adjudicated abused, neglected, or dependent, as provided by G.S. 7B-904, provided the parent or guardian has been properly served with summons pursuant to G.S. 7B-406.

(c) When the court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

(1) Any other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue, unless the juvenile proceeding and the civil custody action or claim are consolidated pursuant to subsection (d) of this section or the court in the juvenile proceeding enters an order dissolving the stay.

(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to exercise jurisdiction in the juvenile proceeding.

(d) Notwithstanding G.S. 50-13.5(f), the court in a juvenile proceeding may order that any civil action or claim for custody filed in the district be consolidated with the juvenile proceeding. If a civil action or claim for custody of the juvenile is filed in another district, the court in the juvenile proceeding, for good cause and after consulting with the court in the other district, may: (i) order that the civil action or claim for custody be transferred to the county in which the juvenile proceeding is filed; or (ii) order a change of venue in the juvenile proceeding and transfer the juvenile proceeding to the county in which the civil action or claim is filed. The court in the juvenile proceeding may also proceed in the juvenile proceeding while the civil action or claim remains stayed or dissolve the stay of the civil action or claim and stay the juvenile proceeding pending a resolution of the civil action or claim.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2001-62, § 13, eff. Oct. 1, 2001; S.L. 2005-320, § 1, eff. Oct. 1, 2005; S.L. 2005-399, § 4, eff. Oct. 1, 2005.

§ 7B-201. Retention and termination of jurisdiction

(a) When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.

(b) When the court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise. Termination of the court's jurisdiction in an abuse, neglect, or dependency proceeding, however, shall not affect any of the following:

(1) A civil custody order entered pursuant to G.S. 7B-911.

(2) An order terminating parental rights.

(3) A pending action to terminate parental rights, unless the court orders otherwise.

(4) Any proceeding in which the juvenile is alleged to be or has been adjudicated undisciplined or delinquent.

(5) The court's jurisdiction in relation to any new abuse, neglect, or dependency petition that is filed.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2005-320, § 2, eff. Oct. 1, 2005.

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

(a) In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right. When a petition is filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall appoint provisional counsel for each parent named in the petition and indicate the appointment on the juvenile summons or attached notice. At the first hearing, the court shall dismiss the provisional counsel if 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.

The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent.

The court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding.

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

(1), (2) Deleted by S.L. 2005-398, s 2, eff. Oct. 1, 2005.

(c) On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17, if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian ad litem.

(d) Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

(e) Guardians ad litem appointed under this section may engage in all of the following practices:

(1) Helping the parent to enter consent orders, if appropriate.

(2) Facilitating service of process on the parent.

(3) Assuring that necessary pleadings are filed.

(4) Assisting the parent and the parent's counsel, if requested by the parent's counsel, to ensure that the parent's procedural due process requirements are met.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-144, § 16, eff. July 1, 2001; S.L. 2001-208, § 2, eff. Jan. 1, 2002; S.L. 2005-398, § 2, eff. Oct. 1, 2005.

TEMPORARY AND NONSECURE CUSTODY

§ 7B-308. Authority of medical professionals in abuse cases

(a) Any physician or administrator of a hospital, clinic, or other medical facility to which a suspected abused juvenile is brought for medical diagnosis or treatment shall have the right, when authorized by the chief district court judge of the district or the judge's designee, to retain physical custody of the juvenile in the facility when the physician who examines the juvenile certifies in writing that the juvenile who is suspected of being abused should remain for medical treatment or that, according to the juvenile's medical evaluation, it is unsafe for the juvenile to return to the juvenile's parent, guardian, custodian, or caretaker. This written certification must be signed by the certifying physician and must include the time and date that

the judicial authority to retain custody is given. Copies of the written certification must be appended to the juvenile's medical and judicial records and another copy must be given to the juvenile's parent, guardian, custodian, or caretaker. The right to retain custody in the facility shall exist for up to 12 hours from the time and date contained in the written certification.

(b) Immediately upon receipt of judicial authority to retain custody, the physician, the administrator, or that person's designee shall so notify the director of social services for the county in which the facility is located. The director shall treat this notification as a report of suspected abuse and shall immediately begin an assessment of the case.

(1) If the assessment reveals (i) that it is the opinion of the certifying physician that the juvenile is in need of medical treatment to cure or alleviate physical distress or to prevent the juvenile from suffering serious physical injury, and (ii) that it is the opinion of the physician that the juvenile should for these reasons remain in the custody of the facility for 12 hours, but (iii) that the juvenile's parent, guardian, custodian, or caretaker cannot be reached or, upon request, will not consent to the treatment within the facility, the director shall within the initial 12-hour period file a juvenile petition alleging abuse and setting forth supporting allegations and shall seek a nonsecure custody order. A petition filed and a nonsecure custody order obtained in accordance with this subdivision shall come on for hearing under the regular provisions of this Subchapter unless the director and the certifying physician together voluntarily dismiss the petition.

(2) In all cases except those described in subdivision (1) above, the director shall conduct the assessment and may initiate juvenile proceedings and take all other steps authorized by the regular provisions of this Subchapter. If the director decides not to file a petition, the physician, the administrator, or that person's designee may ask the prosecutor to review this decision according to the provisions of G.S. 7B-305 and G.S. 7B-306.

(c) If, upon hearing, the court determines that the juvenile is found in a county other than the county of legal residence, in accord with G.S. 153A-257, the juvenile may be transferred, in accord with G.S. 7B-903(2), to the custody of the department of social services in the county of residence.

(d) If the court, upon inquiry, determines that the medical treatment rendered was necessary and appropriate, the cost of that treatment may be charged to the parents, guardian, custodian, or caretaker, or, if the parents are unable to pay, to the county of residence in accordance with G.S. 7B-903 and G.S. 7B-904.

(e) Except as otherwise provided, a petition begun under this section shall proceed in like manner with petitions begun under G.S. 7B-302.

(f) The procedures in this section are in addition to, and not in derogation of, the abuse and neglect reporting provisions of G.S. 7B-301 and the temporary custody provisions of G.S. 7B-500. Nothing in this section shall preclude a physician or administrator and a director of social services from following the procedures of G.S. 7B-301 and G.S. 7B-500 whenever these procedures are more appropriate to the juvenile's circumstances.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2005-55, § 8, eff. Oct. 1, 2005.

§ 7B-500. Taking a juvenile into temporary custody; civil and criminal immunity

(a) Temporary custody means the taking of physical custody and providing personal care and supervision

until a court order for nonsecure custody can be obtained. A juvenile may be taken into temporary custody without a court order by a law enforcement officer or a department of social services worker if there are reasonable grounds to believe that the juvenile is abused, neglected, or dependent and that the juvenile would be injured or could not be taken into custody if it were first necessary to obtain a court order. If a department of social services worker takes a juvenile into temporary custody under this section, the worker may arrange for the placement, care, supervision, and transportation of the juvenile.

(b) The following individuals shall, without a court order, take into temporary custody an infant under seven days of age that is voluntarily delivered to the individual by the infant's parent who does not express an intent to return for the infant:

(1) A health care provider, as defined under G.S. 90-21.11, who is on duty or at a hospital or at a local or district health department or at a nonprofit community health center.

(2) A law enforcement officer who is on duty or at a police station or sheriff's department.

(3) A social services worker who is on duty or at a local department of social services.

(4) A certified emergency medical service worker who is on duty or at a fire or emergency medical services station.

(c) An individual who takes an infant into temporary custody under subsection (b) of this section shall perform any act necessary to protect the physical health and well-being of the infant and shall immediately notify the department of social services or a local law enforcement agency. Any individual who takes an infant into temporary custody under subsection (b) of this section may inquire as to the parents' identities and as to any relevant medical history, but the parent is not required to provide the information. The individual shall notify the parent that the parent is not required to provide the information.

(d) Any adult may, without a court order, take into temporary custody an infant under seven days of age that is voluntarily delivered to the individual by the infant's parent who does not express an intent to return for the infant. Any individual who takes an infant into temporary custody under this section shall perform any act necessary to protect the physical health and well-being of the infant and shall immediately notify the department of social services or a local law enforcement agency. An individual who takes an infant into temporary custody under this subsection may inquire as to the parents' identities and as to any relevant medical history, but the parent is not required to provide the information. The individual shall notify the parent that the parent is not required to provide the information.

(e) An individual described in subsection (b) or (d) of this section is immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of any omission or action taken pursuant to the requirements of subsection (c) or (d) of this section as long as that individual was acting in good faith. The immunity established by this subsection does not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2001-291, § 2, eff. July 19, 2001.

§ 7B-501. Duties of person taking juvenile into temporary custody

(a) A person who takes a juvenile into custody without a court order under G.S. 7B-500 shall proceed as follows:

(1) Notify the juvenile's parent, guardian, custodian, or caretaker that the juvenile has been taken into temporary custody and advise the parent, guardian, custodian, or caretaker of the right to be present with the juvenile until a determination is made as to the need for nonsecure custody. Failure to notify the parent that the juvenile is in custody shall not be grounds for release of the juvenile.

(2) Release the juvenile to the juvenile's parent, guardian, custodian, or caretaker if the person having the juvenile in temporary custody decides that continued custody is unnecessary.

(3) The person having temporary custody shall communicate with the director of the department of social services who shall consider prehearing diversion. If the decision is made to file a petition, the director shall contact the judge or person delegated authority pursuant to G.S. 7B-502 for a determination of the need for continued custody.

(b) A juvenile taken into temporary custody under this Article shall not be held for more than 12 hours, or for more than 24 hours if any of the 12 hours falls on a Saturday, Sunday, or legal holiday, unless:

(1) A petition or motion for review has been filed by the director of the department of social services, and

(2) An order for nonsecure custody has been entered by the court.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-502. Authority to issue custody orders; delegation

In the case of any juvenile alleged to be within the jurisdiction of the court, the court may order that the juvenile be placed in nonsecure custody pursuant to criteria set out in G.S. 7B-503 when custody of the juvenile is necessary.

Any district court judge shall have the authority to issue nonsecure custody orders pursuant to G.S. 7B-503. The chief district court judge may delegate the court's authority to persons other than district court judges by administrative order which shall be filed in the office of the clerk of superior court. The administrative order shall specify which persons shall be contacted for approval of a nonsecure custody order pursuant to G.S. 7B-503.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-503. Criteria for nonsecure custody

(a) When a request is made for nonsecure custody, the court shall first consider release of the juvenile to the

juvenile's parent, relative, guardian, custodian, or other responsible adult. An order for nonsecure custody shall be made only when there is a reasonable factual basis to believe the matters alleged in the petition are true, and

(1) The juvenile has been abandoned; or

(2) The juvenile has suffered physical injury or sexual abuse; or

(3) The juvenile is exposed to a 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

(4) The juvenile is in need of medical treatment to cure, alleviate, or prevent suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and the juvenile's parent, guardian, custodian, or caretaker is unwilling or unable to provide or consent to the medical treatment; or

(5) The parent, guardian, custodian, or caretaker consents to the nonsecure custody order; or

(6) The juvenile is a runaway and consents to nonsecure custody.

A juvenile alleged to be abused, neglected, or dependent shall be placed in nonsecure custody only when there is a reasonable factual basis to believe that there are no other reasonable means available to protect the juvenile. In no case shall a juvenile alleged to be abused, neglected, or dependent be placed in secure custody.

(b) Whenever a petition is filed under G.S. 7B-302(d1), the court shall rule on the petition prior to returning the child to a home where the alleged abuser or abusers are or have been present. If the court finds that the alleged abuser or abusers have a history of violent behavior against people, the court shall order the alleged abuser or abusers to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist. The court may order the alleged abuser or abusers to pay the cost of any mental health evaluation required under this section.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 318, § 4, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999.

§ 7B-504. Order for nonsecure custody

The custody order shall be in writing and shall direct a law enforcement officer or other authorized person to assume custody of the juvenile and to make due return on the order. A copy of the order shall be given to the juvenile's parent, guardian, custodian, or caretaker by the official executing the order.

An officer receiving an order for custody which is complete and regular on its face may execute it in accordance with its terms. The officer is not required to inquire into the regularity or continued validity of the order and shall not incur criminal or civil liability for its due service.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-505. Place of nonsecure custody

A juvenile meeting the criteria set out in G.S. 7B-503 may be placed in nonsecure custody with the

department of social services or a person designated in the order for temporary residential placement in:

(1) A licensed foster home or a home otherwise authorized by law to provide such care; or

(2) A facility operated by the department of social services; or

(3) Any other home or facility, including a relative's home approved by the court and designated in the order.

In placing a juvenile in nonsecure custody under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile. In placing a juvenile in nonsecure custody under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence. In placing a juvenile in nonsecure custody under this section, the court shall consider the Indian Child Welfare Act, Pub. L. No. 95- 608, 25 U.S.C. §§ 1901, et seq., as amended, and the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056, as amended, as they may apply. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children, Article 38 of this Chapter.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, § 20, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2002-164, § 4.7, eff. Oct. 23, 2002.

§ 7B-506. Hearing to determine need for continued nonsecure custody

(a) No juvenile shall be held under a nonsecure custody order for more than seven calendar days without a hearing on the merits or a hearing to determine the need for continued custody. A hearing on nonsecure custody conducted under this subsection may be continued for up to 10 business days with the consent of the juvenile's parent, guardian, custodian, or caretaker and, if appointed, the juvenile's guardian ad litem. In addition, the court may require the consent of additional parties or may schedule the hearing on custody despite a party's consent to a continuance. In every case in which an order has been entered by an official exercising authority delegated pursuant to G.S. 7B-502, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of district court in the city or county where the order was entered if such session precedes the expiration of the applicable time period set forth in this subsection: Provided, that if such session does not precede the expiration of the time period, the hearing may be conducted at another regularly scheduled session of district court in the district where the order was entered.

(b) At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the guardian ad litem, or juvenile, and the juvenile's parent, guardian, custodian, or caretaker an opportunity to introduce evidence, to be heard in the person's own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that the juvenile's placement in custody is necessary. The court shall not be bound by the usual rules of evidence at such hearings.

(c) The court shall be bound by criteria set forth in G.S. 7B-503 in determining whether continued custody

is warranted.

(c1) In determining whether continued custody is warranted, the court shall consider the opinion of the mental health professional who performed an evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual.

(d) If the court determines that the juvenile meets the criteria in G.S. 7B-503 and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact and signed and entered within 30 days of the completion of the hearing. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

(e) If the court orders at the hearing required in subsection (a) of this section that the juvenile remain in custody, a subsequent hearing on continued custody shall be held within seven business days of that hearing, excluding Saturdays, Sundays, and legal holidays when the courthouse is closed for transactions, and pending a hearing on the merits, hearings thereafter shall be held at intervals of no more than 30 calendar days.

(f) Hearings conducted under subsection (e) of this section may be waived only with the consent of the juvenile's parent, guardian, custodian, or caretaker, and, if appointed, the juvenile's guardian ad litem.

The court may require the consent of additional parties or schedule a hearing despite a party's consent to waiver.

(g) Reserved.

(h) At each hearing to determine the need for continued custody, the court shall:

(1) Inquire as to the identity and location of any missing parent and as to whether paternity is at issue. The court shall include findings as to the efforts undertaken to locate the missing parent and to serve that parent, as well as efforts undertaken to establish paternity when paternity is an issue. The order may provide for specific efforts aimed at determining the identity and location of any missing parent, as well as specific efforts aimed at establishing paternity.

(2) Inquire as to whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order temporary placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile. In placing a juvenile in nonsecure custody under this section, the court shall consider the Indian Child Welfare Act, Pub. L. No. 95-608, 25 U.S.C. §§ 1901, et seq., as amended, and the Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056, as amended, as they may apply. Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children set forth in Article 38 of this Chapter; and

(3) Inquire as to whether there are other juveniles remaining in the home from which the juvenile was removed and, if there are, inquire as to the specific findings of the assessment conducted under G.S. 7B-302 and any actions taken or services provided by the director for the protection of the other juveniles.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, § 21, eff. July 1, 1999; S.L.

1999-318, § 5, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2001-208, §§ 16, 24, eff. Jan. 1, 2002; S.L. 2003-337, § 9, eff. Oct. 1, 2003; S.L. 2005-55, § 11, eff. Oct. 1, 2005.

§ 7B-507. Reasonable efforts

(a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order:

(1) Shall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;

(2) Shall contain findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined under subsection (b) of this section that such efforts are not required or shall cease;

(3) Shall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease;

(4) Shall specify that the juvenile's placement and care are the responsibility of the county department of social services and that the agency is to provide or arrange for the foster care or other placement of the juvenile; and

(5) May provide for services or other efforts aimed at returning the juvenile to a safe home or at achieving another permanent plan for the juvenile.

A finding that reasonable efforts have not been made by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds that placement is necessary for the protection of the juvenile. Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable.

(b) In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

(2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

(3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or

(4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary

manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

(c) At any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by G.S. 7B-907 be held within 30 calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing. At any hearing at which the court finds and orders that reasonable efforts to reunify a family shall cease, the affected parent, guardian, or custodian or that parent, guardian, or custodian's counsel may give notice to preserve the parent, guardian, or custodian's right to appeal the finding and order in accordance with G.S. 7B-1001(a)(5). Notice may be given in open court or in writing within 10 days of the hearing at which the court orders the efforts to reunify the family to cease. The party giving notice shall be permitted to make a detailed offer of proof as to any evidence that person sought to offer in opposition to cessation of reunification that the court refused to admit as evidence or to consider.

(d) In determining reasonable efforts to be made with respect to a juvenile and in making such reasonable efforts, the juvenile's health and safety shall be the paramount concern. Reasonable efforts to preserve or reunify families may be made concurrently with efforts to plan for the juvenile's adoption, to place the juvenile with a legal guardian, or to place the juvenile in another permanent arrangement.

Added by S.L. 1998-229, § 4.1, eff. Jan. 1, 1999. Amended and recodified by S.L. 1998-229, § 21.1, eff. July 1, 1999. Amended by S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2001-487, § 2, eff. Dec. 16, 2001; S.L. 2005-398, § 1, eff. Oct. 1, 2005.

§ 7B-508. Telephonic communication authorized

All communications, notices, orders, authorizations, and requests authorized or required by G.S. 7B-501, 7B-503, and 7B-504 may be made by telephone when other means of communication are impractical. All written orders pursuant to telephonic communication shall bear the name and the title of the person communicating by telephone, the signature and the title of the official entering the order, and the hour and the date of the authorization.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, § 4, eff. Jan. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999.

CONFIDENTIALITY AND DISCOVERY

§ 7B-2901. Confidentiality of records

(a) The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office alleging abuse, neglect, or dependency. The records shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the court. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the court.

The following persons may examine the juvenile's record maintained pursuant to this subsection and obtain copies of written parts of the record without an order of the court:

(1) The person named in the petition as the juvenile;

(2) The guardian ad litem;

(3) The county department of social services; and

(4) The juvenile's parent, guardian, or custodian, or the attorney for the juvenile or the juvenile's parent, guardian, or custodian.

(b) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by the Department or under placement by the court, which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; interviews with the juvenile's family; or other information which the court finds should be protected from public inspection in the best interests of the juvenile. The records maintained pursuant to this subsection may be examined only by order of the court except that the guardian ad litem, or juvenile, shall have the right to examine them.

(c) In the case of a child victim, the court may order the sharing of information among such public agencies as the court deems necessary to reduce the trauma to the victim.

(d) The court's entire record of a proceeding involving consent for an abortion on an unemancipated minor under Article 1A, Part 2 of Chapter 90 of the General Statutes is not a matter of public record, shall be maintained separately from any juvenile record, shall be withheld from public inspection, and may be examined only by order of the court, by the unemancipated minor, or by the unemancipated minor's attorney or guardian ad litem.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 2001- 208, § 10, eff. Jan. 1, 2002.

§ 7B-2902. Disclosure in child fatality or near fatality cases

(a) The following definitions apply in this section:

(1) Child fatality. --The death of a child from suspected abuse, neglect, or maltreatment.

(2) Findings and information. --A written summary, as allowed by subsections (c) through (f) of this

section, of actions taken or services rendered by a public agency following receipt of information that a child might be in need of protection. The written summary shall include any of the following information the agency is able to provide:

a. The dates, outcomes, and results of any actions taken or services rendered.

b. The results of any review by the State Child Fatality Prevention Team, a local child fatality prevention team, a local community child protection team, the Child Fatality Task Force, or any public agency.

c. Confirmation of the receipt of all reports, accepted or not accepted by the county department of social services, for investigation of suspected child abuse, neglect, or maltreatment, including confirmation that investigations were conducted, the results of the investigations, a description of the conduct of the most recent investigation and the services rendered, and a statement of basis for the department's decision.

(3) Near fatality. --A case in which a physician determines that a child is in serious or critical condition as the result of sickness or injury caused by suspected abuse, neglect, or maltreatment.

(4) Public agency. --Any agency of State government or its subdivisions as defined in G.S. 132-1(a).

(b) Notwithstanding any other provision of law and subject to the provisions of subsections (c) through (f) of this section, a public agency shall disclose to the public, upon request, the findings and information related to a child fatality or near fatality if:

(1) A person is criminally charged with having caused the child fatality or near fatality; or

(2) The district attorney has certified that a person would be charged with having caused the child fatality or near fatality but for that person's prior death.

(c) Nothing herein shall be deemed to authorize access to the confidential records in the custody of a public agency, or the disclosure to the public of the substance or content of any psychiatric, psychological, or therapeutic evaluations or like materials or information pertaining to the child or the child's family unless directly related to the cause of the child fatality or near fatality, or the disclosure of information that would reveal the identities of persons who provided information related to the suspected abuse, neglect, or maltreatment of the child.

(d) Within five working days from the receipt of a request for findings and information related to a child fatality or near fatality, a public agency shall consult with the appropriate district attorney and provide the findings and information unless the agency has a reasonable belief that release of the information:

(1) Is not authorized by subsections (a) and (b) of this section;

(2) Is likely to cause mental or physical harm or danger to a minor child residing in the deceased or injured child's household;

(3) Is likely to jeopardize the State's ability to prosecute the defendant;

(4) Is likely to jeopardize the defendant's right to a fair trial;

(5) Is likely to undermine an ongoing or future criminal investigation; or

(6) Is not authorized by federal law and regulations.

(e) Any person whose request is denied may apply to the appropriate superior court for an order compelling disclosure of the findings and information of the public agency. The application shall set forth, with reasonable particularity, factors supporting the application. The superior court shall have jurisdiction to issue such orders. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the appellate courts. After the court has reviewed the specific findings and information, in camera, the court shall issue an order compelling disclosure unless the court finds that one or more of the circumstances in subsection (d) of this section exist.

(f) Access to criminal investigative reports and criminal intelligence information of public law enforcement agencies and confidential information in the possession of the State Child Fatality Prevention Team, the local teams, and the Child Fatality Task Force, shall be governed by G.S. 132-1.4 and G.S. 7B-1413 respectively. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(g) Any public agency or its employees acting in good faith in disclosing or declining to disclose information pursuant to this section shall be immune from any criminal or civil liability that might otherwise be incurred or imposed for such action.

(h) Nothing herein shall be deemed to narrow or limit the definition of "public records" as set forth in G.S. 132-1(a).

Added by S.L. 1998-202, § 6, eff. July 1, 1999.

§ 7B-801. Hearing

(a) At any hearing authorized or required under this Subchapter, the court in its discretion shall determine whether the hearing or any part of the hearing shall be closed to the public. In determining whether to close the hearing or any part of the hearing, the court shall consider the circumstances of the case, including, but not limited to, the following factors:

(1) The nature of the allegations against the juvenile's parent, guardian, custodian or caretaker;

(2) The age and maturity of the juvenile;

(3) The benefit to the juvenile of confidentiality;

(4) The benefit to the juvenile of an open hearing; and

(5) 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.

(b) No hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open.

(c) The adjudicatory hearing shall be held in the district at such time and place as the chief district court

judge shall designate, but no later than 60 days from the filing of the petition unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, § 22, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999.

§ 7B-3100. Disclosure of information about juveniles

(a) The Department, after consultation with the Conference of Chief District Court Judges, shall adopt rules designating certain local agencies that are authorized to share information concerning juveniles in accordance with the provisions of this section. Agencies so designated shall share with one another, upon request and to the extent permitted by federal law and regulations, information that is in their possession that is relevant to any assessment of a report of child abuse, neglect, or dependency or the provision or arrangement of protective services in a child abuse, neglect, or dependency case by a local department of social services pursuant to the authority granted under Chapter 7B of the General Statutes or to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent and shall continue to do so until the protective services case is closed by the local department of social services, or if a petition is filed when the juvenile is no longer subject to the jurisdiction of juvenile court. Agencies that may be designated as "agencies authorized to share information" include local mental health facilities, local health departments, local departments of social services, local law enforcement agencies, local school administrative units, the district's district attorney's office, the Department of Juvenile Justice and Delinquency Prevention, and the Office of Guardian ad Litem Services of the Administrative Office of the Courts. Any information shared among agencies pursuant to this section shall remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile and others or to improve the educational opportunities of the juvenile, and shall be released in accordance with the provisions of the Family Educational and Privacy Rights Act as set forth in 20 U.S.C. § 1232g. Nothing in this section or any other provision of law shall preclude any other necessary sharing of information among agencies. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(b) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 2000- 137, § 3, eff. July 20, 2000; S.L. 2006-205, § 2, eff. Aug. 8, 2006.

NORTH CAROLINA ADMINISTRATIVE CODE

28 N.C.A.C. 1A.0301 (2007)

.0301 DESIGNATED AGENCIES AUTHORIZED TO SHARE INFORMATION

The following agencies shall share with one another upon request, information in their possession that is relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined or delinquent:

(a) The Department of Juvenile Justice & Delinquency Prevention;

(b) The Office of Guardian Ad Litem Services of the Administrative Office of the Courts;

(c) County Departments of Social Services;

(d) Area mental health developmental disability and substance abuse authorities;

(e) Local law enforcement agencies;

(f) District attorneys' offices as authorized by *G.S. 7B-3100*;

(g) County mental health facilities, developmental disabilities and substance abuse programs;

(h) Local school administrative units;

(i) Local health departments; and

(j) A 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, as an agency authorized to share information pursuant to these Rules and the standards set forth in *G.S. 7B-3100*.

Authority *G.S. 7B-3100*.

28 N.C.A.C. 1A.0302 (2007)

.0302 INFORMATION SHARING AMONG AGENCIES

(a) Any agency that receives information disclosed pursuant to *G.S. 7B-3100* and shares such information with another authorized agency, shall document the name of the agency to which the information was provided and the date the information was provided.

(b) When the disclosure of requested information is prohibited or restricted by federal law or regulations, a designated agency shall share the information only in conformity with the applicable federal law and regulations. At the request of the initiating designated agency, the designated agency refusing the request shall inform that agency of the specific law or regulation that is the basis for the refusal.

Authority *G.S. 7B-3100*.

CHAPTER 2
ADJUDICATION

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ADJUDICATION

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§ 2.1 Summary

The adjudication is the stage at which the judge determines whether the allegations in the petition alleging abuse, neglect, or dependency are true. The adjudication is therefore the trial. If all parties agree, a consent order can be entered and there is no need for a trial. Arguably, this is the most critical stage, because an adjudication is necessary in order for the system to continue to be involved in protecting or assisting the child and his or her family.

Although this is indeed a critical stage, much of the work has already taken place. Investigations have been completed, and, ideally, parties have already had the opportunity to work out certain issues, identify needs, and express viewpoints during nonsecure custody hearings, prehearing conferences, or other previous conversations. Once the parties come to court for adjudication, therefore, they should all have a thorough understanding of the facts of the case, the needs of the child and parent, and each other's perspective, including which issues are contested. Unless there is new information or parties change their mind, the parties should be ready to go to trial.

§ 2.2 Timing of Adjudication

A. Commentary on Timing

1. The attorney advocate should push to get the case adjudicated as soon as possible and object to delays that are not beneficial to the child. The book *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* discusses the importance of the timing of adjudication in the following passage.

> *Because of the traumatic effect of removal of a child from the home,* ***it is essential that the adjudication hearing take place as soon as it is practical*** *. . . . Experience in many jurisdictions has shown that it is possible to conduct the adjudication within 60 days after removal of the child. Some jurisdictions set even shorter time limits. . . . Juvenile court proceedings generally should go forward when related criminal proceedings are pending. Delays in adjudication delay progress toward family rehabilitation and reunification. In cases where reunification is impossible, delays in adjudication also delay progress toward termination of parental rights and adoption efforts.*[1]

2. A word about ASFA

> The federal Adoption and Safe Families Act of 1997 ("ASFA") contained a number of timing requirements designed to insure that a case moves through the system at an appropriately fast pace so that children do not linger in foster care unnecessarily. Those requirements have been codified in North Carolina in the Juvenile Code and must be met to prevent loss of federal funding.[2]

[1] National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases, Publication Development Committee, Victims of Child Abuse Project, p. 47, Spring 1995.

[2] For more information on ASFA and ASFA regulations, see Chapter 11 of this manual.

B. Timing of Adjudication According to the Juvenile Code

1. Within 60 days: "The adjudicatory hearing shall be held in the district at such time and place as the chief district judge shall designate but no later than 60 days from the filing of the petition, unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time." **[7B-801(c)]**

2. Continuances: Continuances may be granted for good cause for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested or other information needed in the best interest of the child or to allow for expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interest of the child. **[7B-803]** It is also important to be familiar with local court rules regarding continuances.

3. Bifurcation: The adjudication and disposition are often separated in process because different evidentiary standards apply at different stages. The statutory preference is that the dispositional hearing take place immediately following the adjudicatory hearing; however, the court can hear the adjudicatory evidence and make a decision regarding adjudication but hold the dispositional hearing at a later date so long as the dispositional hearing is completed within thirty (30) days of the conclusion of the adjudicatory hearing. **[7B-901]**

§ 2.3 Casebuilding for Permanence

Throughout the course of a case, the AA and the volunteer must remember that every action taken, every bit of information obtained has the potential to be significant in future proceedings. It is not uncommon for agency attorneys or GAL attorneys to reach the TPR stage only to find a number of things in the case file or the parent's present situation that will make the pursuit of a TPR more difficult, many of which could have been avoided.

As an advocate for the child, it is important that the AA pay attention to the detail that is being incorporated into the court file and make necessary motions or requests to include details that may be overlooked. The court file itself should contain all material facts and findings in all proceedings. Much that takes place during the course of a case, both in and out of court, never makes its way into the court file even if it is appropriate. The judge may incorporate reports into the orders, which is a simple way to get appropriate detail into the court file.

Jane Thompson, North Carolina assistant attorney general, and Jane Malpass, former children's program representative now consultant with the N.C. Division of Social Services, compiled some materials on casebuilding that advocate the importance of ensuring that each stage of an abuse, neglect, or dependency case paves the way to permanence. The following concepts are drawn from those materials:

- All material facts of the case should be alleged in the petition.
- More than one condition or status of the child can often be alleged to provide all possible judicial options.
- The adjudication order should completely "tell the story" of the case either by findings in the order itself or by incorporating by reference a court report that does tell that story, whether the adjudication is by way of hearing or consent.
- Court reports for disposition and reviews should set out services offered to the family (including pre-petition services), whether such services were successful, and a "roadmap" of services to be provided and expectations for parental improvement in the near future. Reports should address how visitation is

going, whether roadmaps are being followed to achieve desired results, and whether the roadmap needs alteration. The report should also address whether positive change has occurred, the reasons for the change or lack of change, and the direction the case is going.

- Disposition orders should mandate the roadmap for the case during the next review period — services required, changes expected, resources to be utilized. Each disposition order and review order should contain findings about reasonable efforts and whether placement in the home is contrary to the welfare of the child. Each review order needs to adequately tell the story of the case from the last order to the present.

§ 2.4 Consent Agreements

A. Consent Judgments under the Juvenile Code

It is always possible for the judge to enter a consent order or judgment on a petition for abuse, neglect, or dependency if the following statutory criteria are met: (1) **all parties are present**; (2) the **juvenile is represented by counsel**; (3) all **other parties** are either **represented by counsel** or have **waived counsel**; and (4) **sufficient findings of fact** are made by the judge. **[7B-902]** The GAL, representing the juvenile who is a party to the case pursuant to 7B-601, must also agree with other parties for a consent agreement to take place. The judge has the right to refuse to sign a consent agreement, because the judge is ultimately responsible for oversight of the case.[3]

Case notes:

1. In *In re Thrift v. Buncombe County Dep't Soc. Servs*., 137 N.C. App. 559 (2000), the court of appeals found error in the lack of agreement by all parties to a **consent order**. In this case, the mother was not present at the hearing and her attorney informed the court that he was not authorized to consent to an adjudication. All the other parties, including the father, had consented. In its opinion, the court of appeals said "According to the mandates of section 7A-641 [now 7B-902], *all parties must be present in order for the trial court to enter a consent judgment*. [emphasis added] In the case at bar, respondent was not present and, as such, no valid consent judgement could be entered." *Thrift* at 563. It therefore seems that not only did the court find error with the fact that the mother did not agree with the consent order, it found error with the fact that she was not physically present when it was entered. See also *In re Shaw*, 152 N.C. App. (2002) reversing adjudication order entered by consent of only one parent; and *In re J.R.*, 163 N.C. App. 201 (2004) holding that consent by father was insufficient to bind mother and testimony of social worker did not constitute clear and convincing evidence.

2. In *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489 (1999), a private custody case, the terms of the parties' consent agreement required that it be reviewed by the judge with each party acknowledging that they understood the legal effect of the agreement and that it was to be signed by the judge once such review had occurred. [7B-902 requires the judge to make findings in juvenile cases.] However, the evidence revealed that the judge had not reviewed the agreement with the parties. The Court of Appeals held that without reviewing the consent order with the parties, the judge should not have signed it and vacated the agreement. In its opinion, the court noted that there is no requirement with consent judgments that the parties actually

[3] See Buckingham v. Buckingham, 134 N.C. App. 82 (1999), *rev. denied*, 351 N.C. 100 (1999) relating to the issue of finality and standard for amending consent judgments for child custody.

appear in court and acknowledge to the court their continuing consent unless the agreement itself requires such. Anytime a consent agreement is entered into, however, such consent is void if continuing consent does not exist at the time the court sanctions or approves the agreement. Having the court review the agreement with the parties and acknowledge their continuing consent is one way to avoid having the judgment set aside on the ground that the consent of the parties was not subsisting at the time of its entry. (*Tevepaugh* cites *Ledford v. Ledford*, 229 N.C. 373 (1948) and *Buckingham, infra*, as authorities for these conclusions.)

3. *Price v. Dobson*, 141 N.C. App. 131 (2000) is a case in which the court of appeals said that when a party joins into a duly agreed to and entered consent order, that party waives his right to appeal from the judgment and the case is left with no unresolved issue to appeal.

B. The GAL's Role in Reaching Consent

If a consent agreement has not been reached, the GAL must assess whether there is still a possibility for consent and, if so, coordinate parties to discuss such a possibility. It is never too late to try to reach a consent agreement. If there is any possibility that one can be reached, the GAL should take the initiative to gather the parties to discuss the issues. *Avoiding the adversarial atmosphere of an adjudicatory hearing in favor of a consent agreement is almost always preferable***.** In order to determine whether consent is possible, attorneys for each party need to spend time prior to the hearing talking to their clients and to each other.

An excerpt from an ABA training conference addresses the role of the GAL in negotiations.

> The Guardian ad Litem can serve effectively as an 'honest broker' in many cases because the attorneys for the other parties want the child's attorney to side with their position. Consequently, the Guardian may be a catalyst to a negotiated settlement in order to avoid the additional trauma to the child from a full-blown adversary hearing, especially where the child may be called upon to choose between parents or in favor of an agency and against the parents. In serving this 'honest broker' role the Guardian ad Litem can extract concessions from all of the parties to benefit the child.[4]

C. The Need for Sufficient Evidence and Sufficient Findings of Fact

1. Sufficient evidence

If a consent agreement is reached, the attorney advocate must help ensure that sufficient evidence is still presented in court or that the order contains the necessary findings of fact and conclusions of law. Even with a consent agreement, it is still important for the court to hear sufficient evidence concerning the allegations contained in the petition. First, it is important that the court record of the proceedings be complete and accurate. Second, it is important for the parent to hear, out loud in a courtroom, the underlying evidence of the allegations to make an impression regarding the serious nature of the proceedings. A parent may not fully understand the allegations he or she is facing until hearing the evidence in court. It is also wise to include agreement as to a draft of proposed findings of fact as part of consent negotiations.

[4] *Virginia State Bar Young Lawyers Conference, Training Seminar for Guardians ad Litem (1987).*

2. Sufficient findings

When a consent judgment is entered, "it is essential that the court's findings accurately record the reasons for state intervention."[5] This requirement is necessary because the findings made at adjudication become the benchmark against which later progress is measured, and provides the basis for the case plan and for case review. The accuracy of adjudicatory findings should never be bargained away, as they will also be important in determining whether a child can be returned home safely.[6]

D. Unwise to Consent or Stipulate to Less Than What the Facts Reflect

The AA must be careful about what is consented to or stipulated to in the course of negotiations in a case, because some agreements may have a negative effect in the future pursuit of a TPR. Stipulating to a watered-down version of the facts, consenting to an adjudication of dependency when the facts actually warrant neglect or abuse, or consenting to neglect when the facts warrant abuse, can all damage chances at a successful TPR down the road. While there are times that concessions are preferable to a lost case, unnecessary concessions can lead to a court record that lacks important facts and findings to prove a TPR case. When the evidence is good, but consenting to something less than the facts warrant is easier than a trial, attorneys should consider whether doing what is easier now may make things harder in the future. An attorney advocate may regret consenting to dependency when neglect would have provided grounds for termination in a later stage.

E. An Alternative to Consent: Agreeing Not to Oppose or Put on Evidence

Consenting or stipulating may affect a pending criminal action or may simply be unacceptable to the parents, even if they are not denying the allegations. In such a situation, another option to propose to parents and their attorneys is the possible agreement of the parents not to oppose or put on evidence. This way, a full-blown trial is still avoided, but the record does not reflect consent on the part of the parents. If this is an acceptable option, it is still important that the record include detailed findings of fact and conclusions of law.

§ 2.5 Procedural Matters Related to the Adjudicatory Hearing

A. Conduct of Hearing [7B-802]

In conducting the hearing, the judge is required to

1. determine the existence or nonexistence of any of the conditions alleged in the petition,

2. protect the due process rights of the juvenile and the parent.

B. Amendment of Petition

The judge may permit a petition to be amended when the amendment does not change the nature of the offense alleged or the conditions upon which the petition is based. **[7B-800]**

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[5] Resource Guidelines, p. 47.

[6] Resource Guidelines, pp. 47, 48.

C. Public Access to Hearing [7B-801]

1. The court determines whether the hearings are open or closed and considers the circumstances of the case including, but not limited to, the following factors:

- the nature of the allegations against the juvenile's parent, guardian, custodian or caretaker;
- 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(1) and G.S. 7B-2901 will be compromised by an open hearing.

2. If the juvenile requests that the hearing remain open, then no part of the hearing shall be closed by the court.

Note: When the evidence involves issues of sexual abuse, a sexually transmitted disease, or other highly sensitive information, the GAL attorney advocate may want to consider requesting that the public be excluded. In addition, the AA may consider requesting that the hearing be closed if he or she has reason to believe that certain persons (such as members of the press) who should not be exposed to the information or would compromise the confidentiality of the information will be present in court.

D. Rules of Evidence

1. The rules of evidence in civil cases apply. **[7B-804]**

2. Different evidentiary rules for adjudication and disposition: It is important to remember that adjudication is more formal than disposition. More evidence is admissible at disposition, where formal rules of evidence do not have to be applied.[7]

Evidence admitted during adjudication but considered for disposition: Where the parent contended on appeal that the trial court erred in *admitting evidence of post-petition occurrences*, the court of appeals found that since the trial court held the adjudication and disposition hearings at the same time, the post-petition occurrences were admissible for the disposition stage. *Powers v. Powers*, 130 N.C. App. 37 (1998), *disc. rev. denied*, 349 N.C. 530 (1998). (In *Powers* the evidence had come in during the adjudication hearing, but the court of appeals ruled that since it was a nonjury trial and there was no showing that the judge acted on it for adjudication purposes, it could be presumed that the judge only considered the evidence for dispositional purposes.)

E. Record of Proceedings

The hearing must be recorded by stenographic notes or electronic (audio taping) or mechanical means. The records are reduced to a written transcript only when timely notice of appeal has been given. **[7B-806]** The record that the clerk of court is required to keep includes recordings of the hearing. After the time for appeal has expired with no appeal having been filed, the recording may be erased or destroyed upon the written order of the court. **[7B-2901(a)]** However, Part VII, Section 6 of the AOC Records Retention Schedule recommends that the clerk retain the recording of a juvenile hearing for at least 90 days after the date of the hearing.

[7] See § 3.2.D.1 for more information on admissibility of evidence in the dispositional phase of a case.

It is unclear whether a judge would be able to order transcription under circumstances other than an appeal.

F. Standard of Proof [7B-805]

The allegations of the petition must be proven by clear and convincing evidence. DSS acts as petitioner and must bear this burden. Pursuant to 7B-807, the order must state that this burden of proof has been met and failure to so state constitutes reversible error. *In re Johnson*, 76 N.C. App. 159 (1985), (involving a delinquency proceeding). However, when no appeal is taken based on this failure, the validity of the adjudication order is not affected. *In re Wheeler*, 87 N.C. App. 189 (1987).

G. Rules of Civil Procedure

The Rules of Civil Procedure apply unless otherwise governed by statute. *In re Bullabough*, 89 N.C. App. 171 (1988). See also *In re McKinney*, 158 N.C. App. 441 (2003).

H. No Default Judgments

A default judgment or judgment on the pleadings is inappropriate in an adjudication of neglect or abuse. See *In re Thrift v. Buncombe County Dep't Soc. Servs*., 137 N.C. App. 559 (2000).

§ 2.6 Practical Tips Regarding Procedure

A. Getting a Subpoena Issued and Served

See Rule 45 of the North Carolina Rules of Civil Procedurr

1. More than one way to get a subpoena served

a. **Agency service**: After a subpoena form is filled out and signed, it can be taken to the clerk of civil court or to civil process to be served. Many consider service by this method to be too slow and ineffective for their needs, but it depends on the district. It should be noted that when handing over a subpoena to be served, service by telephone, even the night before the hearing, is not uncommon; however, service cannot be by telephone when issuing a subpoena for records. Juveniles are considered indigent, and under G.S. 6-24, "a person who sues as an indigent is not required to advance the required court costs and no officer shall require any fee of the person." Therefore, law enforcement should not require a service fee for serving a subpoena for the juvenile.

b. **Serving it oneself**: After filling out and signing a subpoena, the attorney advocate can also send it himself or herself by certified mail. This could be faster than other forms of service if speed is an issue. If the certified mail receipt comes back, an affidavit may be drawn up attesting to service by mail. The receipt should be stapled to the affidavit and filed with the clerk to prove service.

c. **Order to Show Cause**: If a witness who is properly served ignores a subpoena and fails to come to court, attorneys can request an order to show cause to be issued by the court or an order to instruct a law enforcement officer to get the witness.

2. Courtesy notice to witnesses

Getting someone to come to court may take more than proper service of a subpoena. Letting someone know that a subpoena is coming either by fax, phone, or mail is a courtesy that should be extended when possible. Advance notice of a subpoena can help the witness rearrange his or her schedule to be at the hearing and can also foster positive feelings by the witness about the GAL program, as well as about the court process itself.

B. If the GAL Does Not Show up for the Hearing or Is Unprepared

If the GAL's testimony or information not yet obtained is crucial and its necessity outweighs the damage done by prolonging the child's case, it would be appropriate to request a continuance pursuant to the child's best interests. Otherwise, the AA should do the best he or she can with any prior information, the GAL's report, conversations with GAL staff, and anything else available. If the GAL has a good reason for not being present, that reason should be explained to the court.

C. When to Speak and Where to Sit

The timing of the GAL's opportunity to question witnesses and make arguments to the court varies depending on the district and the individual judge. DSS is always first, but the decision varies as to whether the GAL or the parent follows DSS. In some courtrooms, there are tables for each party including the petitioner (DSS), the respondent (parents), and the GAL (representing the child). In other courtrooms, there are only two tables, and the GAL needs to find his or her own place. A new AA should simply ask someone like GAL staff, the clerk, or the DSS attorney where the GAL typically sits and in what order things proceed. It is important that the GAL's placement in the courtroom is independent (sitting at same table as DSS is not a good idea). If there is no microphone at the GAL table, it is important to speak up, because the proceedings are recorded.

§ 2.7 Preparing for the Adjudicatory Hearing

Theoretically at this point, as stated earlier, most of the preparation for adjudication with respect to the investigation, conversation with other parties, identification of potential witnesses, and exhibits has already taken place. However, the AA must also focus on the evidence that will actually be presented at hearing, how that evidence will affect the best interests of the child, and what must be done in court to ensure that the court hears everything necessary to accurately convey the GAL's position. *If the AA has not already done so, he or she can go over the checklists for the nonsecure custody hearing and the prehearing conference in the previous chapter as reminders of pre-adjudication issues.*

A. Talking to the Volunteer

The AA should talk to the GAL volunteer to determine the primary facts, issues, and recommendations that the volunteer wants to emphasize to the court concerning the best interests of the child. To begin with, the AA needs to talk to the volunteer to determine the approach to be taken in the adjudicatory hearing. Waiting for a volunteer's court report to assess the volunteer's perspective on the case is not the best way to prepare for adjudication for several reasons. First, the deadline for the court report may not be far enough in advance of the adjudication to allow for adequate case preparation, and even if it is, the volunteer may hand in a report at the last minute. There must be adequate time to subpoena witnesses or obtain necessary exhibits, as well as to engage in last-minute conversations with other parties. Second, a volunteer's written report may not be clear enough to allow

the AA to prepare for a hearing. Third, it may be necessary to prepare the volunteer to be a witness. *See "Talking to the Volunteer" in § 8.5.C. of this manual.*

B. Analyzing the Facts

The AA must analyze the facts in the case to form an opinion regarding whether the law supports the allegations of abuse, neglect, or dependency. (See the explanation of the law beginning at § 2.8 titled, "The Evidence: Proving the Case to Get an Adjudication.")

C. Making a Final Determination of Each Party's Position

The AA must make a final determination of the position of each party (DSS, the parents, and anyone else involved in the case), including their goals and concerns. Prior to the adjudicatory hearing, the AA should know the position of DSS and the parents based on information gathered by the volunteer, or information gathered at nonsecure custody hearings or prehearing conferences. If the AA is unsure of any party's position, or has reason to think a position has changed, he or she should talk to the volunteer and contact the other parties (via counsel) to get as much information as possible regarding the party's position. Of course, it is entirely possible (especially where the parents are concerned) for one to change his or her position just prior to hearing based on new information or simply a change of heart. It is also possible that the AA will be unable to determine the positions of each party and will have to prepare for multiple possibilities.

1. Knowing other parties' positions also means knowing their intentions on specific issues:

a. **The petition itself** – the party's position on the facts of the petition.

b. **In the case of the parents**, which specific allegations contained in the petition they intend to **admit or deny**.

c. **Grounds for adjudication** – Is the party pushing for an adjudication of abuse, neglect, dependency, or any combination of the three?

d. **Custody** – even though this is not the dispositional phase of the proceedings, it is important to know each party's position on custody, because it is likely to affect their adjudicatory presentation.

2. Making a final determination as to the evidence each party is likely to present

Ideally, the AA will already have exchanged witness and exhibit lists in a prehearing conference. If this hasn't happened, or if there is reason to believe things have changed, the AA should contact counsel for the party to attempt to find out what they intend to present in court.

D. Determining What Evidence the GAL Must Present for Trial

To prepare for adjudication, the AA will need to determine what evidence the GAL should present to supplement the evidence being presented by other parties. This will depend on the position of the other parties and the evidence they present. The AA cannot assume that DSS will present all of the necessary evidence to advocate for the GAL's position and may need to present evidence on behalf of the GAL for

the following reasons:

- The GAL's position concerning the facts may be different from DSS's position, and additional evidence may be required to present those facts.
- The GAL may want to emphasize or supplement various aspects of evidence presented by DSS to facilitate directing the court's focus to the child's best interests and to give the child a voice in court.
- The GAL may have obtained evidence not obtained by any other party that is crucial to the case and must be presented to the court.
- The GAL AA may simply believe that more evidence will be needed to get an adjudication if that is what is desired by the GAL.

E. Determining If There Are Last-Minute Pretrial Motions

It is important for the AA to assess the need for pretrial motions and to file the appropriate motions to save time and successfully prevail on certain points of law. Any legal issue that has the potential for dispute may be more easily resolved through a pretrial motion, particularly a motion in limine. Such motions should be made according to the North Carolina Rules of Civil Procedure. *See Chapter 6 in this manual titled "Appeals, Motions and Procedural Tools" for examples of such motions and tools, and the Appendix in this manual for samples of the same.*

If there is a pretrial motion that has yet to be made but will benefit the child, the AA may still be able to submit it in writing, or, if the judge is amenable, the AA may choose to make the motion orally prior to hearing. If the latter, giving notice to the other parties of that intention will lessen the adversarial nature of the process and is considered fair play.

F. Doing General Trial Preparation based on Anticipated Possibilities

Everyone prepares for a hearing differently. Whether an attorney keeps everything in mind, makes general notes or outlines, or writes out questions and arguments word for word, *the key to being prepared is anticipating all the possibilities that can happen.* In doing so, the attorney advocate might consider the following regarding the case as well as the other parties:

- The witnesses who will testify: their credibility, the evidence sought to be gained from them, the overall impression they are likely to leave with the court.
- The exhibits that may be introduced: which exhibits will be introduced through which witnesses, and what is the significant evidence sought through the exhibit? Are there any problems with admissibility?
- The arguments that each party will make to the judge at closing: what will each seek to support through evidence?
- The primary facts and arguments: which are likely to stand out to make an impression (good and bad) on the judge?
- The statutory elements for an adjudication: can they all be met based on the anticipated evidence?

Carefully considering these issues will help the AA anticipate the possibilities so that he or she can be prepared to handle the evidence to be presented, to make appropriate objections, to ask appropriate questions, and make persuasive arguments based on the evidence.

G. Preparing to Present Applicable Case Law, as a Brief or Oral Argument

The AA should not hesitate to use cases to support points of law that are being argued. Cases can also be used to support the facts being argued. Very often, facts of a case will parallel a published opinion and support the GAL's position. A judge will often welcome the opportunity to be influenced by a case that deals with the same point of law or facts similar to those with which he or she is struggling. Sometimes when parties are arguing two very different positions, pulling out a case to support a point can make a big difference. When using case law, the AA can either prepare a bench brief or prepare to argue the case orally. In either event, the AA should have copies of the case available for the judge and the other parties.

H. Determining Whether the Child Should Be in the Courtroom and/or Testify

When making the important – and difficult – decision about whether the child should be present in court and whether the child should testify, there are many factors that must be considered. Anyone who has had a significant personal or professional relationship with the child (especially mental health professionals) can be consulted about this matter. The child's wishes are very important in this process. It is also important to note the impact of having a "real" child in the courtroom and the impact on the child of being part of the process. The decision about the child's presence should hinge on such factors as the following:

- age and maturity of the child;
- **the child's wishes**;
- stability and fragility of the child, including whether trauma is likely and, if so, to what degree;
- the type of testimony and evidence likely to be presented at trial;
- whether the child will be accompanied by someone able to provide comfort and security;
- whether there will be certain individuals in the courtroom whose very presence would be traumatic for the child;
- whether the presence of the child is likely to yield a positive or negative response from the judge;
- whether being present in court might help the child deal with his or her situation and feelings; and
- whether missing school is an issue for the child.

It may not be necessary for the child to attend an entire hearing. It may be beneficial for the child to be present for certain parts of the hearing but absent from the courtroom during others. It is also possible to ask the judge to place a child on telephone standby so that the child might be called at the appropriate time or only if needed, to avoid missing school or sitting through portions of the hearing that are not necessary**.** If the child should testify, it may be possible for the testimony to be in a nontraditional setting, possibly outside the presence of the alleged perpetrator. *For more information on testifying in a nontraditional setting, see § 7.2.E. of this manual.*

Note that there are places in the Juvenile Code that require children 12 years of age or older to get notice of certain proceedings and some places that require the judge to receive information from the child in certain proceedings and/or give the child an opportunity to be heard. (See, e.g., 7B-901, 7B-906, 7B-907, 7B- 908.) In fact, 7B-901 states that the juvenile has an opportunity to present evidence and may advise the court concerning the disposition he or she believes to be in his or her best interests. See Volume 2, § 12.5.C. in this manual for more information on children's presence in court. While the child's voice is often heard through the GAL, these provisions in the statute

emphasize the important role played by the child.

See § 7.2, titled "The Child Witness," for more information.

§ 2.8 The Evidence: Proving the Case to Get an Adjudication

See Chapter 7 of this manual, titled "Evidence Relating to Abuse, Neglect, and Dependency Proceedings," for details regarding specific evidentiary matters, including case law.

While the GAL is often in favor of adjudication of the petition to allow the juvenile court to exercise continuing jurisdiction over the case and parties, there are times when the GAL and DSS disagree as to whether the adjudication should be one of abuse, neglect or dependency. In any event, although the GAL is not the petitioner and therefore not responsible for proving the case, the GAL has a duty to ensure that the court is presented with all evidence that is competent and relevant to prove the allegations that would further the best interests of the child.

A. The Standard of Proof: Clear and Convincing Evidence

1. To make an adjudication of abuse, neglect, or dependency, the judge must find that the allegations contained in the petition have been proven by clear and convincing evidence. If the allegations are not proven, the petition shall be dismissed. **[7B-805, 7B-807]**

2. Failure to state in the order that the allegations have been proven by clear and convincing evidence constitutes reversible error. *In re Johnson*, 76 N.C. App. 159 (1985) (failure to state burden of proof met in delinquency proceeding); See also *In re Wade*, 67 N.C. App. 708 (1984).

3. There is no requirement as to where or how such a recital of the standard of proof should be included, and a trial court's statement that it reached its conclusions through clear, cogent and convincing evidence is sufficient to meet the requirement of N.C.G.S. § 7B-807. *In re J.D.S.*, 170 N.C. App. 244, 252-53, 612 S.E.2d 350, 356 (2005).

4 Where no appeal is taken, however, failure to state that the burden of proof has been met will not affect the validity of the adjudication order. *In re Wheeler*, 87 N.C. App. 189 (1987).

B. Preliminary Elements of Abuse and Neglect

[*Note*: the statutory definitions referred to below are set out verbatim at the end of this chapter.]

Preliminary elements to be proven for an adjudication of abuse or neglect include the following:

1. The child named in the petition is a juvenile.
A juvenile is defined as one who has not reached his or her eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States. **[7B-101(14)]**

2. The person alleged to be responsible for the abuse or neglect (for some types of neglect, see the definition of neglect) is, in relation to the child, one of the following: [See definition of abuse and neglect, 7B-101(1) and (15).]

- parent
- guardian

- custodian – the person or agency that has been awarded legal custody of a juvenile by a court**. [7B-101(8)]**
- caretaker – This includes the following: **[7B-101(3)]**
    - A person other than a parent, guardian or custodian who has responsibility for the health and welfare of a juvenile in a residential setting, including a stepparent, foster parent, adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, or any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility.
    - A person who has the responsibility for the care of a juvenile in a child day-care home or facility (as defined in Article 7 of Section 110 of the General Statutes) and includes any person who has the approval of the care provider to assume responsibility for the juveniles under the care of the care provider.

C. The Definitions of Abuse and Neglect

In addition to the above preliminary elements, the petitioner must also prove that the child has been abused or neglected under the following definitions:

1. Abuse [7B-101(1)]

Abuse occurs where the parent, guardian, custodian, or caretaker does any of the following:

a. Inflicts or allows to be inflicted upon the juvenile a **serious physical injury** by other than accidental means; or

b. Creates or allows to be created a **substantial risk of serious physical injury to** the juvenile by other than accidental means; or

c. Uses or allows to be used upon the juvenile **cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior; or**

d. **Commits, permits, or encourages the commission of a violation of the following laws** by, with, or upon the juvenile

- First or second degree rape
- First or second degree sexual offense
- Sexual act by a custodian
- Crime against nature
- Incest
- Preparation of obscene photographs, slides or motion pictures of the juvenile
- Employing or permitting the juvenile to assist in a violation of the obscenity laws
- Dissemination or displaying of obscene material to the juvenile
- First and second degree sexual exploitation of the juvenile
- Promoting the prostitution of the juvenile
- Taking indecent liberties with the juvenile; or

*****See statute numbers corresponding to the above laws in 7B-101(1)(d) at the end of this chapter.

e. Creates or allows to be created **serious emotional damage to the juvenile**, evidenced by

severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; or

f. **Encourages, directs, or approves of delinquent acts** involving moral turpitude committed by the juvenile.

2. Casenotes on abuse

a. Parents and caretakers owe a duty to the child to protect him or her from harm; thus, the **failure of a parent to prevent someone else from inflicting injury** or committing sexual acts upon a child may result in a child being adjudicated abused. *In re Gwaltney*, 68 N.C. App. 686 (1984). In *Gwaltney*, the court pointed out that the mother had abused the children by "allowing situations to occur in the home which would tend to promote the sexual abuse." *Id.* at 689. See also *In re Adcock*, 69 N.C. App. 222 (1984) (failure to protect child from abusive conduct or to report the child abuse made parent liable for neglect); *State v. Walden*, 306 N.C. 466 (1982) (aiding and abetting child assault by failure to take reasonable steps to prevent the assault);

b. See Chapter 7 of this manual on evidence for case law involving evidence of abuse. Included in this chapter are such issues as battered child syndrome, expert and lay testimony, prior acts of abuse, and so forth.

c. Evidence of **serious emotional damage due to parents' long-standing, acrimonious marital dispute,** resulting in "chronic adjustment disorder" and depression in children can support a finding of abuse. *Powers v. Powers*, 130 N.C. App. 37 (1998).

3. Neglect [7B-101(15)]

A neglected juvenile is one who falls in any of the following circumstances:

a. **does not receive proper care, supervision, or discipline** from the juvenile's parent, guardian, custodian, or caretaker; or

b. has been **abandoned; or**

c. **is not provided necessary medical or remedial care;**

d. **lives in an environment injurious to the juvenile's welfare; or**

e. **has been placed for care or adoption in violation of law**, including

- Unlicensed group home. *See* G.S. 131D-10.1, *et seq*.
- Payment in exchange for adoption. *See* G.S. 48-10-102.
- Solicitation for adoption. *See* G.S. 48-10-101.
- Private adoptive placement without required notice to DSS. *See* G.S. 48-3-301.
- Violation of Interstate Compact on the Placement of Children. *See* G.S. 7B-3800 et *seq*.).

f. **Other child or sibling living in the home of abused or neglected juvenile:**

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. **[7B-101(15)]**

i. In the case of *In re A.B.*, --- N.C. App. ---, 635 S.E.2d 11, (2006), the Court of Appeals held that a newborn still physically in residence in the hospital may properly be determined to "live" in the home of his or her parents for the purposes of considering under 7B-101(15) whether a substantial risk of impairment exists to that child. Relying on *In re McClean, infra*, the court stated that "to hold that a newborn child must be physically placed in the home where another child was abused or neglected would subject the newborn to substantial risk, contrary to the purposes of the statute." *Id*. at 16.

ii. In the case of *In re McLean*, 135 N.C. App. 387 (1999), DSS filed a petition for neglect on a newborn while she was still in the hospital based on the fact that if sent home, she would be living in an environment injurious to her welfare, because her older sister had died in that same home and murder charges were pending. Here the parents had planned to take the infant home to live among the same persons as her deceased sister, and family members (including the mother) were supportive of the father in spite of the fact that he had pleaded guilty to murder. The court of appeals thought it appropriate that the trial court considered the substantial risk of impairment to one child when another child in the home has been subjected to abuse or neglect.

iii. In the case *In re Ellis*, 135 N.C. App. 338 (1999), a petition for abuse and neglect was filed on two children in part due to the suspicious nature of an older sibling's death. The court of appeals found no error in the trial court's dismissal of the petition. The trial court could not find evidence of abuse or neglect but conceded that the careful monitoring of the home by DSS may have contributed to the level of care and concern the children received. Nevertheless, there was no evidence that the care would become inadequate once DSS was no longer involved with the family. In addition, the court found it significant that there was competent, conflicting evidence as to who administered the medication to the older sibling that resulted in her death and that it could have been someone other than the current caretaker(s).

iv. *In re Nicholson and Ford*, 114 N.C. App. 91 (1994), stated that although evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile, the statute does not require removal of all other children from the home once a child has died or been subjected to sexual or severe physical abuse. This case, however, preceded changes in the law giving DSS the authority to cease reunification efforts or initiate termination proceedings on the basis of abuse or death of another child living in the home or termination of parental rights with respect to another child living in the home. **[See 7B-507 and 7B-1111 (a) (8) and (9).]**

4. Casenotes on neglect

a. **General notes on neglect**

i. **The parent has the right to control the child without undue interference from the state**. Only when parents neglect to perform basic parental duties may the state intervene. *See H.L. v. Matheson*, 450 U.S. 398 (1981); *Parham v. J.R.*, 442 U.S. 584 (1979).

Anonymous call reporting a naked two-year old playing unsupervised in a driveway, standing alone, did not constitute a report of abuse, neglect or dependency to invoke the statutory investigative mandate of DSS. *In re Stumbo*, 357 N.C. 279 (2003).

ii. **This 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, *appeal dismissed and cert. denied*, 306 N.C. 557 (1982); *In re Biggers*, 50 N.C. App. 332 (1981). *[Note that there have been changes to the statutory definition of neglect since these cases.]*

iii. **Finding that a child's home is not clean or that the child is neither well-fed nor clothed is not dispositive on the issue of neglect**. "Any child whose physical, mental or emotional condition has been impaired or is in danger of becoming impaired as a result of the failure of his or her parent to exercise that degree of care consistent with the normative standards imposed upon the parents by our society . . . may be considered neglected under GS 7A-517(21) [now 7B-101(15)]." *In re Thompson*, 64 N.C. App. 95, 101 (1983).

iv. **Risk of threatened future harm can constitute neglect to allow DSS to obtain temporary custody of a juvenile**. *See In re Evans*, 81 N.C. App. 449 (1986) (distinguishing the standard of proof necessary for termination of parental rights versus removal).

b. **Casenotes on conduct constituting neglect**

i. **Refusal to send a child to therapeutic day care**. *See In re Cusson*, 43 N.C. App. 333 (1979).

ii. **Failure of the parent to seek a recommended evaluation to determine if a child is developing normally and to seek treatment if necessary**. *See In re Thompson*, 64 N.C. App. 95 (1983)(failure to follow through on plans for psychological treatment for hyperactivity as recommended by health officials). *See also In the Matter of Ray*, 95 Misc. 2d 1026, 408 N.Y.S. 2d 737 (1978).

iii. **Failure of parents to enroll their children in school**, thus depriving them of their opportunity to receive a basic education, *In the Matter of Devone*, 86 N.C. App. 57 (1987); involving a mildly retarded child taught at home, *see In re McMillan*, 30 N.C. App. 235 (1976).

iv. **Failure to provide necessary medical care**, thus depriving the child of the opportunity for normal growth and development. *See In re Bell*, 107 N.C. App. 566 (1992); *State v. Harper*, 72 N.C. App. 471 (1985); *In re Huber*, 57 N.C. App. 453, *appeal dismissed and cert. denied*, 306 N.C. 557 (1982); *State v. Mapp*, 45 N.C. App. 574 (1980).

v. **Failure to prevent father from having opportunities to commit sexual acts** on teenage daughters. *In re Gwaltney*, 68 N.C. App. 686 (1984). *See also In the Matter of Brittny Nicole Helms*, 127 N.C. App. 505 (1997).

vi. **Failure to make adequate efforts to see that the child receives prescribed**

medication. *See State v. Harper*, 72 N.C. App. 471 (1985); *In re Webb*, 70 N.C. App. 345 (1984), *aff'd*, 313 N.C. 322 (1985).

vii. **Failure to understand the importance of proper food for an infant** resulting in malnutrition. *See In re Webb*, 70 N.C. App. 345, *aff'd*, 313 N.C. 322 (1985) (malnourished infant required hospitalization); *In re Apa*, 59 N.C. App. 322 (1982).

viii. **Allowing a child to live in a filthy home**. *See In re Safriet*, 112 N.C. App. 747 (1993); *In re Webb*, 70 N.C. App. 345 *aff'd*, 313 N.C. 322 (1985); *State v. Harper*, 72 N.C. App. 471 (1985); and *In re Black*, 76 N.C. App. 106 (1985).

ix. **An able parent's willful failure to support a child or visit him**. *See In re Safriet*, 112 N.C. App. 747 (1993); see also *In re Apa*, 59 N.C. App. 322 (1982).

x. **Disciplining a child so severely that bruises and internal abrasions result**. *See In re Thompson*, 64 N.C. App. 95, 99 (1983); *see also State v. Hunter*, 48 N.C. App. 656 (1980).

xi. **Abandonment in which a parent withholds his presence, his love, his care,** the opportunity to display filial affection, and willfully neglects to lend support and maintenance, or a parent "evinces a settled purpose and a willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child." *See In re Stroud*, 38 N.C. App. 373 (1978); *Pratt v. Bishop*, 257 N.C. 486, 503 (1962).

xii. **Failure to provide a stable home environment and indifference to the child's physical welfare**. *In re Adcock*, 69 N.C. App. 222, (1984). *See also In the Matter of Brittny Nicole Helms*, 127 N.C. App. 505 (1997); *In re Black*, 76 N.C. App. 106 (1985).

xiii. A **parent's abuse of alcohol, without proof of an adverse impact on the child, is insufficient for an adjudication of neglect** as a ground for termination. *In re Phifer*, 67 N.C. App. 16, (1984). *See also In re McDonald*, 72 N.C. App. 234, *disc. rev. denied*, 314 N.C. 115, (1985). But in *Powers v. Powers*, 130 N.C. App. 37 (1998), the mother's **severe alcohol abuse resulted in problems supporting a finding of neglect.**

xiv. Evidence of abuse and drug use on the part of the father and grandfather of the child supported the conclusion that the child was at risk when exposed to them**. Evidence of inability to maintain a secure living situation free of drugs, violence, and attempted sexual assaults supports a conclusion of neglect**. *In the Matter of Brittny Nicole Helms*, 127 N.C. App. 505 (1997). *See also In re Blackburn*, 142 N.C. App. 607 (2001).

xv. **Failure to provide adequate food, socialization, stimulation, and medical care** was conduct constituting neglect. *In re Bell*, 107 N.C. App. 566 (1992).

xvi. Evidence of neglect was gleaned primarily from the fact that a newborn would be sent home to live with the same caretakers who were responsible for the death of the newborn's older sister. The father had pleaded guilty in the death of the older sister, and the mother and other family members supported the father in spite of his plea. *In re McLean*, 135 N.C. App. 387 (1999).

c. **Casenotes on determining factors of neglect**

i. **"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**. Therefore the fact that the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected." *In re Montgomery*, 311 N.C. 101 (1984). *See also Wilson v Wilson*, 269 N.C. 676 (1967) and *Santosky v. Kramer*, 455 U.S. 745 (1982).

ii. **It is not necessary to find a failure to provide physical necessities** to children to prove neglect. *In re Black*, 76 N.C. App. 106 (1985). *See also In re APA*, 59 N.C. App. 322 (1982)(holding the trial court may consider failure to provide personal contact, love, and affection).

D. Elements of Dependency

1. Definition [7B-101(9)]

To adjudicate a juvenile dependent, the court must find that the juvenile is in need of assistance or placement because

a. the juvenile has no parent, guardian, or custodian responsible for his or her care or supervision, or

b. the juvenile's parent, guardian, or custodian is
   i. unable to provide for the care or supervision; and
   ii. lacks an appropriate alternative child care arrangement.

2. Casenotes on Dependency

a. In determining whether a juvenile is dependent, "the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427 (2005).

b. Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court. *In re K.D.*, --- N.C. App. ---, 631 S.E.2d 150, 155 (2006).

c. Adjudication order finding dependency reversed and remanded for failure to make findings of fact regarding the availability of alternative child care arrangements. *See In re B.M.*, --- N.C. App. ---, 643 S.E.2d 644 (2007).

§ 2.9 The Adjudication Order

A. Orders Generally

1. Rule 52(a) of the North Carolina Rules of Civil Procedure governs court orders of bench trials and requires that the court:

- Find facts specially
- State separately its conclusions of law
- Direct entry of the judgment

2. Findings of Fact versus Conclusions of Law

"Any determination requiring the exercise of judgment or 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 as a **finding of fact**." *In re Helms*, 127 N.C. App. 505 (1997)(emphasis added).

3. Review on Appeal

Rule 52(c) of the North Carolina Rules of Civil Procedure provides the issue of sufficiency of the evidence to support findings of fact made at a bench trial may be raised on appeal whether or not the party raising the issue has objected at trial or made a motion to amend the judgment or for specific findings. It is imperative that the juvenile court make sufficient findings of fact that support the conclusions of law, or the order can be reversed and remanded by a subsequent appeal.

B. Content of the Order

1. The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. [8]

The court's written findings of fact and conclusions of law should [9]

- accurately reflect the reasons for an adjudication of abuse, neglect, and dependency;
- accurately reflect the reasons for continued state intervention;
- state that the findings are by clear and convincing evidence;
- provide sufficiently detailed information to justify agency and court choices for treatment and services;
- provide a defensible basis for refusing to return a child home;
- be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning; and
- set date and time of next hearing, if needed.

[8] Although prior to January 1, 2002 7B-807 did not expressly state that the adjudicatory order shall be in writing and contain appropriate findings of fact and conclusions of law, see appellate cases in this subsection, below, relating to these requirements. Statutory requirements are set out below.

[9] These are not necessarily statutory requirements, but are suggested by the National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, 1995, p. 52.

2. Examples of conclusions of law: The determination of whether neglect exists pursuant to an adjudicatory hearing is classified as a conclusion of law (not a finding of fact), because it requires the application of legal principles set forth in the definition of neglect. The determination of whether DSS has made reasonable efforts and whether it is in the best interest of the child to be in DSS custody are also conclusions of law, because they require an exercise of judgment. *Id. See also In re Gleisner*, 141 N.C. App. 475 (2000) described below in subsection 3.

3. The court must make findings of fact and state separate conclusions of law in sufficient detail.

a. In the case of *In re Everette*, 133 N.C. App. 84 (1999), the trial court's adjudication order contained only three short findings, one of which was actually a conclusion of law. Not only did the court of appeals find that the findings were insufficient but it found that the trial court should have stated separate conclusions of law. Here there were no findings supporting a neglect adjudication. The case was remanded.

b. *In re Gleisner*, 141 N.C. App. 475 (2000), is a case which the court of appeals remanded because it was unable to conduct a proper review due to problems with the trial court's order. First, the "factual findings" in the trial court's order were not factual findings but were a recitation of the evidence presented at trial and the trial court therefore failed to resolve numerous disputed factual issues. Second, it was unclear from the record on what basis one of the children was found neglected because all the order stated was that the child was found to be neglected "based on the incident in March." Not only was this a legal conclusion that was mistakenly designated a factual finding, it was also faulty because the court of appeals could find no "incident in March" that involved this child. Finally, the order was problematic because it failed to address impairment or a substantial risk of impairment as a consequence of the failure to provide proper care, supervision, or discipline.

4. Recitations of testimony do not constitute findings of fact.

It is the duty of the trial court to resolve disputed issues. Merely reciting testimony of parties or listing identical allegations from the petition does not resolve the issues that lead to the hearing.

"Mere recitations of testimony are not findings of fact." *In re O.W.*, 164 N.C. App. 699 (2004). "Recitations of the testimony of each witness do not constitute findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question when emerged from all the evidence presented." *Moore v. Moore*, 160 N.C. App. 569 (2003).

5. Recitations of the allegations do not constitute findings of fact.

Although "cutting and pasting" certainly saves time in drafting orders, allegations from the petition must be proven by clear and convincing evidence or stipulated by the parties to constitute a finding of fact.

The trial court may not simply "recite allegations," but must through "processes of logical reasoning from the evidentiary facts" find the ultimate facts essential to support the conclusions of law. *In re Harton*, 156 N.C. App. 655 (2003).

"The trial court's findings must consist of more than a recitation of allegations. *In re Anderson*, 151 N.C. App. 94 (2002).

C. Timing and Drafting of the Order

1. Drafting and reviewing: Typically, the party who prevails drafts the order (often DSS), but all parties should be given an opportunity to review the order before the judge signs it. In the event that the DSS attorney drafts the order, but does not submit a proposed copy to the GAL, the AA should contact the DSS attorney and request such a procedure. In some districts, however, it is customary for the clerk to prepare the order, and in some cases the judge is the only one who reviews it. It would be to everyone's benefit, however, to suggest a process whereby the judge and all parties have an opportunity to review the order. It is important to check orders carefully and point out discrepancies or mistakes. In the event that an order is entered without GAL or AA review and there are mistakes or omissions, the AA should make a motion pursuant to Rule 52(b) of the North Carolina Rules of Civil Procedure to amend the judgment within ten (10) days of entry and request that the order be amended to include omitted or mistaken findings of fact or conclusions of law. Reviewing orders is imperative to prevent issues on appeal.

2. Timing: The adjudicatory order shall be reduced to writing, signed, and entered no later than thirty (30) days following the completion of the adjudicatory hearing. If the order is not entered within thirty (30) days following the completion of the hearing, the juvenile clerk shall schedule a subsequent hearing at the first juvenile court session scheduled following this thirty (30) day period to determine and explain the reason for the delay and to obtain any needed clarification regarding the order's contents. The order shall be entered within ten (10) days of this subsequent hearing.[10] **[7B-807(b)]**

Late filing of adjudication and disposition orders not grounds for reversal absent prejudice. *In re E.N.S.*, 164 N.C. App. 146 (2004), *disc. review denied*, 359 N.C. 189 (2004). *See also In re T.L.T.*, 170 N.C. App. 430 (2005)(holding delay does not constitute prejudice *per se*, but a five month delay was prejudicial).

D. Status of the Child

1. Adjudication of abuse, neglect or dependency refers to the status of the child—not the fault of culpability of the parent.

a. In determining whether a child is abused, neglected, or dependent upon an adjudication of a juvenile petition, 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 (1984).

b. When confronted with petitions alleging abuse, neglect and/or dependency, it is the trial court's function to adjudicate whether the juvenile has the **status** of one or more of these conditions. *In re J.A.G.*, 172 N.C. App. 708 (2005).

c. Where the non-custodial mother argued that the trial court erred in finding and concluding that the child was abused an neglected without assigning responsibility for the abuse and neglect to the custodial father, the court held that the purpose of abuse, neglect, and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected, or dependent. *In re J.S.*, --- N.C. App. ---, 641 S.E.2d 395 (2007).

[10] Session Laws 2005-398 added this mandate for a subsequent hearing when an order is not timely entered effective October 1, 2005.

2. Refrain from "as to" language. Adjudication orders should *not* include "as to" language such as "the child is abused as to the father and neglected as to the mother." The proper conclusion of law is that the child is abused and neglected, and the specific findings of fact can reflect whose actions resulted in the adjudication. Although the Court of Appeals has not found prejudicial error when orders are drafted using "as to" language, the following excerpt is compelling:

> "It is nonsensical for trial court's to adjudicate abuse, neglect, and/or dependency "as to" to certain parents or caretakers. Moreover…it is unhelpful and confusing for trial courts to make explicit conclusions of law that a child is abused, neglected, and/or dependent 'because' named person(s) committed certain acts." (quoting concurrence)

In re A.S., --- N.C. App. ---, 640 S.E.2d 817 (2007).

CHECKLISTS AND WORKSHEETS

§ 2.10 WORKSHEET FOR ADJUDICATION*

Trial Preparation

_____ Received all necessary information from GAL volunteer concerning relevant facts and perceptions of GAL.

_____ GAL believes there is evidence of abuse, neglect, or dependency (circle those that apply) to support an adjudication _____

Summarize key facts that do or do not support the allegations of abuse, neglect, or dependency:

How does the child feel about this proceeding?

Is it possible to have the child(ren) present at adjudication even if they are not an appropriate witness?

Does the parent need a GAL pursuant to 7B-602? Yes/No
Has paternity been established? Yes/No If not, explain how paternity has been or will be handled:

Does the Indian Child Welfare Act apply to this case? _____
Date of any prehearing conference (formal or informal): _____
Is there a consent agreement in this case? Yes/No
Are any prehearing evaluations of parent(s) or child taking place? If so, are they court ordered?

What other services have been provided to the child(ren) or parents?

Describe parent(s)' response to such services:

DSS general position on the case:

Parent(s)' general position on the case:

Agreed upon stipulations:

*****For use by Guardian ad Litem Attorney Advocates.

ADJUDICATION

Contested Issues:

_____
_____
_____

Summary of Evidence Expected to Be Presented by DSS or Parent(s)

Social Services' witnesses and exhibits for trial:

_____
_____
_____
_____
_____
_____
_____

Parent(s)' witnesses and exhibits for trial:

_____
_____
_____
_____
_____
_____
_____

Problems with DSS' evidence:

_____
_____
_____
_____

Problems with parents' evidence:

_____
_____
_____
_____

Summary of Evidence to Be Presented by GAL

Witness or exhibit	Subpoena status	Significant evidence intended to be presented through this witness or exhibit
1.		
2.		
3.		
4.		
5.		
6.		
7.		

Summarize any problems with the above evidence to be introduced by the GAL:

List any pretrial motions being made by any party:_____
_____

List any case law that applies to your case:

Case:	Issue case discusses:
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Adjudicatory Hearing

Persons who should be present:

____ Judge _____
____ Parent(s) whose rights have not been terminated _____
____ Parent(s)' attorney(s) _____ _____
____ Social Services caseworker(s) _____ _____
____ GAL volunteer _____
____ GAL attorney advocate _____
____ Court reporter or recording equipment
____ Relatives with legal standing, other custodial adults _____ _____
____ Security personnel
____ Agency attorney _____

Persons whose presence may be needed:

____ Children _____
____ Extended family members _____ _____
____ Counselor/therapist _____ _____
____ Experts (medical or other) _____ _____
____ Law enforcement officers
____ Adoptive parents _____
____ Foster parents _____
____ Other service providers _____ _____
____ Juvenile court counselor
____ Probation or parole officer
____ Anyone else with specific knowledge about the circumstances surrounding the child or parent that would help support your case _____ _____ _____

	Summary of Key Evidence Presented at Hearing		
(copy additional pages of this chart as needed)	Significant issue addressed by this witness or exhibit	Significant content of testimony or exhibit	Points to argue based on this evidence
Witness: Exhibit: Exhibit #: Exhibit admitted? Direct Exam by: Cross Exam by:			
Witness: Exhibit: Exhibit #: Exhibit admitted? Direct Exam by: Cross Exam by:			
Witness: Exhibit: Exhibit #: Exhibit admitted? Direct Exam by: Cross Exam by:			
Witness: Exhibit: Exhibit #: Exhibit admitted? Direct Exam by: Cross Exam by:			

Key Decisions the Court Should Make at Adjudication:

Which allegations of the petition have been admitted or proved by clear and convincing evidence, if any:

Additional Issues to Address at Adjudication

(some of which will not apply when disposition will take place immediately following adjudication)

Where the child is to be placed prior to disposition: _____

Whether further testing or evaluation of the child or parents is necessary prior to disposition: _____

_____

Whether the agency is taking prompt steps to evaluate relatives as possible caretakers (including relatives from outside the area) in preparation for disposition:

When child is placed with parent, whether such placement is to be conditioned on no contact between child and/or caregiver and alleged perpetrator:

Whether the agency must be directed to continue its efforts to notify noncustodial parents, including unwed fathers:

When the child is to be in foster care prior to disposition, set terms for the following:

Visitation: _____

Support: _____

Other communication between parent and child or child and siblings: _____

_____

The court's written findings of fact and conclusions of law should

- accurately reflect factual basis for an adjudication of abuse, neglect, and dependency
- accurately reflect the reasons for continued state intervention
- state that the findings are by clear and convincing evidence
- provide sufficiently detailed information to justify agency and court choices for treatment and services
- provide a defensible basis for refusing to return a child home
- be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning
- set date and time of next hearing, if needed

§ 2.11 MASTER CHECKLIST FOR ADJUDICATION

Master Checklist for Adjudication

Adjudication Preparation

____ Received all necessary information from GAL volunteer concerning relevant facts and perceptions of GAL.

_____ GAL volunteer and AA believe there is evidence of abuse, neglect, or dependency (circle those that apply) to support an adjudication.

State the specific language in the definition(s) of abuse, neglect, or dependency that applies to the facts of the case:

_____ Aware of the child's feelings regarding this proceeding.

_____ The child will/ will not be present at the hearing. _____ The child will/will not testify.

The parent does/ does not need a GAL pursuant to 7B-602

_____ A petition for abuse, neglect, or dependency has/has not been filed on behalf of the minor parent

Paternity has/has not been established. _____ If not, a plan is in place for handling paternity.

_____ A prehearing conference or informal conversations have taken place in an effort to reach consent.

_____ A determination has been made regarding potential stipulations and issues in dispute.

_____ Aware of DSS position in this case. _____ Aware of parents' position in this case.

There is/is not a consent agreement in this case.

The Indian Child Welfare Act does/does not apply to this case.

The Multi-ethnic Placement Act does/does not apply to this case.

_____ Aware of results of any prehearing evaluations of child or parents that have taken place. Those evaluations include _____

_____ Have records in file concerning all services that have been provided to child or parents and the results of those services, or state what is needed: _____

_____ Have records in file concerning case history and all relevant dates and events, or state what is needed: _____

_____ Made efforts to determine the witnesses and exhibits intended to be presented by other parties.

_____ Made a determination regarding evidence to be presented by GAL.

_____ Assessed evidence to be presented by all parties for substance, value, and admissibility.

_____ Dealt with any pretrial motions (made by GAL or other parties).

_____ Researched and collected any applicable case law.

The Adjudicatory Hearing

Persons who should be present:
Judge _____
Parent(s)_____
Parent(s) Atty(s) _____
_____
DSS caseworker _____
GAL volunteer _____
GAL Atty Advocate _____
Agency Attorney_____
Court reporter or recording equipment _____
Relatives with legal standing, other custodial adults
_____
_____
Security personnel _____

Persons whose presence may be needed:
Child(ren) _____
Extended family members _____
Counselor/therapist _____
Experts_____
Law enforcement officers _____
Foster parents _____
Juvenile court counselor _____
Probation or parole officer _____
Other service providers _____
_____
Anyone else with knowledge about the family situation _____
_____

Key decisions the court should make at adjudication:

_____ Which allegations of the petition have been admitted or proven by clear and convincing evidence, if any.

Additional issues to address at adjudication (some of which will not apply when disposition will take place immediately following adjudication):

_____ Where the child is to be placed prior to disposition _____
_____ Whether further testing or evaluation of the child or parents is necessary prior to disposition.
_____ Whether the agency is taking prompt steps to evaluate relatives (including those outside the area) as possible caretakers in preparation for disposition.
_____ When child is placed with parent, whether such placement is to be conditioned on no contact between child and/or caregiver and alleged perpetrator.
_____ Whether the agency must be directed to continue its efforts to notify noncustodial parents, including unwed fathers.
_____ When the child is to be in foster care prior to disposition, set terms for the following:
  _____ Visitation
  _____ Support
  _____ Other communication between child and parent or siblings

The court's written findings of fact and conclusions of law should

_____ accurately reflect factual basis for an adjudication of abuse, neglect, and dependency.
_____ accurately reflect factual basis for continued state intervention.
_____ state that the findings are by clear and convincing evidence.
_____ provide sufficiently detailed information to justify agency and court choices for treatment and services.
_____ provide a defensible basis for refusing to return a child home.
_____ be written in easily understandable language so that all parties know how the court's findings relate to subsequent case planning.
_____ set date and time of next hearing, if needed.

STATUTES

ADJUDICATORY HEARING

§ 7B-800. Amendment of petition

The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-801. Hearing

(a) At any hearing authorized or required under this Subchapter, the court in its discretion shall determine whether the hearing or any part of the hearing shall be closed to the public. In determining whether to close the hearing or any part of the hearing, the court shall consider the circumstances of the case, including, but not limited to, the following factors:

(1) The nature of the allegations against the juvenile's parent, guardian, custodian or caretaker;

(2) The age and maturity of the juvenile;

(3) The benefit to the juvenile of confidentiality;

(4) The benefit to the juvenile of an open hearing; and

(5) 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.

(b) No hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open.

(c) The adjudicatory hearing shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 60 days from the filing of the petition unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, § 22, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999.

§ 7B-802. Conduct of hearing

The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-803. Continuances

The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-804. Rules of evidence

Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-805. Quantum of proof in adjudicatory hearing

The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-806. Record of proceedings

All adjudicatory and dispositional hearings shall be recorded by stenographic notes or by electronic or mechanical means. Records shall be reduced to a written transcript only when timely notice of appeal has been given. The court may order that other hearings be recorded.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-807. Adjudication

(a) If the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state. If the court finds that the allegations have not been proven, the court shall dismiss the petition with prejudice, and if the juvenile is in nonsecure custody, the juvenile shall be released to the parent, guardian, custodian, or caretaker.

(b) The adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of

juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2001-208, § 17, eff. Jan. 1, 2002; S.L. 2005-398, § 3, eff. Oct. 1, 2005.

§ 7B-902. Consent judgment in abuse, neglect, or dependency proceeding

Nothing in this Article precludes the court from entering a consent order or judgment on a petition for abuse, neglect, or dependency when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

DEFINITIONS OF ABUSE, NEGLECT AND DEPENDENCY

§ 7B-101. Definitions

As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused juveniles. -- Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1;

e. 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 or

others; or

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

(2) Aggravated circumstances. -- Any circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

(3) Caretaker. -- Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services. "Caretaker" also means any person who has the responsibility for the care of a juvenile in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes and includes any person who has the approval of the care provider to assume responsibility for the juveniles under the care of the care provider. Nothing in this subdivision shall be construed to impose a legal duty of support under Chapter 50 or Chapter 110 of the General Statutes. The duty imposed upon a caretaker as defined in this subdivision shall be for the purpose of this Subchapter only.

(4) Clerk. -- Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(5) Community-based program. -- A program providing nonresidential or residential treatment to a juvenile in the community where the juvenile's family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(6) Court. -- The district court division of the General Court of Justice.

(7) Court of competent jurisdiction. -- A court having the power and authority of law to act at the time of acting over the subject matter of the cause.

(7a) Criminal history. -- A local, State, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or a felony, involving violence against a person.

(8) Custodian. -- The person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.

(9) Dependent juvenile. -- A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

(10) Director. -- The director of the county department of social services in the county in which the juvenile resides or is found, or the director's representative as authorized in G.S. 108A-14.

(11) District. -- Any district court district as established by G.S. 7A-133.

(11a) Family assessment response. -- A response to selected reports of child neglect and dependency as determined by the Director using 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.

(11b) Investigative assessment response. -- A response to reports of child abuse and selected reports of child neglect and dependency as determined by the Director using a formal information gathering process to determine whether a juvenile is abused, neglected, or dependent.

(12) Judge. -- Any district court judge.

(13) Judicial district. -- Any district court district as established by G.S. 7A-133.

(14) Juvenile. -- A person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States.

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

(16) Petitioner. -- The individual who initiates court action, whether by the filing of a petition or of a motion for review alleging the matter for adjudication.

(17) Prosecutor. -- The district attorney or assistant district attorney assigned by the district attorney to juvenile proceedings.

(18) Reasonable efforts. -- The diligent use of preventive or reunification services by a department of social 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. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile.

(18a) Responsible individual. -- An individual identified by the director as the person who is responsible for rendering a juvenile abused or seriously neglected.

(19) Safe home. -- A home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect.

(20) Shelter care. -- The temporary care of a juvenile in a physically unrestricting facility pending court disposition.

(21) Substantial evidence. -- Relevant evidence a reasonable mind would accept as adequate to support a conclusion.

(22) Working day. -- Any day other than a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, §§ 1, 18, eff. July 1, 1999; S.L. 1999-190, § 1, eff. June 18, 1999; S.L. 1999-318, § 1, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2005-55, § 1, eff. Oct. 1, 2005; S.L. 2005-399, § 1, eff. Oct. 1, 2005.

CHAPTER 3
DISPOSITION, REVIEW, AND PERMANENCY PLANNING

Table of Contents

Sec.

CHECKLISTS AND WORKSHEETS

STATUTES

Note: *For information on remedies for seeking changes in dispositional orders, see Chapter 6 of this manual on remedies including appeals.*

§ 3.1 Summary and Purpose

A. Summary

Disposition is the stage at which the court determines who shall have legal and/or physical custody and control of the child or children. The court may also make specific orders concerning the children or parents and may mention expectations about what changes need to be made within the family. At disposition, all parties submit to the court (via reports, evidence, and argument) their perspective on what the family's needs are, how those needs can be met, and what should happen before the children may be returned home or court involvement may cease. After disposition, a review hearing must take place within ninety days to allow the court to assess what is happening in the case and to determine if any changes should be made concerning disposition. Subsequent review hearings are held at maximum intervals of six months. Parties can also move for additional review hearings when necessary, in which case the court must hold a hearing. Within twelve months of disposition, a special review hearing designated a "permanency planning hearing" is held; its purpose is to develop a plan to achieve a safe, permanent home for the child within a reasonable period of time.

B. Purpose of Disposition

1. Purpose according to G.S. 7B-900

"The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile . . ." **[7B-900]**

2. Commentary on the purpose of disposition

The purpose of disposition is discussed in the following excerpt from *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases.*

> Decisions at disposition should help the agency and parents develop an appropriate plan to address the specific problems which necessitated state intervention in the case. While adjudication should identify the problems justifying court involvement, disposition should make sure that the parties work out a plan to resolve them. The court should ensure that the agency and court do not work at cross purposes.
>
> Disposition should set a framework for review. Effective dispositional proceedings enable review proceedings to evaluate progress in the case. Where the family problems can be clearly described, appropriate services can be identified, and appropriate objectives can be chosen, this will provide a clear focus for subsequent review hearings. [1]

[1]National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, Publication Development Committee, Victims of Child Abuse Project, Spring 1995, p. 54.

C. Attorney Advocate's Role in Disposition and Reviews

The role of the AA during disposition and review is clearly very important because, as the child's advocate, the AA's input should have a significant impact on the dispositional decision. The appointment statute, 7B-601, provides: "In every case where a nonattorney is appointed as guardian ad litem, an attorney shall be appointed in the case in order to *assure protection of the juvenile's legal rights throughout the proceeding*." (emphasis added) It is therefore clear that attorney advocates are to maintain an active role until the case is closed or the attorney's appointment is terminated.

D. Casebuilding for Permanence

Actions taken and information obtained in the dispositional phase may be critical factors in future proceedings such as termination of parental rights. Details that appear in the court file resulting from disposition may be pivotal in building a case for TPR. *See § 2.3, in this manual for more information on casebuilding.*

E. Disposition and Review: Similar in Purpose and Procedure

Dispositional hearings and review hearings are similar in purpose and procedure, with the dispositional hearing designed to determine initial disposition and review hearings designed to review the initial disposition and make any necessary changes and orders. (See *In re Montgomery*, 77 N.C. App. 709 (1985), stating that a hearing upon motion for review is in the nature of a dispositional hearing.) ***This chapter is organized to combine issues related to review and disposition because many of the statutes and cases that relate to one also relate to the other***. It is important to carefully read the statutes pertaining to disposition and review to get a thorough understanding of the relationship between the two types of hearings.

§ 3.2 Timing and Procedure for Disposition and Review Hearings

A. Timing of Initial Disposition

The court shall hold the dispositional hearing immediately following adjudication, or it may set the dispositional hearing for a future date so long as the dispositional hearing is concluded within 30 days of the conclusion of the adjudicatory hearing.[2] **[7B-901]** Reasons that the court may not immediately proceed to disposition is the need for sufficient social, medical, psychiatric, psychological, and educational information. **[see 7B-808]** At other times, the court simply runs out of time and must schedule a later hearing. However, the thirty (30) day statutory timeframe indicates legislative intent that the disposition be resolved soon after the adjudication.

The attorney advocate should be prepared to proceed immediately to disposition when possible. Mindful of the child's sense of time, the AA should advocate for proceeding to disposition as soon as all relevant evidence has been collected and can be presented to the court. The AA should argue against unnecessary requests for postponing disposition when such postponement is not in the best interest of the child.

[2] Session Laws 2005-398 amended this statute to provide the requirement that the disposition be completed within 30 days of the adjudication if the court does not immediately proceed to disposition. Prior to this amendment, there was no specific statutory time limit. Postponing disposition resulted in delay of services and could increase the life of the case.

B. Automatic Review Hearings

1. Timing of reviews: The statute sets out certain requirements for review hearings that must be conducted within specified time periods by the court. In any case in which custody is removed from a parent, guardian, custodian, or caretaker, review hearings must be held

a. within 90 days from the date of the dispositional hearing, and

b. subsequent review hearings must be held within six months thereafter. **[7B-906]**

2. DSS requests clerk to calendar review: The director of social services shall make a timely request to the clerk to calendar each review at a session of court scheduled for the hearing of juvenile matters. **[7B-906(a)]**

3. Notice of reviews: The clerk shall give 15 days' notice of the review and its purpose to the parent, the juvenile if 12 years of age or more, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, custodian or agency with custody, the guardian ad litem, and any other person the court may specify, indicating the court's impending review. **[7B-906(a)]**

4. Waiver of reviews [7B-906(b)]: Notwithstanding other provisions of this Article, the court may waive the holding of required review hearings, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every 6 months, **if the court finds by clear, cogent, and convincing evidence that**

a. The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least **one year** [3]; and

b. The placement is **stable** and continuation of the placement is in the juvenile's **best interest**; and

c. **Neither** the juvenile's **best interests** nor the **rights** of any party **require** that review **hearings** be held every 6 months; and

d. 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

e. The court order has **designated** the relative or other suitable person as the juvenile's **permanent caretaker** or **guardian of the person**.

NOTE: The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. [7B-906(b)]

Casenote on waiving review hearings. The Court of Appeals found reversible error when the trial court waived review hearings without making findings relating to each statutory factor and held "the trial court must make written findings of fact satisfying each of the enumerated criteria in section 7B-906(b)." *In re L.B.*, --- N.C. App. ---, 2007 N.C. App. LEXIS 1476 (July 3, 2007).

[3] Note that this one year period in which the child has resided with the caretaker does not have to be consecutive months, but may be a cumulative time period, including pre-petition, that equals one year.

C. Reviews on Motion of a Party

1. In addition to those review hearings set by the court, any party in the case may make a motion in the cause for a review hearing. **[7B-1000 and 7B-906(b)(4)]**

2. The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. **[7B-906(b)]**

3. Section 7B-1000 states that the judge may modify or vacate the order in light *of changes in circumstances or the needs of the juvenile. See Also In re Brenner,* 83 N.C. App. 242 (1986).

> **Note**: It can be argued that when review hearings are conducted pursuant to a request of a party, there is a requirement of a finding of changed circumstances (*see, e.g., In re Williamson*, 77 N.C. App. 53 (1985)) for custody to be modified. However, when "changes in circumstances" is read along with the language of "or the needs of the juvenile," in 7B-1000, this appears to lead back to the best interest standard, which is the requirement in regular review hearings set by the court. This may be a simple semantic difference; therefore when the hearing takes place pursuant to a motion by a party, the judge would be prudent to refer, in the order, to whether there has been a "change in circumstances" *and* to the "needs of the juvenile."

D. Informal Hearing

1. Formal rules of evidence do not apply: "The dispositional hearing may be informal, and the judge may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe is in the best interest of the juvenile. The court may consider any evidence, **including hearsay evidence** as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and most appropriate disposition."[4] **[7B-901]**

> a. **Not error to admit DSS and GAL reports**. The trial court did not err by admitting the evidence of the DSS and guardian ad litem's reports because the formal rules of evidence do not apply to dispositional hearing. In re M.J.G., 168 N.C. App. 638 (2005).

2. Consolidation of adjudication and disposition is permitted. In adjudication of petition alleging neglect, it was not error for the trial court to consolidate the adjudicatory and dispositional hearing for evidentiary purposes since there is no requirement that the two stages be conducted at separate hearings so long as the trial court applies the proper evidentiary standards *i.e.* "clear and convincing evidence"for the adjudicatory stage and the "best interests of the child" at the disposition stage. *In re O.W.*, 164 N.C. App. 699 (2004).

3. Any evidence that is competent and relevant to a showing of best interest of the child must be heard and considered, but the court has the discretion to exclude cumulative testimony. *In re Shue*, 311 N.C. 586 (1984).

[4] Session Laws 2003-62 amended the statute to specifically include hearsay. Prior to this amendment, it was necessary to rely on caselaw decisions. *See In re Montgomery*, 77 N.C. App. 709 (1985), stating that the formal rules of evidence do not apply at dispositional or review hearings, and therefore the court could consider written psychological reports regarding the needs of the children. While *Montgomery* found the trial court's decision to admit hearsay evidence was not error, it is unclear whether there would have been the same holding had the judge and parties insisted in application of the formal rules of evidence.

a. **Evidence admitted during adjudication but considered for disposition:** Where the parent contended on appeal that the trial court erred in admitting evidence of post-petition occurrences, the court of appeals found that since the trial court held the adjudication and disposition hearings at the same time, the post-petition occurrences were admissible for the disposition stage. *Powers v. Powers*, 130 N.C. App. 37 (1998). (In *Powers* the evidence had come in during the adjudication hearing, but the court of appeals ruled that since it was a nonjury trial and there was no showing that the judge acted on it for adjudication purposes, it could be presumed that the judge considered the evidence only for dispositional purposes.)

b**. Evidence not admitted during adjudication:** At disposition, the court is not restricted to considering only those acts for which there had been an adjudication. The court may consider evidence that is reliable, accurate, and competently obtained. *In re Bullabough*, 89 N.C. App. 171 (1988); *In re Barkley*, 61 N.C. App. 267 (1983).

c. **Court cannot cut the evidence short:** In the case of *In re O'Neal*, 140 N.C. App. 254 (2000), the court of appeals said it was error for the trial court to cut off an intervening party's attempt to introduce evidence regarding best interest and make an offer of proof where the trial court had excluded the evidence not because it was incompetent, irrelevant, or cumulative, but simply declined to "hear anything else about this thing today."

E. Sources of Information

At the dispositional hearing, the juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile. **[7B-901]** At every review hearing, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency that will aid it in its review. **[7B-906(c)]**

F. Record of Proceedings

Dispositional proceedings must be recorded just like adjudicatory proceedings, but reduced to written transcript only when notice of appeal has been given. **[7B-806]** *See § 2.4.E in this manual for more information.*

G. Consent Judgments

If adjudication was by consent, the consent agreement typically will contain specific terms for meeting the needs of the child and the parents, which become part of disposition if the court signs the consent order. All parties, including the GAL, must agree to the terms of the order. The consent order should contain findings of fact to support or provide a basis for the specific dispositional items ordered in the consent decree itself. (*See 7B-902, which governs consent judgments in abuse, neglect, or dependency proceedings; and § 2.4 of this manual for more information on consent*.)

If there is a consent agreement that addresses disposition, the AA should make sure the terms are detailed and thorough, addressing as much as would be addressed if there were no consent order.

H. Burden of Proof

The language of the statutes (7B-901 and 7B-906) does not place any burden of proof upon either the parent or DSS during disposition or review. The essential requirement is that sufficient evidence be presented so that the court can make a determination regarding best interest. *In re Shue*, 311 N.C. 586 (1984).

I. Timing of Orders

Dispositional, Review, an Permanency Planning orders must be in writing, signed, and entered no later than 30 days from the completion of the hearing. **[7B-905(a); 7B-906(d); & 7B-907(c)]** The statute governing review and permanency planning orders specifically provides that if the order is not entered within thirty (30) days following the completion of the hearing, the juvenile clerk shall schedule a subsequent hearing at the first juvenile court session scheduled following this thirty (30) day period to determine and explain the reason for the delay and to obtain any needed clarification regarding the order's contents. The order shall be entered within ten (10) days of this subsequent hearing.[5]

§ 3.3 Investigation and Reports

A. Obtaining, Understanding, and Clarifying the GAL Report

Ideally, the attorney advocate will receive a GAL report far enough in advance of the hearing to determine whether the report raises issues requiring clarification or additional information. Even if the AA feels "up-to-speed" on the case and understands the GAL's position, the report itself may not be a complete reflection of the AA's understanding of the case. The GAL report may contain pieces of information that the AA did not know about or finds problematic, or the report may lack information that the AA considers important. In any event, because the GAL report is handed to the judge, the AA must be prepared to deal with whatever is or is not contained in the report in the best way possible to advocate for the child's best interests. For example, the AA may need to prepare questions to ask the GAL on the stand that will clarify parts of the report, or may need to call certain witnesses to support or supplement the report. It is important for the AA to discuss his or her intentions with the GAL so that they operate as a team and not on separate, parallel tracks.

Some GALs and AAs believe it is important to prepare a report that can be shared with the child. Obviously, this is not always possible. However, if some of the relevant information is not appropriate for the child to see, the AA might consider introducing it into evidence via documents or testimony.

B. The Statute: Predisposition Reports [7B-808] [6]

1. Timing: The judge shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information.

[5] Session Laws 2005-398 added this mandate for a subsequent hearing when an order is not timely entered effective October 1, 2005.

[6] Note that this statute, carried over from the old 7A Juvenile Code which combined abuse and neglect with delinquency and undisciplined cases, seems to have been written more with delinquency cases in mind than abuse and neglect. Now that the statute is contained in the section addressing abuse and neglect, its applicability is not well understood. Among other problems, it is unclear whether the "predisposition report" refers only to the DSS report or includes the GAL report or any other reports. Neither DSS nor GAL call their report a "predisposition report" and never have, which adds to the confusion.

2. Considered only after adjudication: No predisposition report shall be submitted to or considered by the judge prior to the completion of the adjudicatory hearing.

3. DSS Report: The DSS report prepared for the court shall contain the results of any mental health evaluation under 7B-503, a placement plan, and a treatment plan appropriate to meet the needs of the juvenile.

4. Opportunity to offer evidence in rebuttal: Opportunity shall be afforded the juvenile and his or her parent, guardian, or custodian at the dispositional hearing.

5. Local Rules: Pursuant to local rules or an administrative order, the chief district court judge may allows the sharing of reports among parties, and an order that prohibits disclosure of the report to the juvenile if the court determines that disclosure would not be in the best interest of the juvenile. However, the local rules or administrative order may not do the following:

- Prohibit a party entitled by law to receive confidential information from receiving that information.
- Allow disclosure of any confidential source protected by statute.

§ 3.4 Dispositional Alternatives and Dispositional Orders

[Note that orders made in review hearings are dispositional orders, so this subsection relates to review and permanency planning hearings as well.]

A. Requirements Regarding Form for the Dispositional Order [7B-905]

1. All orders

a. shall be in writing;
b. shall be signed and entered no later than 30 days from the completion of the hearing
c. shall contain appropriate findings of fact;
d. shall contain appropriate conclusions of law;
e. shall state with particularity, both orally and in the written order, the precise terms of the disposition including the kind, duration and the person responsible for carrying out the disposition and the person or agency in whom custody is vested;
f. comply with the requirements of 7B-507 governing reasonable efforts.

2. Form of order: The judge may make an oral entry of the order and later reduce the order to written form. The judge is not required to announce all findings and conclusions in open court but must state the terms of disposition with particularity. *In re Bullabough*, 89 N.C. App. 171 (1988).

3. Timing. The statute governing review orders specifically provides that if the order is not entered within thirty (30) days following the completion of the hearing, the juvenile clerk shall schedule a subsequent hearing at the first juvenile court session scheduled following this thirty (30) day period to determine and explain the reason for the delay and to obtain any needed clarification regarding the order's contents. The order shall be entered within ten (10) days of this subsequent hearing.[7]

[7] Session Laws 2005-398 added this mandate for a subsequent hearing when an order is not timely entered effective October 1, 2005.

See § 2.9 titled Adjudication Order regarding rules, elements, and timing of applicable to all juvenile orders.

B. Dispositional Alternatives for Placement [7B-903, 7B-906]

Section 7B-903 sets out the dispositional alternatives the court may consider and specifically states that any alternatives may be combined when in the best interest of the child. ***These alternatives are available to the judge in review and permanency planning hearings as well,*** because 7B-906(d) and 7B-907(c) both specifically state that in a review or permanency planning hearing, the judge may make any disposition authorized by 7B-903. For review hearings, the court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the juvenile. [7B-906(d)]

See subsections C, D, E, and F below, describing the requirements for the various placement alternatives, including requirements when removing a child from home or returning a child home.

The dispositional alternatives are as follows (note that this is not an exact reflection of statutory language):

1. **Dismissal**

2. **Continuance** to allow the juvenile, parent, or others to take appropriate action.

3. Placing the child in the **custody of a parent, relative, or other suitable person**

> [But note the law relating to **violent caregivers,** which states, "When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior against people, the court shall consider the opinion of the mental health professional who performed an evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual." [**7B-903(b).** *See also* "Violent Caregivers" in § 1.6.C.3, in this manual.]

4. **Placing the child in his own home and requiring that the child be supervised by DSS** or other personnel available to the court, subject to conditions specified by the judge concerning the parent or child. [See § 3.4.F, below, on requirements for returning the child home.]

.

5. Placing the child in the **custody of a private agency** offering placement services.

6. Placing the child in the **custody of the Department of Social Services** in the county of the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of DSS in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. [Unless otherwise ordered by the judge, DSS, via the director, has the authority to arrange for, provide or consent to needed routine or emergency medical or surgical care or treatment. After unsuccessfully attempting to obtain consent from parents, DSS can also arrange for, provide or consent to psychiatric, psychological, educational or other remedial evaluations or treatment . . .] See § 3.4.E.3, below, regarding the requirement of reasonable efforts when a child is placed in DSS custody.

Practical Note: In North Carolina it is common for judges or parties to use the language "physical custody" and "legal custody," but the exact meaning of these terms is unclear. At times, for example, the court orders that legal custody be given to DSS but that the parents have physical custody of the children. What the court probably intends in such a situation is for the children to go home but for DSS to remain involved in the case. *It is important to get clarification from the court regarding the meaning of such terms*. It is also important to determine how much authority the judge intends to accompany each term, especially relating to placement. In any event, once a child is placed in his or her own home, whether or not DSS is still involved and/or has legal custody, the procedures for temporary custody or nonsecure custody will have to be followed in order to remove the child.

The task of determining resources to meet the child's needs falls on the GAL volunteer and staff, not the attorney advocate***. As a member of the GAL team of representation, however, the attorney advocate must be knowledgeable about the various resources.*** In some situations, the attorney advocate might be able to suggest an unexplored alternative. But more importantly, the AA needs to be knowledgeable about such alternatives so that he or she knows how to deal with these resources in the courtroom and have an intelligent dialogue about them. For information on local service-oriented or placement resources, contact the GAL District Administrator. For information on state and national resources of any kind, contact the GAL state office.

C. Notice to GAL of Intent to Change Placement [7B-905(d)]

1. Statutory Requirement. When DSS has custody or placement responsibility of a juvenile intends to change the juvenile's placement, DSS *shall* give the GAL for the juvenile notice of its intention unless precluded by emergency circumstances. In the event of emergency circumstances, DSS shall notify the GAL or AA within 72 hours of the placement change, unless local rules require notification within a shorter time period.[8]

2. What constitutes "notice" to GAL? The statute does not define the way in which DSS must notify GAL. In other words, it does not specify written or verbal notice. It is advisable first to ensure that DSS (attorney, director, social workers) are aware of this statutory provision and that the local GAL Program and DSS agency agree upon a method of notice. For instance, notice may be sufficient if the social worker calls the GAL Program office and leaves a voicemail. Other districts may prefer a faxed written notice. Regardless of the agreed-upon method, continued communication between GAL and DSS is pivotal.

3. Legal strategies:

a. Specific provisions in the order

If DSS has failed to comply with this statutory provision or the GAL wants to ensure that the child is not removed without a court order, a request that such a provision be part of the court order should be made to the judge. Although federal IV-E foster care funding requires that DSS be given "placement authority," so long as the court order indicates that the judge gave valid consideration regarding the agency's position, IV-E funding will not be jeopardized. The court may order a specific placement in the child's best interest and require that DSS file a motion to allow all parties to be heard before the child is moved to different placement.

[8] This amendment was enacted by Session Laws 2005-398 effective October 1, 2005.

b. Temporary restraining order

Upon receiving notice of the intent to change placement, if the GAL has evidence that the move would be contrary to the child's best interest, a temporary restaining order may be sought to preserve the status quo pending a full hearing. *For details, see § 6.6.of of this manual.*

D. Dispositional Orders Concerning Child's Needs [9]

1. Specific orders: The court may make specific orders concerning services to be provided to the child, and regardless of where the child is placed, the statute (7B-903) states that the court

a. *may order* that the child be examined by a physician, psychiatrist, psychologist, or other qualified expert to determine the needs of the juvenile. Upon completion of the examination, the court shall conduct a hearing to determine whether the juvenile is in need of treatment and who should pay the cost of the treatment. **[7B-903(3)(a)]** (See 7B-903 for details regarding notice of the hearing to the county manager or designee.) If the judge finds that the juvenile is in need of treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment and order the parent to pay the cost unless the parent is unable, in which case the cost may be charged to the county. **[7B-903(3)(a)]**

b. *shall order* that the juvenile be referred to the area mental health, developmental disabilities, and substance abuse director for appropriate action if the judge believes, or if there is evidence presented to the effect that, the child is mentally ill or developmentally disabled. **[7B-903(3)(b)]**

i. The child may not, however, be directly committed to a state hospital or mental retardation center.

ii. The area mental health director shall be responsible for arranging an interdisciplinary evaluation of the child and for mobilizing resources to meet his needs.

iii. If institutionalization is determined to be necessary, it will be done so by consent of the parent, but the signature of the judge may be substituted for parental consent.

iv. If an area regional mental hospital refuses admission to a juvenile referred by a judge or discharges such a juvenile prior to completion of treatment, the hospital must submit to the judge a report stating the reasons, as well as diagnosis, treatment recommendations, and recommended alternative facility. **[7B-903(3)(b)]**

2. Limited to currently existing services: With respect to dispositional orders, the court is limited to using currently existing programs or those for which the funding and mechanism for implementation are in place. (Court cannot make an order that essentially calls for the creation of a new program.) *See, e.g.*, *In re Jackson*, 84 N.C. App. 167 (1987); *In re Wharton*, 305 N.C. 565 (1982).

[9] For a discussion on the court's authority over the parent, including orders pertaining to the parent, see § 3.6 in this chapter, titled "Court's Authority over Parents."

E. Voluntary Foster Care Placements

Voluntary foster care placements are voluntary agreements made between the juvenile's parents and DSS. These agreements are made with no petition filed, so the GAL is not involved. There are times, however, when the voluntary placement does not work out or a petition ends up being filed in the case, at which point the GAL may be appointed. The statute, under 7B-910, sets up requirements for reviewing such voluntary placements, including an initial review hearing in 90 days and placement of no longer than 6 months without a petition.[10] *See statute at the end of this chapter and § 10.2.G.1 of this manual.*

F. When the Child Is Removed from Parent's Custody

1. Cannot be returned home without a hearing: If a juvenile is removed, DSS may not allow unsupervised visitation with, or return physical custody of the juvenile to, the parent, guardian, custodian, or caretaker without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home. **[7B-903(a)(2)(c)]** This means that without a hearing, DSS cannot send the child back to the parent and call it a visit, unless the judge has approved the length of the visit and whether it may be unsupervised.

2. Looking to relatives first: In placing a juvenile in out-of-home care, the court first must consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court so finds, then the court shall order placement with the relative *unless the court finds that the placement is contrary to the best interests of the juvenile*. The statute also requires the court to consider whether it is in the juvenile's best interest to remain in his or her community of residence. Placement with a relative outside the state must be in accordance with the Interstate Compact on the Placement of Children. **[7B-903(a)(2)(c)]**

> **A word about relatives:** Unfortunately, this statute is commonly misunderstood and misused when the language "unless the court finds that the placement is contrary to the best interests of the juvenile" is ignored. For example, when a child has formed a strong bond over time with foster parents who want to adopt her and suddenly a relative comes is brought forward, it may not be in the best interest of the child to disrupt such a placement just to put the child with someone related by blood. This statute therefore stresses the importance of trying to place with relatives but makes it clear that this is not to be done when it is contrary to the child's best interests.

3. Verification of custodian or guardian [7B-906(g) & 7B-707(f)]

a. If the court determines that a juvenile shall be placed in the custody of an individual other than the parents or appoints a guardian of the person pursuant to 7B-600, the court shall verify the person receiving custody or being appointed as guardian of the juvenile *understands the legal significance* of the placement or appointment and will have *adequate resources* to care appropriately for the juvenile.

[10] Legislation in 2001 made changes that take effect for actions pending or filed on or after January 1, 2002, replacing 180 days with 90 days, and replacing 12 months with 6 months.

b. Best practice involves ensuring that the potential custodian or guardian is present in court to address the judge on these issues. If there are concerns such as return of the child to the parents or lack of financial resources, it is appropriate to call the potential custodian or guardian to the stand to testify under oath.

4. Examination and determination of Reasonable Efforts [7B-507]

a. All orders placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services shall contain findings on the following: **[7B-507(a)]**[11]

i. **best interest:** a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;[12]

ii. **whether reasonable efforts have been made:** findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined that such efforts are not required or shall cease;[13]

[*A finding that reasonable efforts have not been made* by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds that placement is necessary for the protection of the juvenile. Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable.]**[507(a)]**

iii. **whether reasonable efforts should continue:** findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile unless the court has previously determined or determines that such efforts are not required or shall cease;

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[11] Federal Regulations on the Adoption and Safe Families Act (ASFA) took effect on March 27, 2000, and have a number of requirements pertaining to reasonable efforts. Information on these requirements and on ASFA, can be found in Volume 2, Chapter 11 of this manual, which the reader is strongly urged to consult for important information. Lack of compliance with these regulations seriously jeopardizes federal funding to state programs. Specifically, these regulations state that there must be a finding that continuation of the child in the home is contrary to the welfare of the child and there must be findings that there have been reasonable efforts both to prevent placement and to finalize a permanent placement home. These findings are required to be detailed. Source for ASFA information: *New Federal Regulations on ASFA: Detailed Court Findings Concerning "Reasonable Efforts" and "Contrary to the Welfare" Findings*, by Mark Hardin, National Child Welfare Resource Center on Legal and Judicial Issues, April, 2000.

[12] The "contrary to the welfare" requirement in the ASFA Regulations (see previous footnote) is met if the court finds that the placement is in "the child's best interest." 65 Fed. Reg. 4055. However, the court should not depart from the specific language in such phrases since other phrases may not be considered to have the same meaning as the phrase "contrary to the welfare."

[13] The ASFA regulations say there are three types of reasonable efforts: 1) reasonable efforts to prevent placement; 2) reasonable efforts to reunify families following placement; and, 3) reasonable efforts to arrange and finalize a new permanent home after reunification is no longer the goal. 45 C.F.R. § 1356.21(b). The only required judicial findings of reasonable efforts, however, are 1) the court must find that there have been reasonable efforts to prevent placement; and 2) there have been reasonable efforts to finalize a permanency plan. 45 C.F.R. § 1356.21(b)(2). The Federal Regulations on ASFA require that findings that there were reasonable efforts to prevent placement must be made within 60 days following the removal of the child from home. "Contrary to welfare" findings must be made in the first court order authorizing the children's removal from home.

iv. **statement that DSS is responsible for child:** specifying that the juvenile's placement and care are the responsibility of the county department of social services and that the agency is to provide or arrange for the foster care or other placement of the juvenile; and

v. **may provide for services or other efforts aimed at returning the juvenile** to a safe home or at achieving another permanent plan for the juvenile.

b. Ceasing reunification: In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that **[7B-507(b)]**

i. Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

ii. A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

iii. A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or

iv. A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

c. Permanency Planning Hearing when reunification is ordered to cease: At any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by G.S. 7B-907 be held within thirty calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing. **[7B-507(c)]**

d. Concurrent planning is appropriate: Reasonable efforts to preserve or reunify families may be made concurrently with efforts to plan for the juvenile's adoption, to place the juvenile with a legal guardian, or to place the juvenile in another permanent arrangement. **[7B-507(d)]**

e. In determining reasonable efforts to be made, **the juvenile's health and safety are of paramount concern. [7B-507(d)]**

Note that if all relevant issues are not addressed by DSS, the parent, or the court, the GAL attorney advocate should bring them to the attention of the court for resolution if they might affect the best interest of the child. The court's orders should address all of the relevant issues discussed in this chapter under § 3.5.A and contain all the elements necessary pursuant to Rule 52(a) of the North Carolina Rules of Civil Procedure discussed in § 2.9.

5. Orders placing a child in DSS custody: In addition to the requirements of reasonable efforts set out above, the order needs to specify that the child's placement and care are the responsibility of the county DSS, including to provide or arrange for the foster care or other placement of the child. The GAL may request that the order state that no changes in placement shall be made without the GAL's consent or opportunity for hearing. [See § 3.4.C *supra* regarding notice to GAL of placement changes]

6. Visitation: "Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home *shall provide for appropriate visitation* as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interest of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension but shall expeditiously file a motion for review." **[7B-905(c)]**

a. DSS must submit a visitation plan to the court. Disposition order that left visitation in the discretion of DSS was remanded as the statute requires that DSS submit a visitation plan, whatever that may be, to the court for approval. *In re D.S.A.*, --- N.C. App. ---, 641 S.E.2d 18 (2007).

b. Custody award to parent must provide for visitation to the noncustodial parent. The trial court maintains the responsibility to ensure that an appropriate visitation plan is established in a dispositional order, and cannot leave visitation in the discretion of the custodian or guardian, even if that person is a biological parent. *In re C.P.*, --- N.C. App. ---, 641 S.E.2d 13 (2007).

c. Notice of review hearing implies that visitation will be addressed. Because 7B-906(c) requires the trial court to consider and make findings of fact regarding visitation, there is no requirement that the parties be specifically noticed that issues relating to visitation will be considered. *In re Padgett*, 156 N.C. App. 644 (2003).

7. Review hearing within 90 days: "A dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker shall direct that the review hearing required by 7B-906 be held within 90 days from the date of the dispositional hearing and, if practicable, shall set the date and time for the review hearing." **[7B-905(b)]**

G. Returning the Child to the Custody of the Parents

1. Commentary: The following excerpt discusses the issue of allowing the child to remain in the home and is taken from the book Resource Guidelines.[14]

> If the child is to remain at home, the judge usually needs to impose specific conditions on both the parents and the agency. In considering conditions to be imposed on the agency, the judge should determine what agency supervision will be needed for the child's protection and what services will be provided.
>
> There are several issues of parental responsibility when a child is allowed to remain at home. The court usually needs to impose specific behavioral

[14] National Council of Juvenile and Family Court Judges, Resource Guidelines, page 59.

directives upon the parents and to clarify their obligations to cooperate with the child welfare agency. In many cases, the judge must also establish or modify the child support obligations and visitation rights of the non-custodial parent. In some cases, the judge may need to issue a no-contact order for the child's protection.

But see § 3.6 in this chapter on Court's Authority Over Parents for limitations on what the court can order.

2. Such placement must be found by the court to be suitable and in the best interest of the child. [7B-906(d)]

See In re Isenhour, 101 N.C. App. 550 (1991), *In re Shue*, 311 N.C. 586 (1984); and *In re Arends,* 88 N.C.App. 550 (1988*)* regarding the necessity of finding that the juvenile will receive proper care and supervision along with a finding of best interest in order to return the child home.

3. The court must find sufficient facts to show that the juvenile will receive proper care and supervision in a safe home. [7B-903(a)(2)(c) and 7B-906(d)]

4. Cannot return child home without a hearing: If a juvenile is removed, DSS may not allow unsupervised visitation with, or return physical custody of the juvenile to, the parent or person standing in loco parentis without a hearing at which the court finds that the juvenile will receive proper care and supervision in a safe home. **[7B-903(a)(2)(c)]** This means that without a hearing, DSS cannot send the child back to the parent and call it a visit, unless the judge has approved the length of the visit and whether it may be unsupervised; or the court order specifically permits return to the parents home upon consent of all parties, including GAL. Oftentimes, return is dependent upon input of mental health service providers.

5. If custody is restored to a parent, the court shall be relieved of the duty to conduct periodic reviews of the placement. **[7B-906(d)]**

a. Applies to custody given to former non-custodial parent. Where custody changes from one parent to another in the child's best interest, the trial court was relieved of the duty to conduct periodic reviews of placement pursuant to 7B-905 and 7B-906(d). *Rholetter v. Rholetter*, 162 N.C. App. 653 (2004).

H. Criteria and Written Findings on Review

In each review hearing, the court shall consider the following criteria and make written findings regarding those that are relevant **[7B-906(c)]:**

1. **Services which have been offered** to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time.

2. Where the juvenile's return home is unlikely, the **efforts which have been made** to evaluate or plan for other methods of care.

3. **Goals of the foster care placement** and the appropriateness of the foster care plan.

4. **A new foster care plan**, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile.

5. Reports on the **placements the juvenile has had and any services offered to the juvenile and the parent.**

6. An appropriate **visitation plan.**

7. **If the child is 16 or 17 years of age**, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.

8. **When and if termination of parental rights should be considered**.

9. **Any other criteria** the court deems necessary.

Remember that "the court may consider any evidence including hearsay as defined in G.S. 8C-1, Rule 801, that the court finds to be *reliable, relevant, and necessary to determine the needs of the juvenile* and the most appropriate disposition." **[7B-906(c)]**

I. Other Issues to Be Considered on Review[15]

1. Whether services or responsibilities need to be clarified or modified due to the availability of additional information or changed circumstances

2. Whether intended foster care placement adequately meets all physical, emotional, and educational needs of children

3. Whether terms of child support need to be set or adjusted

4. Clarification of time frame and individuals responsible for events or accomplishment of goals

§ 3.5 Preparing for the Disposition or Review Hearings

(Note: some of the same preparations should be made for any dispostional hearing i.e. disposition, review and permanency planning hearings)

A. Defining the Position the GAL Is Taking on All Issues Relating to Disposition

By way of the GAL report, conversations with the GAL volunteer, staff, and others, the GAL AA must have a clear understanding of the GAL position that will be presented to the court on all of the following issues (as well as the reasons behind it):

- where the child should be placed
- what the child wants to see happen in this case
- the child's needs and what services should be offered to him or her
- the parent's needs, what changes they must make, and the services that should be offered to them; how this should play out in court orders, and by when goals should be accomplished

[15] Inspired by Resource Guidelines, pp. 71, 72.

- visitation between parent and child, supervised or unsupervised
- visitation between siblings
- child support
- whether recommended placement would cause the child to change schools and whether that is a problem (if so whether there is any way to avoid such a change)
- whether placement with parent should be conditioned on parent having no contact with certain individuals suspected of harming the child
- whether DSS has made reasonable efforts to prevent or eliminate the need for placement outside the home and what the response has been
- whether there has been an exhaustive effort to identify family and friends as potential placement alternatives
- whether the case should be moving toward reunification or termination
- when the case should be reviewed

It is important for the AA to convey to the GAL volunteer and staff that the AA receive certain information as it emerges, and not just at staff meetings or via a Guardian ad Litem report. Communication between the AA, GAL volunteer, and GAL staff is critical in representing the best interests of the child-client. Examples of information that should be passed on to the AA as it is received include copies of documents obtained by the GAL, notices that the child's placement may change or has changed or the child has run away, information that there are school problems or mental hospitalization, juvenile delinquency charges, unauthorized contact with parents, pregnancy, medical problems, and the like. Where documents are voluminous, the volunteer should speak to the AA to determine what the AA will need to see. **Receiving such information in a timely manner may enable the AA to do the extra preparation necessary in the case, including research, filing a motion, or subpoenaing and preparing records or witnesses**.

B. Assessing and Preparing the Evidence based on the Position of Each Party

Prior to disposition, the AA must identify disputed issues, undisputed issues, and those with room for negotiation. To effectively assess the evidence that he or she might need to present in the dispositional hearing, the AA should consider the following questions:

1. What is the position of the parents regarding disposition?

    - Where are they requesting that the child be placed? What argument will they make and what evidence will they have to support this request?
    - What are they saying about their past or future participation in certain services? Are they refuting certain assertions that DSS or the GAL will be making regarding past or future services?
    - What is their position concerning visitation? What evidence might they offer to support their position?

2. What is the position of DSS regarding disposition?

    - Where are they requesting that the child be placed? What argument will they make and what evidence will they have to support this request?
    - What are they saying about what must change and how that change will be brought about (what actions must be taken by the parents), and when do they expect to see improvement or resolution?
    - What types of services have been offered to the child and parents, and what types is DSS

going to recommend for both? What, if any, evidence will DSS offer to support their request for getting specific services ordered by the court?

- What is their position concerning visitation? What evidence might they offer to support their position? What is their view on supervised vs. unsupervised visitation?

3. Can the GAL offer additional evidence to support the GAL's position or refute an opposing position regarding any of the preceding issues?

C. Subpoenaing and Preparing Witnesses and Documents

The AA should not rely on another party or a promise to get necessary witnesses and documents to court. A subpoena should be issued by the AA anytime the AA knows a witness will be needed to testify to support the GAL's position, even if it ends up duplicating a subpoena issued by DSS. The AA should not assume that the witness or document will automatically convey the evidence he or she wants conveyed. Interviewing and/or preparing witnesses and reviewing documents are critical.

D. Receiving and Distributing GAL Court Report to All Parties prior to Dispositional Hearing

Some districts have local rules regarding the distribution of reports prior to hearing and place a time limit on the receipt of such reports. Even when such local rules do not exist, it is usually to everyone's advantage to receive the court reports in advance of disposition.

E. Determining Whether the Child Should Be Present in the Courtroom and/or Testify

G.S. 7B-906(c) specifically states that at every review hearing, the court shall consider information from a number of individuals *including* the juvenile. It is therefore clearly acceptable and desirable to allow the juvenile to have input in these proceedings. The question, then, is whether that input should be delivered via evidence entered by the juvenile's representative (the volunteer or attorney advocate) or by testimony from the juvenile. Although it is not always in the child's best interest to be in court, the language in the statute that allows for the juvenile's input can be interpreted to mean that the child's wishes should be heard. It is important to remember that the courtroom proceedings reflect this child's life and most of the evidence therefore will not come as a surprise to the child, even if such proceedings would be difficult.

The decision about whether to have the child present and/or testifying in the courtroom is difficult. Anyone who has had a significant personal or professional relationship with the child (especially mental health professionals) can be consulted about this matter. The decision should hinge on such factors as the following:

- what the child wants;
- age and maturity of the child;
- stability and fragility of the child including whether trauma is likely and, if so, to what degree;
- the type of testimony and evidence likely to be presented at trial;
- whether the child will be accompanied by someone able to provide comfort and security;
- whether there will be certain individuals in the courtroom whose very presence would be traumatic for the child;
- whether the presence of the child is likely to yield a positive or negative response or result from the judge;

- whether being present in court might help the child deal with his or her situation and feelings;
- whether the child may be permitted by the court to testify in a nontraditional setting, thereby reducing or eliminating some of the disadvantages of testifying;
- whether missing school is an issue for the child; and
- whether the child's testimony will be helpful to the court.

It may not be necessary for the child to attend an entire hearing. At times it may be beneficial for the child to be present only for certain parts of the hearing. The judge might be asked to place a child on telephone standby so that a child could be called at the appropriate time, or only if needed, to avoid having the child miss school or sit through portions of the hearing that are not beneficial or necessary. In addition, the AA should consider whether it is best to have the child testify in a nontraditional setting.

See § 7.2, on Evidence and § 12.5, both in this manual, for more detailed information concerning the child witness and children in court, including information on children testifying in a nontraditional setting.

§ 3.6 Court's Authority over Parents

A. Jurisdiction over the Parent

The court has jurisdiction over a parent of a child who has been adjudicated abused, neglected, or dependent, provided the parent has been properly served with the summons pursuant to G.S. 7B-406. [7B-200(b), 7B-406(c)] Jurisdiction over the parent is obtained when the parent is served with the summons.

B. Cost

If the court orders treatment for the juvenile pursuant to **7B-903(a)(3)**, the court may order the parent or other responsible parties to pay the cost of the treatment or care ordered. **[7B-904(a)]** If ordered to participate in treatment, the cost shall be paid pursuant to 7B-903. **[7B-904]**

C. Parent's Participation in Child's Treatment

If the court finds that it is in the best interest of the child for the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care to be directly involved in the child's treatment, the court may order that individual to participate in medical, psychiatric, psychological, or other treatment of the juvenile. **[7B-904(b)]**

D. Parent to Receive Treatment or Comply with Special Orders

The court may determine that the best interests of the child require that the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the child's adjudication or to the court's decision to deny custody to that person. If such a determination is made, the court may order that person to comply with a plan of treatment approved by the court or condition legal custody or physical placement of the child with the parent upon the parent's compliance with the plan of treatment. (The statute goes on to specify who pays for such treatment.) **[7B-904(c)]**

The court's authority, however, is limited to 7B-904. In the case *In re Cogdill*, 137 N.C. App. 504 (2000), the Court of Appeals ruled that the trial court did not have authority to require the mother to "secure and maintain stable housing and employment," stating that 7A-650 [now 7B-904] is the sole source of the trial court's authority over the parent and does not allow for such an order. (The question remains whether the judge may condition legal custody or physical placement of the child with the parent on compliance with certain expectations outside the scope of the statute without directly ordering the parent to meet those expectations.) Since *Cogdill*, however, the General Assembly enacted changes to 7B-904 giving the court more authority over the parent in the dispositional phase of a case as follows:

> **(d1)** "At the dispositional hearing or a subsequent hearing, the court may order the parent, guardian, custodian, or caretaker served with a copy of the summons pursuant to G.S. 7B-407 to do any of the following:
>
> > (1) Attend and participate in parental responsibility classes if those classes are available in the judicial district in which the parent, guardian, custodian, or caretaker resides.
> >
> > (2) Provide, to the extent that person is able to do so, transportation for the juvenile to keep appointments for medical, psychiatric, psychological, or other treatment ordered by the court if the juvenile remains in or is returned to the home.
> >
> > (3) Take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker."

E. Child Support

The court may order a parent who is able to pay child support for a child who is removed from the parent's care. Payment of support is determined using the North Carolina Child Support Guidelines pursuant to G.S. 50-13.4(c). **[7B-904(d)]** However, the statute does not provide for the trial court to order a parent to contact a child support enforcement agency. *In re A.S.*, --- N.C. App. ---, 640 S.E.2d. 817 (2007)(order that parent contact CSE was remanded). Although the trial court does not have the authority to order a parent to contact a child support enforcement agency, the court can instruct DSS to open a IV-D child support action.

F. Contempt for Failure to Comply [7B-904(e)]

Failure of a parent who is personally served to participate or comply with orders may result in civil contempt: "Upon motion of a party or upon the court's own motion, the court may issue an order directing the parent, guardian, custodian, or caretaker served with a copy of the summons pursuant to G.S. 7B-407 to appear and show cause why the parent, guardian, custodian, or caretaker should not be found or held in civil or criminal contempt for willfully failing to comply with an order of the court. Chapter 5A of the General Statutes shall govern contempt proceedings initiated pursuant to this section."

§ 3.7 Court's Continuing Jurisdiction over the Case & GAL's Continuing Involvement

A. Jurisdiction over Child

Once the court obtains jurisdiction over a child, jurisdiction continues until terminated by order of the court, until the child's eighteenth birthday, or until the child is otherwise emancipated, whichever occurs first. **[7B-201]** This means that when a judge returns a child home, the case will not be terminated unless the judge formally orders that the case be terminated if that is what is intended.

B. GAL's Continuing Involvement

The GAL's responsibilities continue until a permanent plan has been achieved for the juvenile.[16] **[7B-601]** The judge's authority to modify any order or disposition made as a result of an adjudication continues during the minority of the child or until terminated by court order. **[7B-1000(b)]**

§ 3.8 Permanency Planning Hearing [7B-907]

If parties haven't already done so, now is the time for everyone involved to get serious about whether the case is moving toward termination or reunification, what needs to happen to achieve that goal, who needs to make it happen, and within what time limitations. It is advisable that the GAL and AA begin thinking about the permanent plan as early as disposition, and even begin to set forth concurrent plans. Parents are often told by social workers that they have a year to get their act together. The result is that parents often do not start completing the requirements of his or her case plan until reaching the permanency planning stage of the case. By introducing early in the case concurrent plans of custody or guardianship to a court-approved caretaker, or even termination of parental rights and adoption, parents can become more motivate to work toward reunification. The basic requirements of the statute are set out below. *Please see the appendix to this manual for a sample permanency planning order.*

A. Purpose

The purpose of the permanency planning hearing shall be to develop a plan to achieve a **safe, permanent home for the juvenile within a reasonable period of time**. **[7B-907(a)]**

B. Timing, Reason for Hearing

In any case in which custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing *within twelve* (12) *months* after the date of the *initial order removing custody* (often the nonsecure custody order), and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906. Subsequent permanency planning hearings shall be held at least every six months thereafter, or earlier as set by the court, to review the progress made in finalizing the permanent plan for the juvenile, or, if necessary, to make a new permanent plan for the juvenile. **[7B-907(a)]**

[16] Historical note: prior to legislative changes made in 1999, 7B-601 stated that the Guardian ad Litem's appointment expired at the end of two years, although it did allow for reappointment upon a showing of good cause, as does the present statute.

C. Calendaring and Notice

"The Director of Social Services shall make a timely request to the clerk to calendar each permanency planning hearing at a session of court scheduled for the hearing of juvenile matters. The clerk shall give 15 days' notice of the hearing and its purpose to the parent, the juvenile if 12 years of age or more, the guardian, any foster parent, relative, or preadoptive parent 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, indicating the court's impending review. Nothing in this provision shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and an opportunity to be heard." **[7B 907(a)]**

D. Sources of Information

"At any permanency planning review, the court shall consider information from the parent, the juvenile, the Guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the Guardian ad Litem, and any other person or agency which will aid it in the court's review." The court is permitted to consider any evidence, including hearsay evidence that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and make the most appropriate disposition. **[7B-907(b)]**

E. Criteria to Be Considered [7B-907(b)]

"At the conclusion of the hearing, if the juvenile is not returned home, the court *shall consider the following criteria and make written findings* regarding those that are relevant:

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
(2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
(3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued, and if so, any barriers to the juvenile's adoption;
(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
(5) Whether the county department of social services has, since the initial permanency [planning hearing], made reasonable efforts to implement the permanent plan for the juvenile;
(6) Any other criteria the court deems necessary."

F. Disposition upon Conclusion of Hearing

1. Generally: "At the conclusion of the hearing, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. The judge may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or make any disposition authorized by G.S. 7B-903, including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile." **[7B-907(c)]**

a. Permanency Options.[17] There are four options of permanent plans:

1. Reunification with parent (includes non-removal parents)
2. Custody to a court-approved caretaker
3. Guardianship to a court-approved caretaker
4. Termination or relinquishment of parental rights followed by adoption

Older Youth: "Independent living" may *not* be characterized as a permanent plan, although youth 16 and older must have an independent living assessment pursuant to 7B-906(c)(7). It is often difficult to find a permanent placement for an older youth in foster care; however, DSS and GAL should still push for identification of a permanent custodian or guardian in the event that there is no adoptive parent.

b. Parents' Rights and Responsibilities. In the event that the court orders

1. **Visitation**. In the event that custody or guardianship is granted, the court must address the parents' "rights and responsibilities" pursuant to 7B-907(b)(2). If rights are not terminated, then the parent is still entitled to visitation, unless there is evidence presented and appropriate findings made by the court as to why visitation is denied. Further, the terms of visitation may not simply be delegated to the guardian or custodian, but must be determined by the court. The GAL should have input as to the appropriate type of visitation (unsupervised or supervised by the guardian or custodian) and terms (frequency, overnights, etc.).

Casenotes on the award of visitation:

The award of custody of a child and the award of visitation constitutes the exercise of a judicial function and may not be delegated to a custodian or guardian. To give the custodian or guardian of a child the authority to decide when, where, and under what circumstances a parent may visit his or her child could result in the complete deneial of the right; therefore, the trial court is not permitted to grant the privilege of visitation in the discretion of the custodian or guardian. *See In re L.B.*, --- N.C. App. ---, 639 S.E.2d. 23 (2007); *In re E.C.*, 174 N.C. App. 517 (2005); *In re Custody of Stancil*, 10 N.C. App. 545 (1971).

2. **Child Support**. In addition to the right of visitation, the parent is still financially responsible for the care of his or her child; therefore, the parent should be under a child support order to pay the custodian or guardian. In many cases, there is already a IV-D case pending, and it is just necessary for the custodian or guardian to be referred to the appropriate case worker to become the payee.

2. It is imperative that the court order follows the language of 7B-907

The Court of Appeals case *In re Dula*, 143 N.C. App. 16 (2001), *affirmed*, 354 N.C. 356, (2001), addressed the expectations for court orders resulting from permanency planning hearings. In this case, the trial court had stated in its "permanency planning juvenile review" order that there were no relatives willing and able to provide proper care and supervision of the child in a safe home, that DSS had made "reasonable efforts to prevent or eliminate the need for placement of the juvenile," and that a return of the child to the parent "would be an extremely dangerous action." The trial court then ordered custody of the child to remain with DSS,

[17] See Appendix for a comparison of permanency options and details regarding modification and financial implications.

reunification efforts to cease, and a plan of adoption for the child to "be pursued" by DSS. The court of appeals was apparently troubled by the failure of the trial court to follow the exact language of 7B-907 in its order, stating that since the child had been in the custody of DSS for 19 of the most recent 22 months, the trial court "was required to either direct DSS to initiate termination of parental rights proceedings against Respondent or make findings as permitted by section 7B-907(d)(1-3). The trial court did neither." (A footnote here stated that the order of the trial court directing DSS to pursue a plan of adoption was not sufficient compliance with section 7B-907(c)) The court of appeals went on to reverse and remand the trial court's order to be consistent with the mandate of section 7B-907(d). (It should be noted that there was a lengthy concurring and dissenting separate opinion in this case.)

However, the Court of Appeals subsequently explained that the trial court did not have to explicitly state findings pursuant to 7B-907 so long as they address those statutory factors *relevant* to the case. *In re J.C.S.*, 164 N.C. App. 96 (2004).

3. Orders directing action by DSS

a. "If the juvenile is not returned home, the court shall enter an order consistent with its findings that directs the department of social services to make reasonable efforts to place the juvenile in a timely manner in accordance with the permanent plan, to complete whatever steps are necessary to finalize the permanent placement of the juvenile, and to document such steps in the juvenile's case plan." **[7B-907(c)]** (See *In re Dula*, 143 N.C. App. 16 (2001), *affirmed*, 354 N.C.356 (2001), where the parent had argued that it was error for the trial court to order all reunification efforts to cease but the court of appeals found no error since the trial court had made numerous findings regarding DSS's unsuccessful efforts to prevent or eliminate the need for placement outside the home. The Court of Appeals stated that DSS therefore had no obligation to reunify the parent and child but did have the obligation to locate permanent placement for the child.)

> "If the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, the provisions of G.S. 7B-507 [reasonable efforts] shall apply to any order entered under this section." **[7B-907(c)]**

b. "**If at any time custody is restored to a parent**, or findings are made in accordance with G.S. 7B-906(b), the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." **[7B-907(c)]**

c. Ordering Pursuit of Termination of Parental Rights [7B-907(d)]

> "In the case of a juvenile who is in the custody or placement responsibility of a county department of social services, and has been in placement outside the home for 12 of the most recent 22 months; or a court of competent jurisdiction has determined that the parent has abandoned the child; or has committed murder or voluntary manslaughter of another child of the parent; or has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent, the director of the department of social services shall initiate a proceeding to terminate the parental rights of the parent unless the court finds:
>
> > (1) The permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person;
> > (2) The court makes specific findings why the filing of a petition for

> termination of parental rights is not in the best interests of the child; or
> (3) The department of social services has not provided the juvenile's family with such services as the department deems necessary, when reasonable efforts are still required to enable the juvenile's return to a safe home.
>
> If a proceeding to terminate the parental rights of the juvenile's parents is necessary in order to perfect the permanent plan for the juvenile, the director of the department of social services *shall file a petition to terminate parental rights within 60 calendar days* from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed. **[7B-907(e)]**

4. Timing of orders

Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. The statute governing permanency planning orders specifically provides that if the order is not entered within thirty (30) days following the completion of the hearing, the juvenile clerk shall schedule a subsequent hearing at the first juvenile court session scheduled following this thirty (30) day period to determine and explain the reason for the delay and to obtain any needed clarification regarding the order's contents. The order shall be entered within ten (10) days of this subsequent hearing.[18]

5. Combining hearings is prudent, but statutory requirements must be met

It is important to note that 7B-907 allows permanency planning hearings to be combined with review hearings. It will often be prudent for such hearings to be combined, but when they are, it is important to realize that the requirements for both types of hearings must be met. For example, it is simple to label a review hearing a "permanency planning hearing" but the label itself is not what makes it a permanency planning hearing. Unless a hearing is conducted pursuant to the requirements of 7B-907, the hearing cannot be considered a "permanency planning hearing" and an additional permanency planning hearing will still have to be conducted.

§ 3.9 Civil Child Custody Order: An Alternative Disposition [7B-911]

Juvenile court judges now have the statutory ability to award custody and transfer the case to domestic court thus terminating juvenile court jurisdiction. The result is that any subsequent motions for modification of the custody order must be file in domestic court pursuant to G.S. § 50-13.7. Parents are no longer entitled court-appointed counsel if indigent. The award of custody may be to a parent or other appropriate person in accordance with the governing statutes of Chapter 50 relating to custody actions between parents and non-agency third parties. In order to enter the civil child custody order, the court must make findings and conclusions that support the entry of a custody order in accordance with Chapter 50, or if there already exists a Chapter 50 custody action, then there must be findings and conclusions that support a modification of custody pursuant to G.S. 50-13.7. **[7B-911(c)]** In a separate order terminating juvenile court jurisdiction, the court must find the following:

[18] Session Laws 2005-398 added this mandate for a subsequent hearing when an order is not timely entered effective October 1, 2005.

(1) that there is *no longer a need for continued state intervention* on behalf of the juvenile under Chapter 7B; *and*
(2) that at least *six (6) months have passed* since the court made the determination that the juvenile's placement with the person to whom the court is awarding custody is the *permanent plan* for the juvenile.

NOTE: this second finding is *not* necessary if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Casenote:

Although the statute contemplates two orders, the Court of Appeals has interpreted this statute to hold that there is no requirement that the trial court enter two different orders in a neglect action; the trial court may enter one order for placement in both the juvenile file and the civil file as long as the order was sufficient to support termination of juvenile court jurisdiction and modification of custody. *In re A.S.*, -- N.C. App. --, 641 S.E.2d 400 (2007).

§ 3.10 Disposition Pending Appeal [7B-1003]

Pending disposition of an appeal, the return of the juvenile to the custody of the parent or guardian of the juvenile, with or without conditions, may issue unless the court orders otherwise. When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior, the court shall consider the opinion of the mental health professional who performed the evaluation under G.S. 7B-503(b) before returning the juvenile to the custody of that individual.[19] *For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.* The provisions of subsections (b) and (c) of G.S. 7B-905 shall apply to any order entered under this section that provides for the placement or continued placement of a juvenile in foster care.

§ 3.11 Disposition after Appeal [7B-1004]

"Upon the affirmation of the order of adjudication or disposition of the court by the court of appeals or by the supreme court in the event of such an appeal, the court shall have authority to modify or alter the original order of adjudication or disposition as the court finds to be in the best interest of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within ten days thereafter as to why the modifying order should be vacated or altered."

§ 3.12 Review When Parent Has Surrendered Child for Adoption or Adoption Is Dismissed or Withdrawn [7B-909]

Section 7B-909 sets out certain circumstances under which a case must be calendared for review when parents have surrendered a child for adoption or adoption is dismissed or withdrawn. S*ee statute at the end of this chapter for details.*

[19] This sentence was added by 1999 legislation. See Chapter 1, subsection VI.C.3., in this manual for more provisions related to "violent caregivers" (person responsible for abuse with a history of violent behavior).

CHECKLISTS AND WORKSHEETS

§ 3.13 Checklist for Disposition or Review

Disposition Preparation

____ Received a copy of the GAL report.

____ Clarified any confusing or problematic issues in conversations with GAL and staff (have received updated information on the case and had the opportunity to meet with GAL and staff).

____ The child will/ will not be present at the hearing. _____ The child will/will not testify.

____ Aware of the child's feelings regarding this proceeding and have prepared the child for the proceedings or to testify.

____ Prepared to advocate for the GAL's position concerning all issues detailed below under "key issues that should be addressed at disposition or review"

____ Aware of placement alternatives that have been explored, the pros and cons of each.

____ Have knowledge of DSS position regarding issues for disposition or review.

____ Have enough knowledge of parent(s)' position regarding issues for disposition or review to allow for adequate preparation for hearing.

____ Have subpoenaed necessary witnesses or documents for hearing, or have arranged for specific persons and/or documents to be available for hearing.

____ Have done any necessary preparation of witnesses or documents for hearing.

Dispositional or Review Hearing

Persons who should be present:
Judge _____
Parent(s)_____
Parent(s) atty(s) _____
_____
DSS caseworker _____
GAL volunteer _____
GAL atty advocate _____
Agency attorney _____
Court reporter or recording equipment _____
Relatives with legal standing, other custodial adults: _____
_____
_____
Security personnel _____

Persons whose presence may be needed:
Child(ren) _____
Extended family members _____
Counselor/therapist _____
Experts _____
Law enforcement officers _____
Foster parents _____
Juvenile court counselor _____
Probation or parole officer _____
Other service providers _____
_____
_____
Anyone else with knowledge about the family situation _____
_____

Key issues that should be addressed at disposition or review:

____ Where the child should be placed (for review: how is placement going?):

____ What the child's needs are and what services should be offered to the child:

____ What the parents' needs are, what changes they must make, and the services that should be offered to them. (For review, the key question is also what have they done so far to improve their circumstances, and where do they go from here?)

____ What orders need to be entered by the court?

____ What is the timetable for accomplishment of goals?

____ Visitation between parent and child:

____ Visitation between siblings:

____ Whether recommended placement will cause the child to change schools, whether that is a problem and whether there is any way to avoid such a change:

____ Whether return to parent or placement with parent should be conditioned on certain people having no contact with parent and/or child:

____ Whether DSS has made reasonable efforts to prevent or eliminate the need for placement outside the home. What has the response been to such efforts?

____ Whether there has been an exhaustive effort to identify family and friends as potential placement alternatives:

____ Whether the case should be moving toward reunification or termination:

___ When the case should be reviewed:

§ 3.14 Checklist for Permanency Planning Hearing

(To be used in addition to "Checklist for Disposition or Review" to ensure compliance with 7B-907)

____ Completed "Checklist for Disposition or Review" in addition to the issues set out below
____ This hearing is being conducted on _____ (date) as a "permanency planning hearing" pursuant to G.S. 7B-907

____ This hearing is being held within 12 months after the date of the initial order removing custody, entered on, _____ (date), OR
____ This hearing is being held within 30 days after the date of the hearing at which the court found that reasonable efforts are not required or shall cease, which was held on _____(date), OR
____ this hearing is a subsequent hearing held at least every six months after the initial permanency planning hearing which was held on _____(date), AND
____ this hearing is/is not (circle one) being combined with a review hearing required by 7B-906.

Information the court shall consider
____ The court has considered information from the following persons:
____ parent ____ guardian ____ Guardian ad Litem, ____ juvenile
____ any foster parent, relative, or preadoptive parent providing care for the child
_____(names)
____ custodian or agency with custody _____(name)
____ any other person or agency which will aid it in the court's review
_____(names)

Ordering pursuit of termination of parental rights
Check all that apply:
____ This juvenile has been in the custody or placement responsibility of a county department of social services, and has been in placement outside the home for 12 (12 is only in effect for cases pending or filed as of January 1, 2002 and prior to that date it is 15) of the most recent 22 months; OR
____ a court of competent jurisdiction has determined that the parent has abandoned the child; OR
____ the parent has committed murder or voluntary manslaughter of another child of the parent; OR
____ the parent has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent

____ Due to one or more of the above checked factors, the director of the department of social services must initiate a proceeding to terminate the parental rights

OR

____ There was no initiation of termination of parental rights due to the following:
____ the court has made findings that the permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person;
____ the court has made specific findings why the filing of a petition for termination of parental rights is not in the best interests of the child; or
____ the court has made findings that the department of social services has not provided the juvenile's family with such services as the department deems necessary, when reasonable efforts are still required to enable the juvenile's return to a safe home.

Criteria the court must consider
____ The court has considered the following criteria and made findings regarding those that are relevant as

described below

____ Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interest to return home:

____ Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents:

____ Where the juvenile's return home is unlikely within six months, whether adoption should be pursued, and if so, any barriers to the juvenile's adoption:

____ Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why:

____ Whether the county department of social services has, since the initial permanency planning hearing, made reasonable efforts to implement the permanent plan for the juvenile (applying 7B-507):

____ Any other criteria the court deems necessary:

Permanency plans, disposition, and reasonable efforts

____ At the conclusion of the hearing the judge made the following specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time:

_____ Other dispositional orders are as follows:

____ The judge did not order the child returned home and made the following orders directing the department of social services to make reasonable efforts to place the juvenile in a timely manner in accordance with the permanent plan, to complete whatever steps are necessary to finalize the permanent placement of the juvenile, and to document such steps in the juvenile's case plan:

____ The next permanency planning hearing date is: _____ OR
____ The court is relieved of the duty to conduct further reviews because custody has been restored to a parent.

STATUTES

DISPOSITION, REVIEW AND PERMANENCY PLANNING

§ 7B-507. Reasonable efforts

(a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order:

(1) Shall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest;

(2) Shall contain findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined under subsection (b) of this section that such efforts are not required or shall cease;

(3) Shall contain findings as to whether a county department of social services should continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines under subsection (b) of this section that such efforts are not required or shall cease;

(4) Shall specify that the juvenile's placement and care are the responsibility of the county department of social services and that the agency is to provide or arrange for the foster care or other placement of the juvenile; and

(5) May provide for services or other efforts aimed at returning the juvenile to a safe home or at achieving another permanent plan for the juvenile.

A finding that reasonable efforts have not been made by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds that placement is necessary for the protection of the juvenile. Where efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable.

(b) In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

(2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

(3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or

(4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

(c) At any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by G.S. 7B-907 be held within 30 calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing. At any hearing at which the court finds and orders that reasonable efforts to reunify a family shall cease, the affected parent, guardian, or custodian or that parent, guardian, or custodian's counsel may give notice to preserve the parent, guardian, or custodian's right to appeal the finding and order in accordance with G.S. 7B-1001(a)(5). Notice may be given in open court or in writing within 10 days of the hearing at which the court orders the efforts to reunify the family to cease. The party giving notice shall be permitted to make a detailed offer of proof as to any evidence that person sought to offer in opposition to cessation of reunification that the court refused to admit as evidence or to consider.

(d) In determining reasonable efforts to be made with respect to a juvenile and in making such reasonable efforts, the juvenile's health and safety shall be the paramount concern. Reasonable efforts to preserve or reunify families may be made concurrently with efforts to plan for the juvenile's adoption, to place the juvenile with a legal guardian, or to place the juvenile in another permanent arrangement.

Added by S.L. 1998-229, § 4.1, eff. Jan. 1, 1999. Amended and recodified by S.L. 1998-229, § 21.1, eff. July 1, 1999. Amended by S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2001-487, § 2, eff. Dec. 16, 2001; S.L. 2005-398, § 1, eff. Oct. 1, 2005.

§ 7B-808. Predisposition report

(a) The court shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information. No predisposition report shall be submitted to or considered by the court prior to the completion of the adjudicatory hearing. The court may proceed with the dispositional hearing without receiving a predisposition report if the court makes a written finding that a report is not necessary.

(b) The director of the department of social services shall prepare the predisposition report for the court containing the results of any mental health evaluation under G.S. 7B-503, a placement plan, and a treatment plan the director deems appropriate to meet the juvenile's needs.

(c) The chief district court judge may adopt local rules or make an administrative order addressing the sharing of the reports among parties, including an order that prohibits disclosure of the report to the juvenile if the court determines that disclosure would not be in the best interest of the juvenile. Such local rules or administrative order may not:

(1) Prohibit a party entitled by law to receive confidential information from receiving that information.

(2) Allow disclosure of any confidential source protected by statute.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2003-140, § 2, eff. June 4, 2003; S.L. 2004-203, § 17, eff. Aug. 17, 2004.

§ 7B-900. Purpose

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the court should arrange for appropriate community-level services to be provided to the juvenile and the juvenile's family in order to strengthen the home situation.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-901. Dispositional hearing

The dispositional hearing shall take place immediately following the adjudicatory hearing and shall be concluded within 30 days of the conclusion of the adjudicatory hearing. The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and the juvenile's parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. The court may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2003-62, § 1, eff. May 20, 2003; S.L. 2005-398, § 4, eff. Oct. 1, 2005.

Note: House Bill 698 ratified July 17, 2007 effective October 1, 2007 changes “opportunity to present evidence” to “right to present evidence.” This change is to conform to federal IV-E funding requirements.

§ 7B-902. Consent judgment in abuse, neglect, or dependency proceeding

Nothing in this Article precludes the court from entering a consent order or judgment on a petition for abuse, neglect, or dependency when all parties are present, the juvenile is represented by counsel, and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the court.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

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

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

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

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

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

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

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

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

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

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

b. If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, custodian, or caretaker refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the court may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a court and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of treatment, the hospital shall submit to the court a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question.

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

(c) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents, the court shall verify that the person receiving custody of the juvenile understands the legal significance of the placement and will have adequate resources to care appropriately for the juvenile.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, § 23, eff. July 1, 1999; S.L. 1999-318, § 6, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2002-164, § 4.8, eff. Oct. 23, 2002; S.L. 2003-140, § 9(b), eff. June 4, 2003.

§ 7B-904. Authority over parents of juvenile adjudicated as abused, neglected, or dependent

(a) If the court orders medical, surgical, psychiatric, psychological, or other treatment pursuant to G.S. 7B-903, the court may order the parent or other responsible parties to pay the cost of the treatment or care ordered.

(b) At the dispositional hearing or a subsequent hearing if the court finds that it is in the best interests of the juvenile for the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care to be directly involved in the juvenile's treatment, the court may order the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care to participate in medical, psychiatric, psychological, or other treatment of the juvenile. The cost of the treatment shall be paid pursuant to G.S. 7B-903.

(c) At the dispositional hearing or a subsequent hearing the court may determine whether the best interests of the juvenile require that the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care. If the court finds that the best interests of the juvenile require the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care undergo treatment, it may order that individual to comply with a plan of treatment approved by the court or condition legal custody or physical placement of the juvenile with the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care upon that individual's compliance with the plan of treatment. The court may order the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care to pay the cost of treatment ordered pursuant to this subsection. In cases in which the court has conditioned legal custody or physical placement of the juvenile with the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care upon compliance with a plan of treatment, the court may charge the cost of the treatment to the county of the juvenile's residence if the court finds the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care is unable to pay the cost of the treatment. In all other cases, if the court finds the parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care is unable to pay the cost of the treatment ordered pursuant to this subsection, the court may order that individual to receive treatment currently available from the area mental health program that serves the parent's catchment area.

(d) At the dispositional hearing or a subsequent hearing, when legal custody of a juvenile is vested in someone other than the juvenile's parent, if the court finds that the parent is able to do so, the court may order that the parent pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c). If the court places a juvenile in the custody of a county department of social services and if the court finds that the parent is unable to pay the cost of the support required by the juvenile, the cost shall be paid by the county department of social services in whose custody the juvenile is placed, provided the juvenile is not receiving care in an institution owned or operated by the State or federal government or any subdivision thereof.

(d1) At the dispositional hearing or a subsequent hearing, the court may order the parent, guardian, custodian, or caretaker served with a copy of the summons pursuant to G.S. 7B-407 to do any of the following:

(1) Attend and participate in parental responsibility classes if those classes are available in the judicial district in which the parent, guardian, custodian, or caretaker resides.

(2) Provide, to the extent that person is able to do so, transportation for the juvenile to keep appointments for medical, psychiatric, psychological, or other treatment ordered by the court if the juvenile remains in or is returned to the home.

(3) Take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker.

(e) Upon motion of a party or upon the court's own motion, the court may issue an order directing the parent, guardian, custodian, or caretaker served with a copy of the summons pursuant to G.S. 7B-407 to appear and show cause why the parent, guardian, custodian, or caretaker should not be found or held in civil or criminal contempt for willfully failing to comply with an order of the court. Chapter 5A of the General Statutes shall govern contempt proceedings initiated pursuant to this section.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 318, § 7, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2001-208, § 3, eff. Jan. 1, 2002.

§ 7B-905. Dispositional order

(a) The dispositional order shall be in writing, signed, and entered no later than 30 days from the completion of the hearing, and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

(b) A dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker shall direct that the review hearing required by G.S. 7B-906 be held within 90 days from of the date of the dispositional hearing and, if practicable, shall set the date and time for the review hearing.

(c) Any dispositional order shall comply with the requirements of G.S. 7B-507. Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension, but shall expeditiously file a motion for review.

(d) When a county department of social services having custody or placement responsibility of a juvenile intends to change the juvenile's placement, the department shall give the guardian ad litem for the juvenile notice of its intention unless precluded by emergency circumstances from doing so. Where emergency circumstances exist, the department of social services shall notify the guardian ad litem or the attorney

advocate within 72 hours of the placement change, unless local rules require notification within a shorter time period.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, § 24, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2001-208, §§ 4, 18, eff. Jan. 1, 2002; S.L. 2005-398, § 5, eff. Oct. 1, 2005.

§ 7B-906. Review of custody order

(a) In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter. The director of social services shall make a timely request to the clerk to calendar each review at a session of court scheduled for the hearing of juvenile matters. The clerk shall give 15 days' notice of the review and its purpose to the parent, the juvenile, if 12 years of age or more, the guardian, any foster parent, relative, or preadoptive parent 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, indicating the court's impending review. Nothing in this subsection shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and an opportunity to be heard.

(b) Notwithstanding other provisions of this Article, the court may waive the holding of review hearings required by subsection (a) of this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months, if the court finds by clear, cogent, and convincing evidence that:

(1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;

(2) The placement is stable and continuation of the placement is in the juvenile's best interests;

(3) Neither the juvenile's best interests nor the rights of any party 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 juvenile's permanent caretaker or guardian of the person.

The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

(c) At every review hearing, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid in its review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to

be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

In each case the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Services which have been offered to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time.

(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care.

(3) Goals of the foster care placement and the appropriateness of the foster care plan.

(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile.

(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent, guardian, custodian, or caretaker.

(6) An appropriate visitation plan.

(7) If the juvenile is 16 or 17 years of age, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.

(8) When and if termination of parental rights should be considered.

(9) Any other criteria the court deems necessary.

(d) The court, after making findings of fact, may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or may make any disposition authorized by G.S. 7B-903, including the authority to place the juvenile in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interests of the juvenile. The court may enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interests of the juvenile. The order must be reduced to writing, signed, and entered within 30 days of the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

If at any time custody is restored to a parent, guardian, custodian, or caretaker the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

(e) Deleted by S.L. 1998-229, § 25, eff. July 1, 1999.

(f) The provisions of G.S. 7B-506.1 shall apply to any order entered under this section.

(g) If the court determines that the juvenile shall be placed in the custody of an individual other than the

parents or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, §§ 8, 25, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2000-124, § 2, eff. October 1, 2000; S.L. 2001-208, § 19, eff. Jan. 1, 2002; S.L. 2003-62, § 2, eff. May 20, 2003; S.L. 2003-140, § 9(c), eff. June 4, 2003; S.L. 2005-398, § 6, eff. Oct. 1, 2005.

Note: Session Law 2007-276 effective October 1, 2007 changes “opportunity to be heard” to “right to be heard” in the last line of subsection (a). This change is to conform to federal IV-E funding requirements.

§ 7B-907. Permanency planning hearing

(a) In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody, and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906. The purpose of the permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time. Subsequent permanency planning hearings shall be held at least every six months thereafter, or earlier as set by the court, to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile. The Director of Social Services shall make a timely request to the clerk to calendar each permanency planning hearing at a session of court scheduled for the hearing of juvenile matters. The clerk shall give 15 days' notice of the hearing and its purpose to the parent, the juvenile if 12 years of age or more, the guardian, any foster parent, relative, or preadoptive parent 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, indicating the court's impending review. Nothing in this provision shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and an opportunity to be heard.

(b) At any permanency planning review, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid it in the court's review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;

(2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
(3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;

(6) Any other criteria the court deems necessary.

(c) At the conclusion of the hearing, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. The judge may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or make any disposition authorized by G.S. 7B-903 including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile. If the juvenile is not returned home, the court shall enter an order consistent with its findings that directs the department of social services to make reasonable efforts to place the juvenile in a timely manner in accordance with the permanent plan, to complete whatever steps are necessary to finalize the permanent placement of the juvenile, and to document such steps in the juvenile's case plan. Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

If at any time custody is restored to a parent, or findings are made in accordance with G.S. 7B-906(b), the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

If the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, the provisions of G.S. 7B-507 shall apply to any order entered under this section.

(d) In the case of a juvenile who is in the custody or placement responsibility of a county department of social services, and has been in placement outside the home for 12 of the most recent 22 months; or a court of competent jurisdiction has determined that the parent has abandoned the child; or has committed murder or voluntary manslaughter of another child of the parent; or has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent, the director of the department of social services shall initiate a proceeding to terminate the parental rights of the parent unless the court finds:

(1) The permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person;

(2) The court makes specific findings why the filing of a petition for termination of parental rights is not in the best interests of the child; or

(3) The department of social services has not provided the juvenile's family with such services as the department deems necessary, when reasonable efforts are still required to enable the juvenile's return to a safe home.

(e) If a proceeding to terminate the parental rights of the juvenile's parents is necessary in order to perfect the permanent plan for the juvenile, the director of the department of social services shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless

the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed.

(f) If the court determines that the juvenile shall be placed in the custody of an individual other than the parents or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

Added by S.L. 1998-229, § 8.1, eff. Jan. 1, 1999. Amended by S.L. 1998- 229, § 25.1, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2001-208, §§ 5, 20, eff. Jan. 1, 2002; S.L. 2003-62, § 3, eff. May 20, 2003; S.L. 2003-140, § 9(d), eff. June 4, 2003; S.L. 2005-398, § 7, eff. Oct. 1, 2005.

Note: Session Law 2007-276 effective October 1, 2007 changes “opportunity to be heard” to “right to be heard” in the last line of subsection (a). This change is to conform to federal IV-E funding requirements.

§ 7B-909. Review of agency's plan for placement

(a) The director of social services or the director of the licensed private child-placing agency shall promptly notify the clerk to calendar the case for review of the department's or agency's plan for the juvenile at a session of court scheduled for the hearing of juvenile matters in any case where:

(1) One parent has surrendered a juvenile for adoption under the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes and the termination of parental rights proceedings have not been instituted against the nonsurrendering parent within six months of the surrender by the other parent, or

(2) Both parents have surrendered a juvenile for adoption under the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes and that juvenile has not been placed for adoption within six months from the date of the more recent parental surrender.

(b) In any case where an adoption is dismissed or withdrawn and the juvenile returns to foster care with a department of social services or a licensed private child-placing agency, then the department of social services or licensed child-placing agency shall notify the clerk, within 30 days from the date the juvenile returns to care, to calendar the case for review of the agency's plan for the juvenile at a session of court scheduled for the hearing of juvenile matters.

(c) Notification of the court required under subsection (a) or (b) of this section shall be by a petition for review. The petition shall set forth the circumstances necessitating the review under subsection (a) or (b) of this section. The review shall be conducted within 30 days following the filing of the petition for review unless the court shall otherwise direct. The court shall conduct reviews every six months until the juvenile is placed for adoption and the adoption petition is filed by the adoptive parents. The initial review and all subsequent reviews shall be conducted pursuant to G.S. 7B-908. Any individual whose parental rights have been terminated shall not be considered a party to the review unless an appeal of the order terminating parental rights is pending, and a court has stayed the order pending the appeal.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L.

2005-398, § 9, eff. Oct. 1, 2005.

Note: Session Law 2007-276 ratified July 17, 2007 effective October 1, 2007 deletes subsection (b), and under subsection (c) replaces “place for adoption and the adoption petition is filed by the adoptive parents” to “the subject of a decree of adoption.” The result is that the juvenile court will continue to have reviews under this subsection until the adoption petition is finalized.

§ 7B-910. Review of voluntary foster care placements

(a) The court shall review the placement of any juvenile in foster care made pursuant to a voluntary agreement between the juvenile's parents or guardian and a county department of social services and shall make findings from evidence presented at a review hearing with regard to:

(1) The voluntariness of the placement;

(2) The appropriateness of the placement;

(3) Whether the placement is in the best interests of the juvenile; and

(4) The services that have been or should be provided to the parents, guardian, foster parents, and juvenile, as the case may be, either (i) to improve the placement or (ii) to eliminate the need for the placement.

(b) The court may approve the continued placement of the juvenile in foster care on a voluntary agreement basis, disapprove the continuation of the voluntary placement, or direct the department of social services to petition the court for legal custody if the placement is to continue.

(c) An initial review hearing shall be held not more than 90 days after the juvenile's placement and shall be calendared by the clerk for hearing within such period upon timely request by the director of social services. An additional review hearing shall be held 90 days thereafter and any review hearings at such times as the court shall deem appropriate and shall direct, either upon its own motion or upon written request of the parents, guardian, foster parents, or director of social services. A juvenile placed under a voluntary agreement between the juvenile's parent or guardian and the county department of social services shall not remain in placement more than six months without the filing of a petition alleging abuse, neglect, or dependency.

(d) The clerk shall give at least 15 days' advance written notice of the initial and subsequent review hearings to the parents or guardian of the juvenile, to the juvenile if 12 or more years of age, to the director of social services, and to any other persons whom the court may specify.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2001-208, § 21, eff. Jan. 1, 2002.

§ 7B-911. Civil child-custody order

(a) After making proper findings at a dispositional hearing or any subsequent hearing, the court on its own motion or the motion of a party may award custody of the juvenile to a parent or other appropriate person pursuant to *G.S. 50-13.1*, *50-13.2*, *50-13.5*, and *50-13.7*, as provided in this section, and terminate the court's jurisdiction in the juvenile proceeding.

(b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

If the order is filed in an existing civil action and the person to whom the court is awarding custody is not a party to that action, the court shall order that the person be joined as a party and that the caption of the case be changed accordingly. The order shall resolve any pending claim for custody and shall constitute a modification of any custody order previously entered in the action.

If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. The civil filing fee is waived unless the court orders one or more of the parties to pay the filing fee for a civil action into the office of the clerk of superior court. The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. The Administrative Office of the Courts may adopt rules and shall develop and make available appropriate forms for establishing a civil file to implement this section.

(c) The court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding only if:

(1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to *G.S. 50-13.7*; and

(2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:

a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and

b. That at least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Added by S.L. 2005-320 § 4.

§ 7B-1000. Authority to modify or vacate

(a) Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile. Notwithstanding the provision of this subsection, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

(b) In any case where the court finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-124, § 3, eff. October 1, 2000.

§ 7B-1003. Disposition pending appeal

(a) During an appeal of an order entered under this Subchapter, the trial court may enforce the order unless the trial court or an appellate court orders a stay.

(b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:

(1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and

(2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

(c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile. Upon the affirmation of the order of adjudication or disposition of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if there be any, within 10 days thereafter, as to why the modifying order should be vacated or altered.

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

(e) The provisions of subsections (b), (c), and (d) of G.S. 7B-905 shall apply to any order entered during an

appeal that provides for the placement or continued placement of a juvenile in foster care.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 318, § 8, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2001-208, § 27, eff. Jan. 1, 2002; S.L. 2003-140, § 8, eff. June 4, 2003; S.L. 2005-398, § 12, eff. Oct. 1, 2005.

§ 7B-1004. Disposition after appeal

When an order of the court is affirmed by the Court of Appeals or by the Supreme Court, the trial court may modify or alter the original order as the court finds to be in the best interests of the juvenile to reflect any change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within 10 days thereafter as to why the modifying order should be vacated or altered.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2005-398, § 13, eff. Oct. 1, 2005.

CHAPTER 4
TERMINATION OF PARENTAL RIGHTS

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§ 4.1 Summary

"Termination of parental rights should not be a rare occurrence in juvenile or family court even though it is rare in the population as a whole."

From *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, National Council of Juvenile and Family Court Judges, 1995

In North Carolina, approximately 24 out of every 100 reports of abuse, neglect, or dependency are substantiated.[1] A petition is filed in approximately ten to fifteen percent of substantiated cases, and coordinated services are provided to the other eighty-five to ninety percent in order to prevent the need for court intervention.[2] Statistics like these demonstrate that petitions typically are filed only in serious cases, the majority of which require immediate removal of the children from the home. It therefore stands to reason that in many cases that reach the courtroom, the parent's inability to appropriately care for a child involves circumstances that simply cannot be fixed within a reasonable amount of time to allow for a healthy childhood. Where efforts to reunify are futile and inconsistent with the best interests of the child, the child deserves the opportunity for a safe, permanent home that may be achieved by termination of parental rights.

The Federal Adoption and Safe Families Act of 1997 (ASFA) made a number of changes in the law that was implemented in North Carolina under 1998 legislation. Many of these changes affect the opportunities and timing in pursuing termination of parental rights. One of the most significant changes includes the requirement that termination be initiated for children who have been in foster care 12 of the most recent 22 months, unless certain exceptions are met. [7B-907(d)] Another change is the addition of grounds for termination where a parent has committed or been involved in murder or voluntary manslaughter or felonious assault of the parent's child or another child residing in the home; or where parental rights to another child have been terminated. [7B-1111(a)(8) and (9)] The circumstances outlined in these new grounds also provide cause for ceasing reunification efforts. [7B-507 (b)] These changes in the law mean that there will be more cases than ever petitioned for termination and that termination cases will move through the system more quickly. Although these changes ultimately will benefit children by reducing the amount of time spent waiting for a safe, permanent home – and eventually benefit the system by reducing the total caseload–such changes initially will require more time from the juvenile court system and the people who serve in it. For more detailed information on ASFA, see Volume 2, Chapter 11 in this manual.

§ 4.2 Before Termination: Casebuilding for Permanence [3]

It is not uncommon for agency or GAL attorneys to reach the TPR stage only to find a number of things in either the case file or the parent's present situation that will make the pursuit of a TPR more difficult, many of which could have been avoided.

A. A Detailed Court File Builds the Case Toward Permanence

[1] Statistics obtained from NC Department of Health and Human Services, Division of Social Services, statistics for fiscal year 2003/2004.
[2] *Id.*
[3] This section on casebuilding was intentionally repeated from Chapter 2 in order to emphasize its importance with respect to TPR.

Throughout the course of an abuse, neglect, or dependency case, the AA must pay attention to the detail that is being incorporated into the court file. The court file itself should contain all material facts and findings that have led the case toward termination. Much that takes place during the course of a case, both in and out of court, never makes its way into the court file even if it should. As an advocate for the child, the AA must be alert to the detail that is being incorporated into the court file and make necessary motions or requests to include details that may be overlooked. Although there still must be sufficient findings of fact in each order, the judge may incorporate reports into the orders, which is a simple way to get appropriate detail into the court file.

Jane Thompson, assistant attorney general, and Jane Malpass, children's program representative with the N.C. Division of Social Services, have compiled materials on casebuilding that emphasize the importance of ensuring that each stage of an abuse, neglect, or dependency case paves the way to permanence. The following concepts are drawn from those materials and refer primarily to the adjudication and disposition phases of an abuse or neglect case prior to reaching termination:

- All material facts of the case should be alleged in the petition.
- More than one condition or status of the child can often be alleged to provide all possible judicial options.
- The adjudication order should completely "tell the story" of the case either by findings in the order itself or by incorporating by reference a court report that does tell that story, whether the adjudication is by way of hearing or consent.
- Court reports for disposition and reviews should set out services offered to the family (including pre-petition services), whether such services were successful, and a "roadmap" of services to be provided and expectations for parental improvement in the near future. Reports should address how visitation is going, whether roadmaps are being followed to achieve desired results, and whether the roadmap needs alteration. The report should also address whether positive change has occurred, the reasons for the change or lack of change, and the direction the case is going.
- Disposition orders should mandate the roadmap for the case during the next review period – services required, changes expected, resources to be utilized. Each disposition order and review order should contain findings about reasonable efforts and whether placement in the home is contrary to the welfare of the child. Each review order must adequately tell the story of the case from the last order to the present.

B. Effect of Consent and Stipulations in Prior Orders

The AA must be careful about what is consented to or stipulated to in the course of negotiations in a case, because some agreements may have a negative effect in the future pursuit of a TPR. Stipulating to a watered-down version of the facts, consenting to an adjudication of dependency when the facts actually warrant neglect or abuse, or consenting to neglect when the facts warrant abuse, can all damage chances at a successful TPR down the road. While there are times in which concessions are preferable to a lost case, unnecessary concessions can lead to a court record that lacks important facts and findings to prove a TPR case. In situations where the evidence is good, but consenting to something less than the facts warrant is easier than a trial, attorneys should consider whether doing what is easier now may make things harder in the future.

§ 4.3 Evaluating the Case for TPR

Attorney advocates must evaluate the case for TPR, and there are many steps to be taken in a thorough evaluation process. Such steps are the same whether DSS or the GAL is the petitioner, since the GAL takes an independent position. Some of these steps are outlined in this subsection.

A. Examining the Case File to Make a Preliminary Evaluation of Grounds and Best Interest for TPR

The AA may re-examine the case file with a focus on termination and whether facts and evidence will support it.

B. Holding a TPR Meeting with Volunteer and Staff Member

The AA should have a discussion with the GAL volunteer and GAL staff assigned to the case concerning termination of parental rights with respect to the particular case at issue.

[At the end of this chapter are checklists and worksheets that can be read or filled out in preparation for such a meeting or utilized in the meeting to identify issues that require discussion.]

Issues to be addressed at an initial meeting regarding TPR:

1. Termination of parental rights with respect to the best interest of the child or children.

Even if the AA has had multiple discussions with the volunteer and staff throughout the case, it is important to have a focused discussion with them concerning whether termination is truly in the best interest of the child and whether best interest can be shown in court.

2. Termination of parental rights with respect to grounds for termination.

The AA should examine the case and determine whether evidence seems sufficient to prove one or more grounds to terminate. As time goes by after adjudication, evidence is often weakened. Not only is the original evidence diluted, but the passage of time often gives parents the opportunity to "artificially" strengthen their case against TPR. They may be able to make the minimum effort to show the court just enough progress to keep the court from wanting to terminate, when in fact they are not more capable of making the necessary long-term changes that would make them better parents than they were when the petition was filed. Meanwhile, a child waits for permanence while the system tries to make up its mind about the parents' capabilities.

The 1998 legislative changes made in 7B-907(d), pursuant to the Adoption and Safe Families Act,[4] require the court to order DSS to initiate TPR when a child has been in custody or placement responsibility of a county DSS outside the home for 12 of the most recent 22 months. There are three exceptions to this requirement, however, one of which is when the court finds there is a permanent plan of guardianship or custody. **[7B-907(d)(1)]** If it is in the best interest of the child to terminate, but the available evidence for proving grounds to terminate is weak, the AA could consider whether the child would be better off if other avenues to achieve

[4] See Chapter 11 on Federal Laws for more information about ASFA.

permanence were pursued, such as guardianship or custody. [Please see the Appendix to this manual regarding permanency options for detailed information on adoption, guardianship, and custody.] It is always important to remember, however, that the only truly permanent plan is adoption, and one cannot get to adoption without first addressing parental rights by a termination proceeding or relinquishment. Guardianship and custody should be considered only when TPR and/or adoption do not seem to be viable options.

3. Evaluating issues and determining whether the GAL supports termination of parental rights

If the GAL supports termination, and the AA believes the evidence supports it, the AA should begin preparing for the termination of parental rights hearing.

4. Determining what is missing

a. What facts still need to be investigated, by whom, and by what date?
b. What is missing in the file, who can obtain it, and by what date?

5. Beginning discussions about whether the child should be present in court, whether the child should testify, and information the child should have

See §§ 3.5.E and 7.2 of this manual for more information about children in court and children testifying. The AA should consider whether the child is available and should be present for all or part of the proceedings and err on the side of the child's presence since the proceedings involve this child's life. The AA also must consider whether the child's testimony would be helpful, whether the child is capable of testifying, and the pros and cons of having the child testify.

Whether or not the child will be present or testifying, the AA and GAL must determine what, related to the proceedings, needs to be explained to the child.

6. Deciding what, if anything, should be done about the child's situation while awaiting TPR

Is the current placement for the child working out? Does the child have needs that have not been addressed? What is going on with visitation with parents or siblings? It is important to remember the child's sense of time and that it can be a fairly lengthy period from the time a determination is made to move toward TPR to the actual time the TPR case is heard. The AA must ensure that the needs of the child are met during that time period.

7. Keeping up with the case while awaiting a TPR hearing

The situation surrounding the child and the parents since the original adjudication and disposition is vital information that the court must consider at the TPR hearing.[5] The AA, volunteer, and staff should all be mindful of the importance of keeping up with the case while awaiting the hearing. In fact, if reunification efforts have ceased, the GAL volunteer may know more than anyone else about the case and be in a unique position to help present information at the TPR hearing. It is worthwhile stressing to the volunteer the need to keep the attorney advocate advised of any new information.

[5] See § 4.8.A.2. in this chapter for more information on the importance of evidence between original abuse or neglect adjudication and TPR hearing.

§ 4.4 The Role of the Guardian ad Litem in TPR Cases

A. The Attorney Advocate's Role Whether or Not Acting as Petitioner

Whether the GAL is initiating a TPR or participating in one initiated by DSS, it is important that he or she is attentive to details, because so much is at stake and appeals are not uncommon. Regardless of whether DSS or the GAL petitions the court for TPR, when the GAL favors termination, the attorney advocate, as the child's representative, must help ensure that the best possible case is presented.

B. When the GAL Wants to Terminate and DSS Does Not

Generally, DSS will be the party to pursue a TPR petition when appropriate to implement the permanent plan. But sometimes logistical or philosophical hurdles stand in the way of DSS filing the petition. When there is no possibility of reunification and the GAL believes it to be in the best interest of the child to terminate, the AA can initiate a TPR pursuant to 7B-1103 at any time where grounds exist and it serves the best interest of the juvenile.[6]

C. When DSS Wants to Terminate and the GAL Does Not

DSS might be reluctant to file for termination if the GAL is not in favor of it. But in the rare situation in which the GAL "team" is not in favor of termination and DSS proceeds with termination, the role of the GAL AA is to put on evidence and arguments at court that support the GAL's position. For a case in which the GAL argued that it was not in the child's best interest to terminate grounds and the Court of Appeals reversed the termination order finding that the trial court abused its discretion in terminating the mother's parental rights, see *In re J.A.O.*, 166 N.C. App. 222 (2004).

§ 4.5 Pre-Hearing Procedural Issues [7]

A. Who May Petition [7B-1103]

A petition to terminate parental rights may only be filed by

1. Either parent seeking termination of the other parent.

2. Any person judicially appointed as guardian of the person of the child.

3. Any county DSS, consolidated county human services agency, or licensed child-placing agency:

    - to whom custody of the child has been given by a court of competent jurisdiction.

[6] Prior to October 1, 2000, the GAL could initiate a TPR petition only after he or she had served in that capacity for at least one continuous year.

[7] Much of the information in the rest of this chapter (§ 4.5 through end of Termination of Parental Rights) relating to case and statutory law was adapted or extracted from an outline by Janet Mason on Termination of Parental Rights, updated October 2006, with permission, Institute of Government, the University of North Carolina at Chapel Hill. To access this outline or an updated version, type "termination" in the search space at: http://shopping.netsuite.com/sogstore.

- to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-3-701.

4. Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

5. **Any Guardian ad Litem appointed to represent the child pursuant to G.S. 7B-601 [for abuse, neglect and dependency], who has not been relieved of this responsibility.**

6. Any person who has filed a petition for adoption.

B. Termination Petition Filed as Motion in the Cause

Revised legislation in 1999 added a provision allowing for a termination petition to be filed as a motion in the cause, as opposed to filing a new, separate action. The new law that was originally drafted to provide for such a motion was only addressed in 7B-1102. Problems quickly arose, however, with the fact that other laws relating to termination were not revised to accommodate the new provision, creating so many questions and problems related to making a motion in the cause for TPR that it was rarely a good option for initiating TPR. In legislative sessions in 2000, however, changes were made throughout the TPR statutes to accommodate and be compatible with the new motion in the cause provision. Since such changes were made, filing a TPR as a motion in the cause is now a good and often preferable way to pursue TPR as it reduces time, effort, and paperwork in the process of expediting the case. However, it is still necessary to request relief of terminating parental rights. *In re McKinney*, 158 N.C. App. 441 (2003)(reversing TPR order where petitioner's motion in the cause did not specify the relief sought and therefore, failed to confer subject matter jurisdiction).

7B-1102 now reads as follows:

(a) When the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile.

(b) A motion pursuant to subsection (a) of this section and the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:

(1) Service must be in accordance with G.S. 1A-1, Rule 4, if one of the following applies:

a. The person or agency to be served was not served originally with summons.

b. The person or agency to be served was served originally by publication that did not include notice substantially in conformity with the notice required by G.S. 7B-406(b)(4)e.

c. Two years has elapsed since the date of the original action.

(2) In any case, the court may order that service of the motion and notice be made pursuant to G.S. 1A-1, Rule 4.

For purposes of this section, the parent of the juvenile shall not be deemed to be under disability even though the parent is a minor.

(c) When a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court on its own motion or motion of a party may consolidate the action pursuant to G.S. 1A-1, Rule 42.

C. Jurisdiction [7B-1101 and 7B-200(a)(4)]

1. **The district court has exclusive original jurisdiction** to hear and determine any petition or motion relating to termination of parental rights to any child who *resides in, is found in, or is in the legal or actual* custody of a county department of social services or licensed child-placing *agency* ***in the district at the time of filing*** of the petition or motion. (See *In re Leonard*, 77 N.C. App. 439 (1985).)

2. **The age of the parent** is irrelevant. However, if the parent is a minor, then a guardian ad litem must be appointed pursuant to G.S. 1A-1, Rule 17. (see 7B-1101.1 *infra*)

3. **The court must have personal as well as subject matter jurisdiction**. Even when respondent is served properly, the court may lack jurisdiction over a nonresident respondent if he or she does not have "minimum contacts" with North Carolina**.** *A parent must have minimum contacts with the state before a court here may terminate the parent's rights. In re Trueman*, 99 N.C. App. 579 (1990); *In re Finnican*, 104 N.C. App. 157 (1991), *disc. rev. denied*, 330 N.C. 612 (1992).

a. The nonresident parent may raise lack of personal jurisdiction as a defense under G.S. 1A-1, Rule 12(b)(2). *Trueman, id.*

b. When the nonresident parent had no contacts with North Carolina, the termination order was void and could be set aside under G.S. 1A-1, Rule 60(b)(4). *Finnican, id.* [*But see Cooper v. Shealy*, 140 N.C. App. 729 (2000), for analysis of factors used to determine minimum contacts. This is an alienation of affections suit in which the court found minimum contacts were present in spite of limited contact on the part of the defendant as it considered five particular factors including (1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state, and (5) the convenience to the parties.]

c**. Minimum contacts were not required, however, in the case of** a nonresident father of a child born out of wedlock, where the father had failed to establish paternity, legitimate the child, or provide substantial financial support or care to the child and mother. *In re Dixon*, 112 N.C. App. 248 (1993). See also *Harris v. Harris*, 104 N.C. App. 574 (1991)(non-resident father who failed to establish paternity need not have minimum contacts with North Carolina as a prerequisite for personal jurisdiction).

d. **Personal service of process while respondent is temporarily in the state** will confer personal jurisdiction. *Burnham v. California Superior Court*, 110 S. Ct. 2105 (1990) (due process does not bar exercise of personal jurisdiction over nonresident defendant based on personal service while temporarily in the state). Exception: if a party is coming in the state to defend the action that is the reason for the service, service is not valid.

e. **Long arm statute**. Session Law 2007-152 effective October 1, 2007 and applies to motions in the cause or petitions filed after that date amends 7B-1101 as follows: "The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106."

4. **Jurisdiction over TPR cases is also governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Parental Kidnapping and Prevention Act (PKPA)**. Under the PKPA, the jurisdiction of a court that has made a child custody determination consistent with the

PKPA continues as long as that court had proper jurisdiction under its state's laws and that state remains the residence of the child or any party. *See In re Bean*, 132 N.C. App. 363 (1999). (Note that the UCCJEA used to be the UCCJA.) *Please see, § 11.1 in this manual for detailed information on the PKPA (28 U.S.C. § 1738A) and the UCCJEA (G.S. Chapter 50A)*

a. A termination of parental rights is a child custody proceeding under the UCCJEA, 50A-102(4), and is a modification of another state's custody order; therefore, the trial court must make sufficient findings of fact to conclude that it has jurisdiction to modify the previous state's order. *In re N.R.M.*, 165 N.C. App. 294 (2004).

b. Information about the child's residency status pursuant to 50A-209 must be set forth in the petition or motion or an attached affidavit (such as form AOC-CV-609); however, failure to attach the affidavit or set forth the information does not divest the trial court of jurisdiction and may be cured by subsequently filing the necessary information. *In re Clark*, 159 N.C. App. 75 (2003).

D. Contents of Petition [7B-1104]

1**. Petition or motion must be entitled "In re (*last name of child*), a minor child," and must set forth the following facts**, or state that such facts are unknown:

a. Child's birth certificate name, date, and place of birth, county of present residence.

b. Petitioner's or movant's name and address and facts sufficient to show that petitioner or movant is authorized to file a petition or motion pursuant to 7B-1103.

c. Name and address of child's parents. If the parent's name or address is unknown, petition, motion, or attached affidavit must describe efforts that have been made to find out name and address. It is not necessary to name a person whose actions resulted in conception of the child and a subsequent conviction of first-degree or second-degree rape.

d. Name and address of any judicially-appointed *guardian* of the child's person, and of any *person* or *agency* to whom a court of any state has given custody of the child. **A copy of any such order must be attached**. [Failure to attach a copy of an order awarded legal custody to DSS deprived the trial court of subject matter jurisdiction. Failure to attach the custody order is not fatal if the petition has been amended to attach the order or that the custody order is otherwise part of the record. *In re T.B.*, 177 N.C. App. 790 (2006) *see also In re W.L.M.* --- N.C. App. ---, 640 S.E.2d 439 (2007)].

e. Facts sufficient to support a determination that one or more grounds for terminating parental rights exist. [Bare allegation that parent neglected the child and willfully abandoned the child for six months did not comply with the requirement, but an attached custody decree incorporated into the petition did contain sufficient facts. *In re Quevedo*, 106 N.C App. 574, *appeal dismissed*, 332 N.C 483 (1992)].

f. A statement that the petition or motion has not been filed to circumvent the Uniform Child Custody Jurisdiction and Enforcement Act.

[*NOTE:* Because the court must make a finding that it would have jurisdiction to make a

child custody determination, information required by G.S. 50A-209 or other information sufficient to enable the court to make that finding should be set out in the petition, motion, or attached affidavit.]

2. **The petition must be verified in order to confer subject matter jurisdiction.**

a. The fact that the petition is signed and notarized is not sufficient to constitute verification. *In re Triscari*, 109 N.C. App. 285 (1993).

E. Preliminary Hearing: Unknown Parent [7B-1105]

1. **Hearing to determine identity of parent**

If the name or identity of a parent/respondent is unknown, the court must conduct a hearing to determine the parent's name or identity.

a. Hearing must be held within ten days from date the petition is filed, or at the next term of court in the county if there is no court within ten days. Notice of the preliminary hearing need be given only to the petitioner, but the court may summon others to testify.

b. The court may inquire of any known parent about the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a "diligent search" for the parent.

c. If the parent's identity is determined, the court must enter a finding and summon the parent to appear.

d. The court must make findings if unable to ascertain the identity of the unknown parent or issue a publication order (*see* 2, below) within thirty (30) days of the preliminary hearing unless additional time is required for investigation.

e. Special hearing provisions do not apply in the case of a known parent whose whereabouts are unknown. *In re Clark*, 76 N.C. App. 83, *disc. rev. denied*, 314 N.C. 665 (1985).

2. **Publication of notice for unknown parent**

If not able to identify an unknown parent, the court must order publication of notice of the termination proceeding by means most likely to identify the child to the unknown parent. Due diligence in locating a parent is required before publication is allowed. (*See In re Clark supra*)

a. Notice must be published in a newspaper qualified for legal advertising under G.S. 1-597 and 1-598 and published in counties directed by the court weekly for three successive weeks. The notice must

i. be directed to the unknown parent of (male) (female) child born at specified time and place;

ii. designate the court, docket number, and name of case (at direction of the court, *In re Doe* may be substituted);

iii. specify the type of proceeding;

iv. direct the respondent to answer the petition within thirty days after the specified date of first publication;
[*NOTE*: For a combined service by publication, serving both a known and an unknown parent, the time to respond must be forty days, as required by G.S. 1A-1, Rule 4(j1), which must be followed for service on the known parent.]

v. follow the form set out in G.S. 1A-1, Rule 4 (j1); and

vi. state that parental rights will be terminated if no answer is filed.

b. Upon completion of service, a publisher's affidavit must be filed with the court.

3. **No response to publication**
If unknown parent served by publication does not answer within prescribed time, court shall issue an order terminating that parent's rights. **[7B-1105(f)]**

[NOTE: In several cases involving known parents, the court of appeals has said that the court is never required to terminate parental rights. *In re Tyson*, 76 N.C. App. 411 (1985); *In re Godwin*, 31 N.C. App. 137 (1976); *Forsyth County Dept. of Social Services v. Roberts*, 22 N.C. App. 658 (1974).]

F. Issuance of Summons [7B-1106]

(For TPRs initiated by motion, see next subsection concerning notice requirements.)

1. Except as provided in case of an unknown parent under 7B-1105, upon filing of the petition, the following shall be named respondents and a summons directed to them:

a. 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;

b. any judicially appointed custodian or guardian of the person of the child;

c. any county DSS or licensed child-placing agency to which the parent has released the child for adoption under G.S. Chapter 48 or any county department of social services to whom placement responsibility for the child has been given by a court of competent jurisdiction; and

d. the child. [8]

2. Under 7B-1106(b), the summons must include the child's name and notice that

a. a written answer must be filed within thirty days or the parent's rights may be terminated;

b. the parent, if indigent, is entitled to appointed counsel and may contact the clerk

[8] Note 7B-1003 further provides that the summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed and service of the summons shall be completed pursuant to the procedure provided 1A-1, Rule 4(j).

immediately to request counsel;

c. it is a new case and any attorney appointed earlier will not represent the parent in this case unless so ordered by the court;

d. notification of the date, time, and place of the hearing will be mailed upon filing of an answer or thirty days from the date of service;

e. the purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated; and

f. the parent may attend the termination hearing.
[*NOTE*: *See* cases holding that parent does not have absolute right to be present at termination hearing. *In re Murphy*, 105 N.C. App. 651, *affirmed (per curium)*, 332 N.C. 663, (1992); *In re Quevedo*, 106 N.C. App. 574, *appeal dismissed*, 332 N.C. 483 (1992).]

3. The summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed. The summons must be served pursuant to G.S. 1A-1, Rule 4(j1); however, a parent shall not be deemed to be under a disability even if a minor.[9]

a. The petitioner must comply with Rule 4(j1) regarding service by publication and specifically with the section's due diligence requirement. *In re Clark*, 76 N.C. App. 83, *disc. rev. denied*, 314 N.C. 665, (1985). [*See also* later related case, *In re Clark*, 327 N.C. 61(1990), holding that superior court correctly dismissed adoption proceeding, where order terminating father's rights was reversed and father had filed legitimation proceeding.]

b. Service by publication is void, and an order for termination can be overturned, where petitioner did not use diligence in trying to ascertain the respondent/parent's whereabouts. [*See In re Clark supra*].

c. When respondent/parent's whereabouts are unknown, service must comply with both rule 4(j1) and with G.S. 7B-1106. *In re Joseph Children*, 122 N.C. App. 468 (1996) (failure to fully comply with G.S. 7A-289.27(b) [now 7B-1106] was error, but did not prejudice respondent).

d. If a county department of social services, not otherwise a party petitioner, is served with a petition alleging that the parental rights of the parent should be terminated pursuant to G.S. 7B-1111, the department shall file a written answer and shall be deemed a party to the proceeding. [7B-1106(c)]

4. No summons is necessary for any parent who irrevocably relinquished the juvenile to a county DSS or child placement agency or has consented to adoption by the petitioner.

G. Notice in TPRs Initiated by Motion [7B-1106.1]

(a) Upon the filing of a motion pursuant to G.S. 7B-1102, the movant shall prepare a notice directed to each of the following persons or agency, not otherwise a movant:

(1) The parents of the juvenile.

(2) Any person who has been judicially appointed as guardian of the person of the

[9] G.S. 7B-1101 requires that a Rule 17 Guardian ad Litem be appointed to represent any parent under age eighteen.

juvenile.
(3) The custodian of the juvenile appointed by a court of competent jurisdiction.
(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the juvenile has been given by a court of competent jurisdiction.
(5) The juvenile's guardian ad litem if one has been appointed pursuant to G.S. 7B-601 and has not been relieved of responsibility.
(6) The juvenile, if the juvenile is 12 years of age or older at the time the motion is filed.

Provided, no notice need be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency nor to any parent who has consented to the adoption of the juvenile by the movant. The notice shall notify the person or agency to whom it is directed to file a written response within 30 days after service of the motion and notice. Service of the motion and notice shall be completed as provided under G.S. 7B-1102(b).

(b) The notice required by subsection (a) of this section shall include all of the following:
(1) The name of the minor juvenile.
(2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.
(3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
(4) notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
(5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.
(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

(c) If a county department of social services, not otherwise a movant, is served with a motion seeking termination of a parent's rights, the director shall file a written response and shall be deemed a party to the proceeding.

Casenotes:

- Failure to give respondent notice that fully complies with the statutory provisions of 7B-1106.1 is reversible error. *In re D.A.*, 169 N.C. App. 245 (2005); *In re Alexander*, 158 N.C. App. 522 (2003).

- However, it is not reversible error where respondent waives the defense of insufficiency of service or insufficiency of service of process by making a general appearance or by filing a responsive pleading (answer, responsive, or motion) without raising the defense. *In re J.S.L.*, 177 N.C. App. 151, (2006); *In re B.M.*, 168 N.C. App. 350 (2005); *In re Howell*, 161 N.C. App. 650 (2003).

H. Answer or Response of Respondents; Hearing to Determine Issues [G.S. 7B-1107, 7B-1108]

1. Where parent does not file an answer to TPR petition
If the respondent parent fails to file a written answer to the petition or written response to the motion within 30 days after service of the summons and petition or notice and motion, or within the time period established by G.S. 1A-1, Rule 4 (j1) if service is by publication, the court may issue an order terminating all parental and custodial rights; provided the court shall order a hearing on the petition or motion and may examine the petitioner or movant or others on the facts alleged. **[7B-1107]**

[*NOTE*: The court of appeals has held that a parent's failure to file an answer is grounds for terminating parental rights. *In re Becker*, 111 N.C. App. 85 (1993). *But* see *In re Tyner*, 106 N.C. App. 480 (1992), where court of appeals, in dicta, concluded that the 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. Despite the statute's use of "shall," the court should inquire into and receive evidence regarding grounds for termination and the child's best interest and determine whether parental rights should be terminated. The court is never required to terminate parental rights. *See also In re Tyson*, 76 N.C. App. 411 (1985); *In re Godwin*, 31 N.C. App. 137 (1976); *Forsyth County Dept. of Social Services v. Roberts*, 22 N.C. App. 658 (1974).]

2. Answer or response shall admit or deny allegations
Respondent's answer or response shall admit or deny the allegations of the petition or motion and provide the name and address of the respondent or respondent's attorney. **[7B-1108(a)]** (For a discussion of appointment of GAL triggered by denial of allegations, see § 4.6.B below.)

3. The court shall conduct a special hearing to determine the issues raised by the petition and answer(s) or response(s) (if filed). **[7B-1108(b)]**

a. Notice of not less than ten days or more than thirty days must be given by the petitioner or movant to the respondent who answered or responded, and to the child's Guardian ad Litem. *Id*.

b. Notice of hearing is deemed to be given upon deposit of notice, properly addressed, in the U.S. mail, first-class postage paid. *Id.*

c. Fact that special hearing is brief and held just before trial does not conflict with statutory requirements. *In re Peirce*, 53 N.C. App. 373 (1981); *In re Taylor*, 97 N.C. App. 57 (1990). Delineation of issues for adjudication just before termination hearing satisfied the "special hearing" requirement. *Taylor*.

4. If a county department of social services, not otherwise a party petitioner, is served with a petition alleging that the parental rights of the parent should be terminated pursuant to G.S. 7B-1111, the department shall file a written answer and shall be deemed a party to the proceeding. [7B-1106(c)]

I. Timing of Adjudicatory Hearing (7B-1109)

1. A hearing on a termination of parental rights petition or motion must be held within ninety (90) days from the date of filing unless the court orders that it be held at a later time as follows:

a. For **good cause**, the court may continue the hearing up to ninety (90) days from the date of the initial petition to receive **additional evidence** or to allow the parties to conduct **expeditious discovery**.

b. The court may grant a continuance that extends beyond ninety (90) days after the initial petition to **only in extraordinary circumstances** when necessary for the proper administration of justice, and must issue a written order stating the grounds for the continuance.

- Granting or denying a motion for a continuance is in the trial court's discretion. *In re D.Q.W.*, 167 N.C. App. 38 (2004).

- Delay in holding the hearing not reversible error where delay due to respondent's request for continuances. *In re D.J.D.*, 171 N.C. App. 230 (2005).

c. Statutory guidelines are **not** jurisdictional. *In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curium*, 360 N.C. 475 (2006). *In re S.N.H.*, 177 N.C. App. 82, (2006).

d. **Prejudice must be shown in delay of hearing to constitute reversible error**.

- Delay in holding hearing not reversible error in the absence of a showing of prejudice. *In re S.W.*, 175 N.C. App. 719, *disc. review denied*, --- N.C. ---, 635 S.E.2d 559 (2006) (holding termination hearing more than a year after petition was filed and entering order another seven months after the hearing were prejudicial and required reversal).

§ 4.6 The TPR Hearing: Procedural Issues

A. Parent's Representation by Counsel and Guardian ad Litem; Parents' Rights

1. **The parent has the right to counsel and to appointed counsel if indigent** unless the parent waives that right. **[7B-1101.1, 7B-1109(b)]** See *In re Little*, 127 N.C. App. 191 (1997).

a. **Parent's failure to respond to petition or ask for counsel** before the termination hearing does not constitute waiver of the right to counsel. *Little, id*. *See also In re Hopkins*, 163 N.C. App. 38, 592 S.E.2d 22 (2004)(holding that trial court erred in denying mother's request for counsel even though she did not file an answer and requested counsel the day of the termination of parental rights hearing).

b. **The court shall inquire whether the child's parents are present at the adjudicatory hearing and, if so, whether they are represented by counsel**. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent as defined in G.S. 7A-450(a), counsel shall be appointed to represent them in accordance with rules adopted by the Office of Indigent Defense Services. The court shall grant such an extension of time as is reasonable to allow counsel to prepare. **[7B-1109(b)]**

c. If a parent waives counsel, the court shall examine the parent and make **findings of fact sufficient to show that the waivers were knowingly and voluntaryily given**. [**7B-1109(b),** *Little, id.]*

d. **Caution should be exercised in appointing one attorney to represent both parents**, given the potential for conflicting interests and evidence. *In re Byrd*, 72 N.C. App. 277 (1985). But in *Byrd*, the court found that failure to appoint separate counsel for parents was not error. [*On a practical note, even if there does not appear to be a conflict between parents, one often arises as the case progresses, and having to get new counsel can cause significant delays in the case.*]

e. *Lassiter v. Dept. of Social Services*, 452 U.S.18 (1981), held that due process does not require the appointment of counsel for indigent parents in every parental status termination proceeding.

f. **Continuity of counsel**. If the TPR proceeding is filed by motion, then the attorney appointed to represent the parent in the underlying abuse, neglect or dependency proceeding will continue to represent the parent unless the court orders otherwise; however, if the TPR proceeding is filed by petition, then the attorney does not automatically represent the parent unless appointed by the court to do so.

2. **The parent has the right to a Guardian ad Litem** appointed under G.S. 1A-1, Rule 17 (in addition to counsel) under the following circumstances: **[7B-1101.1(b)-(e)]**[10]

a. **Parent is a Minor [7B-602(b)]**

In addition to the right to appointed counsel, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent under the age of 18 years who is not married or otherwise emancipated. Note that if the minor parent is subject of a juvenile petition, the appointment of a Rule 17 guardian ad litem does not affect entitlement to a guardian ad litem pursuant to G.S. 7B-601.

- The issue of failure to appoint a guardian ad litem for respondent in an earlier dependency proceeding in which she was a minor could not be considered in the appeal of the termination of parental rights order. *In re E.T.S.*, --- N.C. App. ---, 623 S.E.2d 300 (2005).

b. **Parent has Diminished Capacity [7B-602(c)-(e)]**

Instead of an automatic appointment based on a pleading of dependency pursuant to G.S. 7B-101 due to substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition, appointment of a Rule 17 guardian ad litem is by motion of any party or the court. Upon motion, the court considers whether there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own best interest.

Behaviors, psychological evaluations, social security disability benefits should be alerts for juvenile court practitioners to consider whether it is appropriate to make a motion for a Rule 17 guardian ad litem.

The statute specifically provides that the parent's counsel shall not be appointed as the Rule 17 guardian ad litem. However, communications between the guardian ad litem and parent's counsel is privileged and confidential to the same extent that communications between counsel and client are privileged.

The is some guidance as to the role of the appointment in that the guardian ad litem may in engage in the following: (1) helping the parent enter consent orders; (2) facilitating service of

[10] Note that the statutory provisions of 7B-1101.1 are the same as 7B-602. Session Laws 2005-398 amended both statutes applicable to petitions or action filed October 1, 2005. This section is reproduced from §1.3(F).

process on the parent; (3) assuring that necessary pleadings are filed; and (4) assisting the parent and the parent's counsel, if requested, to ensure that procedural due process requirements are met. Note: a guardian ad litem appointed under this subsection in accordance with G.S. 1A-1, Rule 17, does not fulfill the same role as representing best interests pursuant to G.S. 7B-601. The trial court should always keep in mind that appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. *In re J.A.A.*, 175 N.C. App. 66, 71 (2005).

- A hearing under G.S. 1A-1, Rule 17, was not required because the transcripts and record did not reveal circumstances that if brought to the trial judge's attention, would have raised "a substantial question as to whether [respondent was] *non compos mentis. In re S.N.H.*, 177 N.C. App. 82, (2006)(decided under former law).

c. **Former Law**. For petitions or actions filed before October 1, 2005, the court was required to appoint a Rule 17 guardian ad litem to represent any parent whose incapability to provide proper care or supervision for the child was alleged as a termination ground pursuant to 7B-1111(6), when the parent's incapability was alleged to be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or a similar cause or condition. Some cases even required such appointment when the ground was not specifically alleged, but the parent's mental health, substance abuse, or other similar issue were central to the case.

- Failure to appoint a guardian ad litem when the statute specifically required one was reversible error. *See In re K.R.S.*, 170 N.C. App. 643 (2005); *In re B.M.*, 168 N.C. App. 350 (2005); *In re T.B.K.*, 166 N.C. App. 234 (2004); *In J.D.*, 164 N.C. App. 176, *disc. review denied*, 358 N.C. 732 (2004); *In re S.B.*, 166 N.C. App. 488 (2004); *In re Estes*, 157 N.C. App. 513, *disc. review denied*, 357 N.C. 459 (2003); *In re Richard v. Michna*, 110 N.C App. 817 (1993).

- For cases in which the Court of Appeals found reversible error for failure to appoint a Rule 17 guardian ad litem even though dependency pursuant to 7B-1111(6) was not alleged, *see e.g. In re L.W.*, 175 N.C. App. 387, disc. review denied, --- N.C. ---, 633 S.E.2d 818 (2006); *In re J.A.A.*, 175 N.C. App. 66, 623 S.E.2d 45 (2005).

- Note that the appointment of a Rule 17 guardian ad litem was only required when the incapability *was the result of* substance abuse, mental illness or another similar cause, and appointment was not require in every case where substance abuse or another cognitive limitation was alleged. *See In re D.H.*, 177 N.C. App. 700, (2006); *In re A.L.G.*, 173 N.C. App. 551 (2005); *In re O.C.*, 171 N.C. App. 457, *disc. review denied*, 360 N.C. 64 (2005); *In re H.W.*, 163 N.C. App. 438, *disc. review denied*, 358 N.C. 543 (2004).

- No testimonial privilege prevented a Rule 17 guardian ad litem from testifying at the termination of parental rights trial against respondent, and the testimony could be used to establish grounds for termination. *In re Shepard*, 162 N.C. App. 215, *disc. review denied*, 358 N.C. 543 (2004).[11]

3. **Parent does not have an absolute right to be present at termination hearing.**

[11] Note that 7B-1101.1(d) specifically overrules this holding.

a. **Incarcerated parent does not have the absolute right to be transported to termination hearing.** *In the Matter of Murphy*, 105 N.C.App. 651 (1992), *affirmed*, 332 N.C. 663 (1992); *In the Matter of Quevedo*, 106 N.C. App. 574 (1992), *appeal dismissed*, 332 N.C. 483 (1992). In these cases, the court stated that "an incarcerated parent does not have an absolute right under the due process clause to be transported to a termination hearing but that the determination is one for the trial court to make, after balancing the three factors specified in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976)." *Quevedo* at 579. The *Eldridge* factors to be weighed are (1) the private interests affected by the proceeding, (2) the risk of error created by the state's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. The Court in *Quevedo* encouraged the authorization of funds for deposing an incarcerated parent in prison. It emphasized that depositions of the parent combined with representation by counsel at the hearing would "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." *Quevedo* at 582.

See also In re Faircloth, 153 N.C. App. 565 (2002)(applying the Matthews v. Eldridge balancing test, examining (1) the private interest affected by the proceeding; (2) risk of error caused by the procedure; and (3) countervailing governmental interest supporting the use of the challenged procedure and holding that "A termination of parental rights hearing is a civil, rather than criminal action, with the right to be present, to testify, and to confront witnesses subject to 'due limitations.'").

b. **Denial of motion for funds to take incarcerated parent's deposition did not violate the parent's due process rights**. *In re K.D.L.*, 176 N.C. App. 261 (2006)(applying the *Matthews v. Eldridge* balancing test.)

c. **Mother's failure to appear for the 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, *disc. rev. denied*, 322 N.C. 835 (1988). *See also Mitchell County Dept. of Soc. Services v. Carpenter*, 127 N.C. App. 353, *affirmed*, 347 N.C. 569 (1998).

B. Representation of Child by Guardian ad Litem

1. **The court *shall* appoint a Guardian ad Litem** to represent the child's best interest if the respondent, in filing an answer or response to the TPR petition or motion, denies any material allegation of the petition, unless the the GAL files the petition or a GAL has already been appointed. **[7B-1108(b)]** An attorney shall be appointed to assist Guardians who are not attorneys and the appointment of the GAL is the same as in G.S. 7B-601 and 603. Otherwise, the court is not required to appoint a GAL.

a. Where it court not be determine from the record on appeal when or for what purpose respondent had filed a letter he later claimed was an "answer," the court refused to assume trial court error an held that appointment of a GAL for the child was not required. *In re Tyner*, 106 N.C. App. 480 (1992).

b. Although respondent waited until the day of the hearing to file an answer, the court was required to appoint a GAL for the child. *In re J.L.S.*, 168 N.C. App. 721 (2005).

c. In a private TPR action, the court's failure to appoint a GAL for the child despite respondent father filing an answer denying material allegations required reversal even though there was not

objection at trial nor was error assigned on appeal. *In re Fuller*, 144 N.C. App. 620 (2001).

2. **The court *may, in its discretion,* appoint a Guardian ad Litem** in order to assist the court in determining the best interest of the child either before or after determining the existence of grounds for terminating parental rights. **[7B-1108(c)]**

3. If a GAL could be appointed for purposes of TPR, **a GAL who was previously appointed for the child** under 7B-601 and any attorney appointed to assist the GAL shall also represent the child in TPR proceedings and shall have the duties and payment of the GAL appointed under this section unless the court determines that the best interests of the child require otherwise. **[7B-1108(d)]**

a. **No GAL trained and supervised from the GAL Program unless**: (1) the child has been the subject of an abuse, neglect or dependency petition; or (2) for good cause, the local GAL Program consents.

b. Appointment of an attorney advocate does not obviate the requirement that a GAL be appointed for the child because the two have different roles and statutory duties. *In re R.A.H.*, 171 N.C. App. 427 (2005). (**Note**: In this case, there was not evidence of a GAL and the AA was appointed three days into the TPR hearing, so it appeared that the AA did not investigate the facts to make a best interest determination, but only protected legal rights in court. Had the AA been appointed sooner and fulfilled the statutory duties, perhaps there would have been a different outcome).

4. 7B-1106(a) requires that the summons and other pleadings or papers directed to the juvenile shall be **served upon the juvenile's guardian ad litem** if one has been appointed. **[7B-1106(a)]** As a result, a Rule 17 GAL appointment may be necessary to effectuate proper service on the child.

C. Understanding the Two-Stage TPR Process of Adjudication and Disposition

1. Adjudication

At the adjudicatory hearing the court must determine the existence or nonexistence of circumstances showing grounds to terminate. **[7B-1109(e)]** Once the court determines the existence of grounds to terminate, it then moves on to the dispositional stage. No discretion may be exercised during the adjudicatory stage. *In re Carr*, 116 N.C. App. 403 (1994).

2. Disposition

If the court determines that grounds to terminate exist, then the court shall terminate parental rights unless it determines that it is not in the best interest of the child to terminate. **[7B-1110]**

The court exercises its discretion in the dispositional stage as to whether it is in the best interest of the child to terminate. *See In re Carr, id.*

Please see § 4.9 later in this chapter, which contains more specific information on best interest and disposition in termination proceedings.

3. Separate hearings not required

Although the court is required to apply different standards at the separate stages of adjudication and disposition, there is no requirement that the stages be conducted at two separate hearings. *In re White*, 81 N.C. App. 82, *cert. denied*, 318 N.C. 283 (1986).

> *The AA should encourage a clear separation between the two stages if the judge does not typically make a clear separation and should help to educate the judge about the need to do so.*
> Even if a judge does not conduct a "grounds" hearing and a "best interest" hearing back-to-back, the judge should at least articulate a clear separation between the two or risk a finding on appeal that the wrong standard was used at the wrong stage. To begin with, the judge needs to make a clear ruling on grounds before proceeding to best interest. The judge may or may not hear new evidence on best interest once a ruling has been made on grounds, but the AA should consider asking the judge for an opportunity to present additional evidence on best interest once a ruling has been made on grounds. Because there are two different standards at the two stages, the AA may be able to admit evidence for purposes of best interest that would not be admissible for adjudication. If presenting additional evidence is not an option, the AA should consider asking the judge, during adjudication, to consider certain evidence for dispositional purposes only and make sure that such limited consideration is stated by the judge for the record. Case law and the statutes are unclear about the evidentiary standard in disposition, but it can be argued that certain evidence that does not comply with the formal rules of evidence is admissible for dispositional purposes only (such as the GAL report). See § 4.7.D, later in this chapter, titled "Admissibility of GAL Report."

D. Burden of Proof

For adjudication in a termination hearing, the burden is on the petitioner [or movant] to prove the facts justifying termination. Findings must be based on clear and convincing evidence. [*See In re Nolen; In re Montgomery*, 311 N.C. 101 (1984); 117 N.C. App. 693 (1995), and 7B-1111(b); 7B-1109(f).]

Once the court has made a ruling concerning grounds, the case enters the **dispositional stage, at which point the petitioner does not carry an evidentiary burden** and the judge makes a discretionary determination regarding best interest of the juvenile. *In re Roberson*, 97 N.C. App. 277 (1990).

E. No Right to a Jury in Termination Proceedings

The adjudicatory hearing is without a jury. **[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).

F. Reporting of Termination Hearings

1. The hearing is reported as provided for civil trials. 7B-1109(a). Electronic recording equipment may be used when court reporters are not available. **[7A-198(a)]**

2. When parties stipulate to the use of recording machines in lieu of a court reporter, they are estopped from complaining on appeal about the quality of the recording equipment. If the equipment fails to function, the record must be reconstructed. To show prejudicial error, a party must show (a) that the party was prejudiced by loss of specific testimony and (b) what the content of any gaps or lost testimony was. *In re Caldwell*, 75 N.C. App. 299 (1985); *In re Peirce*, 53 N.C. App. 373 (1981).

3. The fact that recording is incomplete or inadequate, by itself, it not grounds reversal. The appellant must make a specific showing of probable error as there is a presumption of regularity at trial. *In re Howell*, 161 N.C. App. 650 (2003); *In re Bradshaw*, 160 N.C. App. 677 (2003)(respondent took no steps to reconstruct the record as require by the Rules of Appellate Procedure and only alleged general prejudice)

G. Previously Involved Judge Need Not Recuse, but Presiding Judge Must Sign Order

1. Knowledge of evidentiary facts from an earlier proceeding does not require a judge's disqualification. *In re Faircloth*, 153 N.C. App. 565 (2002).

2. Trial judge is not required to recuse himself or herself merely because the judge has had prior involvement with the family in a juvenile proceeding (this case involved judge recommending at a review hearing that termination be pursued). *In re LaRue*, 113 N.C. App. 807 (1994).

3. It was reversible error for a judge other than the one who presided at the hearing to sign the order terminating parental rights. *In re Whisnant*, 71 N.C. App. 439 (1984). *See also In re Savage*, 163 N.C. App. 195 (2004)(holding that the requirement of Rule 52 of the North Carolina Rules of Civil Procedure is not met when the presiding judge does not sign the order).

H. Court May Order Child or Parent to Be Examined

The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the court may order a similar examination of any parent of the child. **[7B-1109(c)]**

I. Continuances

For **good cause** shown, the court may continue the hearing for up to ninety (90) days from the date of the initial petition in order to receive additional evidence, any reports or assessments that the court has requested, to allow parties to conduct expeditious discovery, or any other information needed in the best interest of the child. Continuances that extend beyond the ninety (90) days shall be granted only in **extraordinary circumstances** when necessary for the proper administration of justice, and the court shall enter a **written order** stating the grounds for the continuance. **[7B-1109(d)]**

Whether to grant a continuance is in the trial court's discretion. In re Mitchell, 148 N.C. App. 483, reversed on other grounds, 356 N.C. 288 (2002)(respondent's absence was voluntary or the result of her own negligence in failing to obtain adequate transportation). *See also In re C.D.A.W.*, 175 N.C. App.680 (2006).

J. Applicability of the Rules of Civil Procedure

1. There is no one rule to follow in determining whether the rules of civil procedure apply in termination cases. The courts have made various statements including the following:

a. Generally, the Rules of Civil Procedure are applicable, except where a different procedure may be prescribed by statute. *In re Clark*, 303 N.C. 592 (1981). [See the following decisions that applied certain rules of civil procedure without questioning applicability.]

i. Entry of Judgment – Rule 58, *In re Moore*, 306 N.C. 394 (1982), *appeal dismissed*, 459 U.S. 1139 (1983).

ii. Motion for relief from a judgment or order – Rule 60(b). *In re Saunders*, 77 N.C. App. 462 (1985).

iii. Amendment of complaint – Rule 15. *In re Smith*, 56 N.C. App. 142 (1982), *cert. denied*, 306 N.C. 385 (1982).

iv. Findings of fact and signing of judgment – Rule 52 and Rule 63. *In re Whisnant*, 71 N.C. App. 439 (1984). *See also In re Savage*, 163 N.C. App. 195 (2004)(Rule 52 requires presiding judge to sign the order).

v. Motion to intervene of right – Rule 24(a)(2). *Hill v. Hill*, 121 N.C. App 510 (1996).

b. However, some decisions have questioned or not applied the Rules of Civil Procedure:

i. Because the plain language of the Juvenile Code set out the procedure, Parents/respondents do not have a right to file a counterclaim in a termination action. *In re Peirce*, 53 N.C. App. 373 (1981).

ii. Summary judgment procedures are not available in termination proceedings. *Curtis v. Curtis*, 104 N.C. App. 625 (1991).

iii. While the Rules of Civil Procedure are not to be ignored, they "are not superimposed" upon termination hearings. *In re Allen*, 58 N.C. App. 322 (1982); *In re Pierce*, 53 N.C. App. 373 (1981).

c. Termination initiation as motion in the cause

Where termination is initiated as a motion in the cause pursuant to 7B-1102, the applicability of the Rules of Civil Procedure are as provided in that section.

2. Does Rule 17 require the appointment of a Guardian ad Litem even when the termination statute does not require it? This issue was addressed in several cases including *In re Clark*, 303 N.C. 592 (1981), *In re Scearce*, 81 N.C. App. 531, *disc. rev. denied*, 318 N.C. 415 (1986), and *In re Barnes*, 97 N.C. App. 325 (1990), the indication being that a Rule 17 GAL should be appointed even when no answer was filed. Yet section 7A-289.29, now 7B-1108, was amended and became effective in July of 1990, after these cases, and was apparently intended to supersede *Barnes* and to be the only authority for appointment of a GAL in a termination case.

§ 4.7 General Evidentiary Issues

[*Note*: The following evidence matters have come up in TPR cases but this subsection does not address matters specifically related to a particular ground for termination, which will be discussed in that part of this chapter related to each particular ground. *See Chapter 7 in this manual on Evidence for more detailed information on evidentiary matters in general, such as child witnesses, experts, documents, and hearsay.*]

A. Privileges

The husband-wife or physician-patient privilege is not grounds for excluding evidence regarding grounds for termination. **[7B-1109(f)]**

B. Records

1. DSS records were admissible under business records exception to the hearsay rule; testimony of social workers who had familiarized themselves with the records was competent even though they had no contact with the case before the petition was filed. *In re Smith*, 56 N.C. App. 142 (1982).

2. In a termination of parental rights action, medical examiner's report was admissible under the public records exception to the hearsay rule, Rule 803(8) of the North Carolina Rules of Evidence as the examiner's office was acting under its statutory duty to investigate and report factual findings relate to the death of one of respondent mother's children. *In re J.S.B.*,--- N.C. App. ---, 644 S.E.2d 580 (2007).

3. Court did not err in considering respondent's mental health records, which the court had ordered disclosed at an earlier stage of the proceeding and which were in the underlying file. *In re J.B.*, 172 N.C. App. 1 (2005). See also *In re J.S.L.*, 177 N.C. App 151 (2006)(trial court did not err by admitting respondent's mental health records when respondent only made a general objection, did not file an motion *in limine*, and did not ask for *in camera* review of the records.)

C. Experts and Opinions *[Please see § 7.5 on experts in this manual.]*

1. Social worker could give opinion as to parents' capacity to provide a stable home environment, even though not tendered as an expert. *In re Pierce*, 67 N.C. App. 257 (1984). It was not error for the court to allow a social worker to give an expert opinion about whether parents' actions were indicative of good parenting skills, even though there was no explicit finding that she was an expert. *In re Peirce*, 53 N.C. App 373 (1981).

2. There was no error in refusing to allow clinical social work expert to testify about the mother's mental health and parenting capacity where there was no evidence that she was an expert in mental health issues. *In re Carr*, 116 N.C. App. 403 (1994).

3. It was not error for the court to admit testimony of witnesses tendered as experts in juvenile protective services, infant development, and permanency planning. *In re Byrd*, 72 N.C. App. 277 (1985).

4. The test in determining admissibility of expert opinion is "whether the opinion expressed is really one based on the special expertise of the expert, that is whether the witness, because of his expertise is in a better position to have an opinion on the subject than is the finder of fact." *State v. Wilkerson*, 295 N.C. 559 (1978).

5. **Expert Fees for Respondents**. Whether to grant an indigent respondent's motion for funds to pay for an expert or other litigtion expenses is in the trial court's discretion. *In re J.B.*, 172 N.C. App. 1; *In re D.R.*, 172 N.C. App. 300 (2005).

D. Admissibility of GAL Report

In the case *In re Quevedo*, 106 N.C. App. 574, *appeal dismissed*, 332 N.C. 483 (1992), admission of a GAL report was error, but the admission was in the adjudicatory phase of the proceedings. (The error was harmless because the report did not contain information that was not properly before the court from another witness.) Because it is clear that the formal rules of evidence apply to adjudication, GAL reports that typically contain hearsay would not be admissible at this stage. Unlike the statutes pertaining to the adjudication and disposition of abuse, neglect, or dependency, statutes pertaining to termination of parental rights do not specifically state that different evidentiary standards apply for adjudication and disposition. However, case law indicates that such a different standard exists in termination proceedings as well. In the case *In re White*, 81 N.C. App. 82, *cert denied*, 318 N.C. 283 (1986), the court mentioned the fact that "the court is required to apply different evidentiary standards at each of the two stages." *Id* at 85. *See also In re Carr*, 116 N.C. App. 403 (1994)((discussing the fact that discretion is exercised by the court in disposition but not adjudication.)

Many districts are in the practice of admitting GAL reports for dispositional purposes. Although other cases have not directly addressed the issue of admitting GAL reports for dispositional purposes, some have clearly admitted them. *See, e.g., In the Matter of Baby Boy Dixon*, 112 N.C. App. 248 (1993); *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994).
Obviously, then, it is important to ensure that a GAL report is not admitted until the court has clearly and unequivocally entered into the dispositional, or best interest, phase of the case. If typical TPR hearings in an AA's district do not have a clear separation between dispositional evidence and adjudicatory evidence, hesitation at admitting such a report for fear of appealable error is warranted but should be remedied by asking that the report be admitted for dispositional purposes only. (*See White, supra*, discussing the court's ability to "consider the evidence in light of the applicable legal standard

and to determine whether grounds for termination exist before proceeding to consider evidence relevant only to the dispositional stage." *White* at 85.) The best solution is to push for a separation between the two phases and/or request to have the report submitted for dispositional purposes only.

E. Parent as an Adverse Party and Fifth Amendment Privilege

The parent may be called to testify as an adverse party; a subpoena is not necessary. The parent may claim his or her Fifth Amendment privilege and refuse to answer questions that might incriminate the parent. *In re Davis*, 116 N.C. App. 409 (1994).

F. No Sixth Amendment Right to Confrontation

The Sixth Amendment does not apply in civil cases and does not bar evidence of out-of-court testimonial statements in civil termination of parental rights proceedings. *In re D.R.*, 172 N.C. App. 300 (2005).

G. Judicial Notice

The trial court may take judicial notice of earlier proceedings in the same cause. The trial court did not err in admitting prior orders into evidence, even though they were based on a lower evidentiary standard of proof. *In re J.B.*, 172 N.C. App. 1 (2005). *See also In re S.W.*, 175 N.C. App. 719, *disc. review denied*, 360 N.C. 534 (2006); *In re M.N.C.*, 176 N.C. App. 114 (2006); *In re S.N.H.*, 177 N.C. App. 82 (2006).

H. Testimony in Non-Traditional Setting

1. **Closed Chambers**. The trial court id not err in allowing the child to testify in closed chambers, over respondent's objection, when all attorneys were allowed to be present and the court made findings about the child's best interest. *In re Williams*, 149 N.C. App. 951 (2002).

2. **Exclusion of Respondent from Courtroom**. Respondent's due process rights were not violate when the trial court exclude 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 J.B.*, 172 N.C. App. 1 (2005).

See § 7.2 E on child testimony in non-traditional Setting in this manual.

I. Timing of Admissible Evidence

The court may admit and consider evidence relating to events between the time the petition (or motion) was file and the hearing. *In re Bishop*, 92 N.C. App. 662 (1989).

§ 4.8 Grounds for Termination [7B-1111][12]

[12] The grounds for termination have been paraphrased for clarity. The reader should consult the statute for exact statutory language.

A. Ground One: The parent has abused or neglected the child within the meaning of 7B-101(1) or 101(15). [7B-1111(a)(1)]

There are two scenarios for utilizing this ground for termination:

1. Proceeding immediately to TPR

There are circumstances when a TPR petition is filed very soon after an abuse or neglect adjudication, alleging abuse or neglect as grounds for termination. If the case involves very serious abuse or neglect, the court could decide to rule at disposition or at an early review hearing that *reunification efforts are futile* and should cease pursuant to G.S. 7B-507. There is nothing in the statute that requires the court to wait a certain period of time before making a determination that reunification efforts should cease.[13] There is also nothing in the statute that requires one petitioning for termination to wait a certain period of time after an adjudication of abuse or neglect to petition for termination. Especially when reunification efforts have ceased, there is no legal reason that a TPR petition cannot be pursued immediately by DSS or the GAL. Pursuit of a TPR petition could even be encouraged or ordered by the court under certain circumstances. In fact, a separate petition for abuse or neglect does not have to be filed in order to prove abuse or neglect as a ground for TPR. Theoretically, *a petition for TPR can be filed on grounds of abuse or neglect with no underlying or preceding petition for abuse or neglect* – although many attorneys would be uncomfortable going this route. If there is an order that reunification efforts cease, a permanency planning hearing must be held within thirty days. **[7B-507(c)]**

2. Prior adjudications

If termination is pursued many months or even years after an adjudication of abuse or neglect, abuse or neglect still can be alleged as grounds to terminate, but the court must examine more than just the prior adjudication of abuse or neglect in order to find grounds to terminate. Utilizing prior adjudications as grounds for termination is possible, but one must understand the case law on this issue to proceed successfully.

If abuse or neglect is alleged as grounds for termination and the adjudication of such abuse or neglect occurred months or years prior to the TPR hearing, the court must examine whether there are changed circumstances since that time, and make a determination as to whether there is a probability of a repetition of abuse or neglect given the fitness of the parent to care for the child at the time of the termination proceeding and the best interest of the child. The AA should plan to present evidence of the parents' present situation.

a. *Ballard*

The N.C. Supreme Court case of *In re Ballard*, 311 N.C. 708 (1984), set the precedent for dealing with prior adjudications in TPRs, and since then a number of cases have followed and interpreted *Ballard*. The bottom line for these cases is set out in a quote from *Ballard*:

> *. . .[E]vidence of neglect by a parent prior to losing custody of a child –*

[13] *But see* the dissenting opinion in *In re Dula*, 143 N.C. App. 16 (2001), *affirmed*, 354 N.C. 356 (2001).

> *including an adjudication of such neglect – is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of* ***changed*** *conditions in light of the evidence of prior neglect and the* ***probability of a repetition of neglect.*** *The determinative factors must be the* ***best interests of the child*** *and the* ***fitness of the parent to care for the child at the time of the termination proceeding****. . .*

Ballard at 715. The court goes on to state that the answer to whether parental rights should be terminated must be based on the ***"then existing best interests of the child and fitness of the parent(s) to care for it in light of any evidence of neglect and the probability of a repetition of neglect. . . ."*** *Id.* at 715, emphasis added.

Ballard's **reasoning applies equally where the prior adjudication is one of abuse** and is not restricted to prior adjudications of neglect. *In re Alleghany County v. Reber*, 75 N.C. App. 467 at 470 (1985), *affirmed (per curiam*), 315 N.C. 382 (1986).

NOTE: A prior adjudication of abuse or neglect is not a precondition to a termination proceeding based on those grounds. *In re Faircloth*, 153 N.C. App. 565 (2002).

b. Examining the present circumstances of a parent who has not been residing with the child in question.

i. In *Dept. of Social Services v. Johnson*, 70 N.C. App. 383 (1984), the court examined the parents' circumstances since removal and at the present time, finding that the parents' lack of efforts and unwillingness to make changes resulted in a proper finding of neglect. The court stated, "**Following loss of custody, parents likely will not have extensive contact with the child; therefore, new evidence of neglect will, of course, be limited.** The more diligent, and hence time-consuming, the efforts of DSS to restore the family unit, the less new evidence there will be. We hesitate to adopt a rule that would encourage DSS to accelerate termination proceedings." *Id*. at 389.

ii. *In re Caldwell*, 75 N.C. App. 299, 302 (1985), cited *Johnson* in stating, **"It is not essential that there be evidence of culpable neglect following the initial adjudication.**" Thus, the appropriate examination is always of the parent's circumstances, not necessarily to find more evidence of neglect, but to see if the conditions that led to the removal have changed and to see if there is a likelihood of repetition of abuse or neglect.

iii. *In re Reyes*, 136 N.C. App. 812 (2000), was a case in which there was **no evidence of neglect at the time of the termination hearing but with a prior adjudication of neglect and the subsequent death of a sibling** resulting from shaken baby syndrome, the court concluded **there was a probability of a repetition of neglect**. The court of appeals held the lower court's findings sufficient to show that grounds for termination existed based on neglect.

iv. *In re Brim*, 139 N.C. App. 733 (2000), was a case in which the court of appeals found that the trial court had appropriately examined evidence of changed circumstances and the probability of a repetition of neglect where the mother had not had custody for a significant period prior to the termination hearing. Here, the trial

court specifically listed a number of things that the mother had failed to do which might have alleviated the conditions that brought the child into foster care.

v. *In re Pope*, 144 N.C. App. 32 (2001)(2001), was a case in which the court of appeals affirmed the trial court's termination of the mother's parental rights, based on the prior adjudication of neglect and the facts supporting the trial court's finding that there was a probability that the child would continue to be neglected if returned to the mother's care. Here the court of appeals stated "If there is no evidence of neglect at the time of the termination proceedings, however, parental rights may nevertheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to the parent. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232. Thus, the petitioner need not present evidence of neglect subsequent to the prior adjudication of neglect. *See In re Caldwell*, 75 N.C. App. 299, 302, 330 S.E.2d 513, 516 (1985)."

vi. *In re J.G.B.*, 177 N.C. App. 375 (2006) involved a case where DSS took custody soon after the child's birth and child was adjudicated dependent only in which the Court of Appeals held that when a child has not been in respondent's custody for a long period of time, the neglect ground cannot be established without evidence of prior neglect and a likely repetition of neglect.

c. Analyzing the probability of a repetition of neglect under the parent's present abilities and fitness to parent

i. Coping ability of parent without children vs. coping ability with children.
In *Smith v. Alleghany County Dept. of Social Services*, 114 N.C. App. 727, *disc. review denied*, 337 N.C. 696 (1994), the court of appeals noted the trial court's statement that although the mother had shown recent improvements, the improvements must be viewed in the light that she no longer has a small son and a handicapped daughter to care for and found the probability of a repetition of neglect to be great if the mother had "the stress of dealing with the two children thrust back upon her."

ii. Factors relating to the parents' situation in attempting to determine their present ability to parent and the likelihood of a repetition of abuse or neglect.

- **The parents' efforts at maintaining a relationship with the child** – how much contact they have made with the child, whether they missed visitation appointments, treatment of the child during visitation, etc. (s*ee, e.g., In re White*, 81 N.C. App. 82 (1986); *In re Parker*, 90 N.C. App. 423 (1988); *In re Davis*, 116 N.C. App. 409 (1994)); *In re Brim*, 139 N.C. App. 733 (2000);

- **parent's efforts at improving the conditions that led to the removal** – whether parent followed through with court directives or DSS plans concerning classes, programs, treatments designed to improve ability to parent, or directives concerning employment, housing, etc. (*see, e.g*., *Smith v. Alleghany County Dept. of Social Services*, 114 N.C. App. 727 (1994); *Dept. of Social Services v. Johnson*, 70 N.C. App. 383 (1984); *In re Davis*, 116 N.C. App. 409 (1994); *In re Parker*, 90 N.C. App. 423 (1988)); *In re*

- **regardless of the parent's efforts at improvement, whether the parent is currently physically and mentally able to care for the child and has eliminated the conditions that led to the removal of the children** (*see, e.g., In re McDonald*, 72 N.C. App. 234 (1984); *In re Caldwell*, 75 N.C. App. 299 (1985); *In re Castillo*, 73 N.C. App. 539 (1985); *In re Stewart*, 82 N.C. App. 651 (1986); *Smith v. Alleghany County Dept. of Social Services*, 114 N.C. App. 727 (1994); *In re Parker*, 90 N.C. App. 423 (1988); *In re Reyes*, 136 N.C. App. 812 (2000); *In re Blackburn* 142 N.C. App. 607 (2001); *In re Brim*, 139 N.C. App. 733 (2000).

d. Cases in which termination was not upheld when there was a prior adjudication of abuse or neglect:

These cases were not upheld for three reasons:

i. Factual insufficiency of the evidence concerning abuse or neglect. *In re Shermer*, 156 N.C. App. 281 (2003); *In re Young*, 346 N.C. 244 (1997); *In re Alleghany County v. Reber*, 75 N.C. App. 467 (1985); *In re Phifer*, 67 N.C. App. 16 (1984).

ii. Failure of the trial court to examine changed circumstances since the time of the prior adjudication. *Union County Dept. of Social Services v. Mullis*, 82 N.C. App. 340 (1986); *In re Garner*, 75 N.C. App. 137 (1985).

iii. The presence of changed circumstances on the part of the parent that showed a present ability to care for the child. *In re Young*, 346 N.C. 244 (1997); *In re Alleghany County v. Reber*, 75 N.C. App. 467 (1985).

e. Remoteness in time of a prior adjudication

Remoteness of the evidence goes to the weight of the evidence and not the admissibility. Evidence from two years, four years and six years after the original adjudication have all been admissible. *In re McDonald*, 72 N.C. App. 234 (1984), *In re Castillo*, 73 N.C. App. 539 (1985), *In re Moore*, 306 N.C. 394 (1982), *appeal dismissed sub nom., Moore v. Guilford County Dept. of Social Services*, 459 U.S. 1139 (1983), respectively. However, evidence from an adjudication thirteen years prior was too remote. *In re Tyson*, 76 N.C. App. 411, 416 (1985).

f. Judicial notice

Some cases also have discussed the fact that prior orders are admissible because the court can take judicial notice of a court file, generally. *See In re Byrd*, 72 N.C. App. 277 (1985). *But see In re Brim*, 139 N.C. App. 733 (2000), a case in which the record did not reflect that the court had taken judicial notice of the entire juvenile file, and it was therefore error to admit certain evidence based on judicial notice.

g. Prior adjudication of neglect could be considered even where court found that it was not in the best interest of the juvenile to terminate parental rights or found no neglect in a later order. *In re Stewart Children*, 82 N.C. App. 651 (1986*); In re Castillo*, 73 N.C. App. 539 (1985), respectively.

h. Res judicata and prior adjudications

A prior adjudication of abuse was res judicata on the question of whether the father had abused the children; the parties were estopped from relitigating that issue of abuse. *In re Wheeler*, 87 N.C. App. 189 (1987).

i. Admission of prior orders concerning other children

i. *In re Allred*, 122 N.C. App 561 (1996), is a termination case in which evidence regarding prior abuse of siblings was deemed admissible, and it cites *Ballard* for its authority. *Allred* even states that the parent will not be prejudiced by the "admission of evidence of the prior abuse of another of respondent's children." *Allred* at 564.
ii. With 1998 changes to the law, prior orders involving TPR of another child or aggravated circumstances are clearly relevant since those circumstances now provide a basis for ceasing reunification efforts (7B-507(b)(3)) or for termination (7B-1111(a)(8) and (9)).

3. Notes on neglect

a. Neglect may be present *even when a parent shows love and concern for a child. In re Montgomery*, 311 N.C. 101 (1984).

b. Neglect may be present if the circumstances and conditions surrounding the child result in neglect *regardless of whether the parent is at fault or culpable*. *In re Montgomery*, 311 N.C. 101 (1984).

c. There is a substantive *difference between the quantum of proof of neglect required for termination and that required for mere removal of child* from parent's custody. While risk of future harm without more is not enough for termination, it is enough for removal. *In re Evans*, 81 N.C. App. 449 (1986); *See also In re Phifer*, 67 N.C. App. 16 (1984)(holding that the risk of future harm alone is not enough for termination on neglect grounds).

d. It is not necessary to find a failure to provide the child with physical necessities for a finding of neglect – a court may also consider *a failure to provide personal contact, love and affection. In re Black*, 76 N.C. App. 106 (1985); *In re Apa*, 59 N.C. App. 322 (1982). *See also In re Mills*, 152 N.C. App. 1 (2002)(holding termination was appropriate on neglect grounds where father conditioned visitation with all children on paternity of one).

e. *Nonfeasance, such as failure to protect,* as well as malfeasance, can constitute neglect. *In re Adcock*, 69 N.C. App. 222 (1984).

f. *Lack of involvement* (*e.g.*, inquiry, communication) with children over a period of time, even when parent was incarcerated for much of that time, can establish a pattern of abandonment and neglect. *In re Graham*, 63 N.C. App. 146 (1983). *Also see In re Blackburn*, 142 N.C. App. 607 (2001).

g. A finding of fact that a parent *abuses alcohol*, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect. *In re Phifer*, 67 N.C. App. 16 (1984).

h. The fact that the mother *gave birth to six children in seven years with little financial resources* was an appropriate factor for the court to consider in determining an increased likelihood of neglect due to the diminishing attention and resources the child would receive where the parents already had a chronic pattern of neglecting their children. *In re Huff*, 140 N.C. App 288 (2000), disc. review denied, 353 N.C. 374 (2001).

i. For an analysis of the admissibility of evidence relating to the *parents' religion* in a termination (or any child protection) proceeding see *In re Huff*, 140 N.C. App 288 (2000), *disc. rev. denied*, 353 N.C. 374 (2001).

Also see § 2.8.C. for more information on the definition of abuse and neglect as well as cases regarding abuse and neglect.

4. Neglect and Incarcerated Parents

a. Evidence was insufficient to establish that an incarcerated parent abandoned or neglected the child, where the father wrote to and called his sons while in prison and made progress on a case plan after is release; there was no evidence of a likelihood of repetition of prior neglect because earlier neglect was solely based on mother's failure to provide proper care and supervision. *In re Shermer*, 156 N.C. App. 281 (2003).

b. Termination of parental rights was affirmed on the basis that there was clear and convincing evidence that incarcerated parent had neglected his child. *In re Yocum*, 158 N.C. Ap. 198, *aff'd per curiam*, 357 N.C. 568 (2003); see also In re J.L.K., 165 N.C. App. 311, *disc. review denied*, 359 N.C. 68 (2004); *In re P.L.P.*, 173 N.C. App. 1, *aff'd per curiam*, 360 N.C. 360 (2006).

c. Evidence was sufficient to establish neglect by frequently incarcerated parent. *In re D.M.W.*, 360 N.C. 583 (2006), *reversing per curiam*, for reasons stated in dissenting opinion, 173 N.C. App. 679 (2005).

d. Although incarcerated parent's lack of contact was beyond his control, other evidence supported conclusion that neglect ground existed. *In re Bradshaw*, 160 N.C. App. 677 (2003).

5. Abuse evidence sufficient (creation of a substantial risk of serious non-accidental physical injury and a probability of repeated abuse if the child was returned home) where the court found that the mother was diagnosed with Munchausen Syndrome by Proxy, the mother 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).

B. Ground Two: The parent has willfully left 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[14] in correcting the conditions that led to the child's removal, provided that no parental rights shall be terminated for the sole reason that the parents are unable to care for the child on account of their poverty. [7B-1111(a)(2)][15]

1. What is "willful"?

a. "Under this section, willfulness means something less than willful abandonment." *In re Nolen*, 117 N.C. App. 693, 699 (1995). *A finding of willfulness does not require a showing of fault by the parent*. *In re Bishop*, 92 N.C. App. 662 (1989).

b. Willfulness may be found under this statute where the parent, recognizing her inability to care for the child, voluntarily leaves the child in foster care. *Id.* In addition, *willfulness is not precluded just because respondent has made some efforts to regain custody of the child. See In re Nolen*, 117 N.C. App. at 699; *In re Oghenekevebe*, 123 N.C. App. 434 (1996). Further, "willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re Nolen*, 117 N.C. App. 693 (1995).

c. *Willfulness can be shown by the parent's "willful behavior" in not improving his or her circumstances that led to removal.* In several N.C. cases, willfulness is found where the parents simply did not make decent efforts to improve their situation – they failed to follow through with parenting classes, substance abuse counseling, vocational training, plus they missed visits or showed up intoxicated at visits, etc. . . *See, e.g., Buncombe County Dept. of Social Services v. Burks*, 92 N.C. App. 662 (1989) and *In re Nolen*, 117 N.C. App. 693 (1995).

d. *A parent's incarceration, standing alone, does not preclude or require a finding of willfulness*. To determine willfulness, a court should examine whether the parent has made efforts to maintain a relationship with the child: has the parent inquired about the child, contacted the child, and sent the child anything? *See In the Matter of Burney*, 57 N.C. App. 203 (1982); *In the Matter of Harris*, 87 N.C. App. 179 (1987); *Whittington v. Hendren*, 156 N.C. App. 364 (2003)(termination affirmed where court found that despite respondent's incarceration, he could have made more of an effort to maintain contact with his child and had foregone the opportunity to attend the termination hearing) See subsection J. below for more information on incarcerated parents.

[14] This provision was changed by the legislature in 2001 and this is the language that is effective for actions pending or filed as of January 1, 2002. Prior to January 1, 2002, the language reads: ". . . that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the juvenile. . ."

[15] Note that for cases filed before October 1, 1992, this ground referred to a two-year or eighteen month, instead of twelve-month period.

2. Reasonable progress under the circumstances in correcting those conditions that led to removal of the child

a. To show whether there has been reasonable progress under the circumstances, the AA should make sure that evidence is put on that addresses the following issues concerning the parent(s):

i. Have they followed through with court directives and service agreements?

ii. How hard have they tried?

iii. Is there anything about their circumstances that could have legitimately prevented them from following through with such efforts?

b. Regardless of how hard parents have tried, have their efforts succeeded in actually correcting the conditions that led to removal?

i. It is entirely possible for parents to do everything that a piece of paper tells them to do and still not change their ability to parent. The AA can remind the court that efforts alone, without showing a correction of the conditions which result in the parent being fit to parent, are meaningless.

ii. The AA must beware of artificial, temporary changes that are made for mere appearance in court.

iii. In the case of *In re Nolen*, 117 N.C. App. 693 (1995), the court pointed out that the mother had made **"extremely limited progress" which the court stated could not be considered reasonable progress.** The court also stated that implicit in "positive response" is that positive results must be shown. Otherwise, a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose. Even though the court was referring to the language "positive response," which is no longer in the statute, the current language "correcting the conditions which led to the removal" has essentially the same meaning. *See also In re Harris*, 87 N.C. App. 179 (1987).

iv. Good intentions are insufficient; there must be actual progress. *In re B.S.D.S.*, 163 N.C. App. 540 (2004).

v. In order to establish willfulness, evidence must show a parent's ability (or capability to acquire the ability) to overcome factors that results in the child's placement. *See In re Baker*, 158 N.C. App. 491 (2003)(evidence of willfulness included parents' refusal to inquire about or complete parenting classes, sign a reunification plan, or use mental health services). *But see In re C.C.*, 173 N.C. App. 375 (2005)(evidence and findings were not sufficient to establish neglect or that respondent "willfully" left the children in care.)

3. The twelve months in foster care need not be continuous. *In re Taylor*, 97 N.C. App. 57 (1990).

4. Time period of twelve months. 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). *See also In re H.L.A.D*, --- N.C. App. ---, 646 S.E.2d. 425 (2007).

5. Minor parent. The court must make specific findings when the termination of parental rights involves a minor parent showing that the parent's age-related limitations as to willfulness have been adequately considered. *In re Matherly*, 149 N.C. App. 452 (2002); *In re J.G.B*., 177 N.C. App. 375 (2006).

6. Additional cases involving willful failure to make reasonable progress: *In re J.T.W*., 361 N.C. 341 (2007)(Supreme Court reversed Court of Appeals holding that findings did support the conclusion that the mother had failed to make reasonable progress under the circumstances); *In re J.S.L*., 177 N.C. App. 151 (2006)(evidence and findings were sufficient to establish the ground with respect to the mother, but not the father); *In re Anderson*, 151 N.C. App. 94 (2002); *In re Frasher*, 147 N.C. App. 513 (2001); *In re McMillon*, 143 N.C. App. 402, *disc. review denied*, 354 N.C. 218 (2001).

C. Ground Three: Child has been placed in the custody of a county DSS, a licensed child-placing agency, a child-caring institution, or foster home, and the parent has willfully failed to pay a reasonable portion of the cost of the child's care for a continuous period of six months next preceding the filing of the petition or motion, although physically and financially able to do so. [7B-1111(a)(3)]

1. Parent's ability to pay and the child's reasonable needs must be examined

a. A finding that the parent is able to pay support is essential to terminate on this ground, and findings of fact must be made to that effect. *See In re Ballard*, 311 N.C. 708 (1984); *In re Phifer*, 67 N.C. App. 16 (1984). However, the finding need only be that the parent was able to pay some amount greater than zero—not as to a specific amount. *In re Huff*, 140 N.C. App 288 (2000).

b. 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 Moore*, 306 N.C. 394 (1982), *appeal dismissed*, 459 U.S. 1139 (1983); *In re Bradley*, 57 N.C. App. 475 (1982).

c. 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. *In re Phifer*, 67 N.C. App. 16 (1984); *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002); *In re Clark*, 151 N.C. App. 286, *disc. review denied*, 356 N.C. 302 (2002); *In re Faircloth*, 161 N.C. App. 523 (2003)(holding trial court's findings and evidence in the record were not sufficient to support the conclusion that this ground existed, where there was no specific evidence or findings as to the mother's employment, earnings, or other financial means during the relevant six-month period).

d. 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).

2. Absence of notice or lack of awareness is not a defense to an obligation to support. Neither the

absence of notice of the support obligation nor the father's lack of awareness that anything was expected or required of him was a defense to termination on this ground. *In re Wright*, 64 N.C. App. 135 (1983).

3. When parent loses opportunity to support a child due to the parent's own misconduct, he or she cannot assert that lack of opportunity as a defense for failing to support the child. *In re Tate*, 67 N.C. App. 89 (1984); *In re Bradley*, 57 N.C. App. 475 (1982).

D. Ground Four: One parent has custody of the child pursuant to court order or agreement of the parents, and the other parent for one year has willfully failed, without justification, to pay for the child's care, support, and education as required by court order or custody agreement. [7B-1111(a)(4)]

1. **NOTE:** Under this ground it is not necessary for the petitioner to prove or for the court to find that respondent had the ability to pay support, since proof of a valid court order or support agreement is required. *In re Roberson*, 97 N.C. App. 277 (1990).

E. Ground Five: Father of a child born out of wedlock has not, before the filing of the termination petition or motion,

- **Established paternity judicially or by affidavit, or**
- **Legitimated the child pursuant to G.S. 49-10 or filed a petition for that purpose, or**
- **Legitimated the child by marriage to the mother, or**
- **Provided substantial financial support or consistent care with respect to the child and mother. [7B-1111(a)(5)]**

1. **DSS carries the burden to prove the lack of paternity or legitimacy** as of the petition's filing date, by clear, cogent and convincing evidence. DSS cannot merely allege lack of paternity or legitimacy in the absence of evidence to the contrary, but must set forth evidence showing that none of the above four circumstances ever occurred. *In re Harris*, 87 N.C. App. 179 (1987). Court must inquire of the Department of Health and Human Services as to whether an affidavit has been filed and must incorporate the certified reply in the case record. **[7B-1111(a)(5)(a)]**

2. For a case decided under the same wording in former adoption statute, stating that **putative father's consent to adoption was required because he had filed a petition for legitimation**, see *In re Clark*, 327 N.C. 61 (1990). However, a putative father's consent is not required for adoption where father has failed to affirmatively acknowledge paternity. *Byrd ex rel. Byrd*, 137 N.C. App. 623 (2000), *aff'd by In re Adoption of Byrd*, 354 N.C. 188 (2001).

3. **Paternity tests**. Even if paternity test shows high likelihood that respondent is not the child's father, the court may consider the 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 that presumption. *In re L.D.B.*, 168 N.C. App. 206 (2005).

4. **Fact that the putative father did not know of the child's existence is not a defense to termination**. *In re T.L.B.*, 167 N.C. App. 298 (2004). *See also In re M.A.I.B.K.*, --- N.C. App. ---, 645 S.E.2d 881 (2007). For a case in which the Court of Appeals reversed the trial court's determination that the ground had not been established, *see A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006), in which the putative father had taken extensive steps trying to determine whether the mother had given birth, the mother lied about the child's parentage, and the mother led respondent to believe she had

miscarried.

F. Ground Six: Incapable of providing care and supervision

The parent is incapable of providing for the proper care and supervision of the child, such that the child is a "dependent juvenile" within the meaning of 7B-101 [in need of assistance or placement because the child has no parent, guardian or custodian responsible for care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement], AND there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition that renders the parent unable or unavailable. [7B-1111(a)(6)]

1. Detrimental effect on parenting ability must be shown. If proceeding on this ground because of the mental illness or mental retardation of the parent, in addition to mental health professionals testifying as to the nature of the problem, the petitioner will need to show evidence that the problem affects the parent's ability to be a parent. *See In re Scott*, 95 N.C. App. 760 (1989). A finding of fact that a parent abuses alcohol, without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights for neglect. *In re Phifer*, 67 N.C. App. 16 (1984). Although the *Phifer* case applied to neglect grounds, the reasoning probably applies to this ground given the *Scott* case and the addition of the language of "substance abuse" to this ground.

2. This ground does not violate the Equal Protection Clause or deny due process. *In re Montgomery,* 311 N.C. 101 (1984).

3. Taken as a whole, a physician's testimony about a mother with a personality disorder did not provide clear and convincing evidence to support the trial court's finding and termination order. *In re Scott*, 95 N.C. App. 760, *disc. rev. denied*, 325 N.C. 708 (1989). Another case in which the evidence, including expert testimony, fell short of proving this ground by clear and convincing evidence even though the mother was said to be profoundly mentally ill and incapacitated was *In re Small*, 138 N.C. App. 474 (2000).

4. 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).

5. Evidence did not support trial court's finding that parents were mentally retarded, where it showed that they had IQ's of 71 and 72, placing them in the borderline range of mental retardation. Because the statute does not define "mental retardation," the court looked at other definitions, including G.S. 122C-3(22), and concluded that the term does not apply to someone with an IQ of 70 or more if the person does not exhibit significant defects in adaptive behavior. *In re LaRue*, 113 N.C. App. 807 (1994).

6. **Minor parent**. 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). Minor parent must be appointed a Rule 17 guardian ad litem. **See § 4.6.A (2)(a) *supra*.**

7. **Court must make findings of unavailability of an appropriate alternative child care**

arrangement. Ground not established by clear and convincing evidence where father was incarcerated and was due for release in seventeen months; evidence did not show he was incapable of arranging for the child's care; and father testified that he told DSS workers about several close relatives that DSS failed to contact. *In re Clark*, 151 N.C. App. 286, *disc. review denied*, 356 N.C. 302 (2002). *In re B.M.*, --- N.C. App. ---, 643 S.E.2d 644 (2007)(reversible error where trial court failed to make any findings regarding the availability to the fatherof alternative child care arrangements).

8. **Rule 17 GAL**. Prior to the amendments of Session Law 2005-398 that gives the trial court discretion in appointing a Rule 17 GAL for parents when dependency is alleged, appellate courts held that under certain facts, it was reversible error: "[W]here the allegations contained in the petition or motion to terminate parental rights tend to show that respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian ad litem to represent respondent at the termination hearing." *In re Estes*, 157 N.C. App. 513 (2003). **For additional information, see § 4.6.A(2)(b) *supra*.**

G. Ground Seven: Parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least sixty consecutive days immediately preceding the filing of the petition or motion.[16] [7B-1111(a)(7)]

1. Definition of willful abandonment: In an adoption case, the N.C. Supreme Court 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. 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. *Pratt v. Bishop*, 257 N.C. 486 (1962).

a. **More than mere neglect.** Willful abandonment under this subsection connotes more than the mere neglect implied in G.S. 7A-289.32(3) [now 7B-1111(a)(1)]. *In re Bluebird*, 105 N.C. App. 42 (1992). *See also In re T.C.B.*, 166 N.C. App. 482 (2004)(trial court's order included findings that were contrary to the conclusion of willfulness).

b. **Failure to communicate with child not willful.** In an adoption proceeding, the court erred in finding that the mother had willfully abandoned the child, when the court made no findings in support of its conclusion that her failure to communicate with the child was willful, and when the record revealed that she had introduced substantial evidence that her actions in not communicating with the child were not willful. *In re Clark v. Jones*, 67 N.C. App. 516, *disc. rev. denied*, 311 N.C. 756 (1984).

2. Failure to pay support, in and of itself, does not constitute abandonment. *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994). Whether a parent has the willful intent to abandon the child is an issue of fact. The fact that the parent paid some support during the relevant six-month period does not preclude a

[16] The following language remained in this statute until July 1, 1999, when it was deleted: "A child may be willfully abandoned by the child's natural father if the child's mother had been willfully abandoned by and was living separate and apart from the father at the time of the child's birth, although the father may not have known of the child's birth. In any event, the child must be over the age of three months at the time of filing of the petition."

finding of willful abandonment. *In re Searle*, 82 N.C. App. 273 (1986).

3. The period at issue is six consecutive months immediately preceding the filing of the TPR petition or motion.

a. In an adoption case, the superior court erred in instructing the jury to consider the six-month period preceding filing of the petition, because summons was endorsed 102 days after it was issued. The action commenced as to the respondent on the day of endorsement; the six-month period preceding that date should have been used. *In re Searle*, 82 N.C. App. 273 (1986).

b. The critical period for finding of abandonment is at least six consecutive months immediately preceding the filing of a petition to terminate parental rights. *In re Young*, 346 N.C. 244 (1997) (reversing termination order on basis that findings did not manifest "a willful determination to forego all parental duties and relinquish all parental claims to the child").

H. Ground Eight: The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; or has 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. The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not conviction was by way of a jury verdict or any kind of plea. [7B-1111(a)(8)]

1. In order to prove that respondent committed a felony assault resulting in serious bodily injury, a conviction under G.S. 14-32(a)(assault inflicting serious *bodily* injury) or G.S. 14-318.4(a3)(felony child abuse inflicting serious bodily injury). Conviction under G.S. 14-318(a)(felony child abuse inflicting serious *physical* injury) would not be sufficient.

2. **Serious bodily injury**: (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. G.S.14-318.4(a3). *See State v. Hannah*, 149 N.C. App. 713, *review denied*, 355 N.C. 754 (2002); *State v. Downs*, --- N.C. App.---, 635 S.E.2d 518, *review denied*, 361 N.C. 173 (2006).

I. Ground Nine: : The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home. [7B-1111(a)(9)]

Evidence sufficient to establish respondent's inability or unwillingness to provide a safe home. *In re L.A.B.*, 178 N.C. App. 295 (2006). *See also V.L.B.*, 168 N.C. App. 679, *disc. review denied*, 359 N.C. 633 (2005).

J. Incarcerated Parents

1. Incarcerated parent's ability to provide financial support

a. A court can find grounds to terminate parental rights of an incarcerated parent based on failure to pay child support. However, the court must find that the parent has the ability to pay some amount greater than zero, either due to existing resources or money earned while incarcerated. *See In re Bradley*, 57 N.C. App. 475 (1982); *In re Garner*, 75 N.C. App. 137 (1985); *In re Becker*, 111 N.C. App. 85 (1993).

b. **Cannot claim inability to support due to own misconduct**. In *Bradley* (*supra*), the parent could not claim that he could not contribute to his child's care when he lost the opportunity for work release due to his own misconduct.

2. Parent's efforts to maintain contact with the child while incarcerated – relating to abandonment or willfully leaving in foster care

a. Committing a crime that might result in incarceration is insufficient, standing alone, to show a parent's settled purpose to forego all parental duties. However, the commission of a crime may be relevant or determinative on the issue of whether a parent is fit to be a parent. [Older 1978 case, *In the matter of the Adoption of Maynor*, 38 N.C. App. 724 (1978), quoting in part a 1962 case, *Pratt.*] Repeated incarceration along with other factors has been held sufficient for termination. *In re Blackburn*, 142 N.C. App. 607 (2001).

b. Courts have looked at the amount of contact the parent has had with the child: how much effort has the parent gone to in an attempt to maintain a relationship with the child and demonstrate concern? Has the parent attempted to arrange visits with the child? Has the parent sent cards, letters, or gifts?

i. The court was not sympathetic to a father who had been writing DSS about his children from jail, was released and had three visits, then stopped having contact, was then reincarcerated and failed to communicate with the children from then on. *In the Matter of Burney,* 57 N.C. App. 203 (1982).

ii. One communication in a two-year period does not evidence the personal contact, love and affection that inheres in the parental relationship–incarceration is irrelevant. *In re Graham*, 63 N.C. App. 146 (1983).

iii. Inquiries and statements made about an incarcerated father's daughter in letters to his sister (who did not have custody of the child) did not impress the court, nor did his claim that he lacked money for cards and gifts, because he had money for hygiene items, drinks, and snacks in prison, and received money occasionally from his sister. *Clark v. Williamson*, 91 N.C. App. 668 (1988).

iv. The court also was not impressed by a father's sudden interest in contacting the children after being informed of the petition to terminate because he had not been in contact with the children for years. *In the Matter of Quevedo*, 106 N.C. App. 574 (1992), *appeal dismissed*, 332 N.C. 483 (1992).

v. In the case of *In re McLemore*, 139 N.C. App. 426 (2000), the mother sought to terminate rights of the father on two grounds, one of which was willful abandonment under N.C.G.S. 7A-289.32(8) [now G.S. 7B-1111(a)(7)]. The father argued that his absence from his child's life was not willful because of his substance abuse and his

incarceration. On the issue of incarceration, the father cited the case of *Harris* and *Maynor*, above. The Court of Appeals distinguished these cases, however, and stated that "In *Harris*, although we noted that a respondent's incarceration, standing alone, neither precludes nor requires a finding of willfulness, we held one attempted contact during the relevant statutory period compelled a finding of willful abandonment, despite respondent's incarceration during the relevant time period under consideration. *In re Harris*, 87 N.C. App. at 184, 360 S.E.2d at 488." *McLemore*, at 431. The court, in referring to the facts of the present case, went on to state, "we also conclude that one ineffectual attempt at contact during the relevant six month period in this case would not preclude otherwise clear willful abandonment, despite the fact of respondent's incarceration during that time." *Id.*

vi. In the case of *In re Blackburn*, 142 N.C. App. 607 (2001), the mother argued that "there was insufficient evidence to show neglect because incarceration alone is not sufficient to demonstrate willful abandonment." *Id* (*citing In re Maynor, supra*). But the court stated that the mother's current incarceration alone was not the basis for the finding of neglect, and went on to discuss a number of other circumstances that demonstrated neglect. The mother claimed that she had overcome her problems and achieved rehabilitation while in prison; that she had frequently written to her daughter and requested visits but those requests were denied; that she had written to the court and petitioner asking them not to terminate her parental rights. The court pointed out that despite her efforts, she had been in trouble repeatedly in prison. The court also stated, in response to the mother's claims, "We note that the child and her best interests are at issue here, not respondent's hopes for the future." *Blackburn* at 614 (*citing In re Smith*, 56 N.C. App. 142, *cert. denied*, 306 N.C. 385 (1982)). The court affirmed the trial court's order of termination based on finding that the mother's conduct demonstrated neglect, that there was no reasonable hope that she could correct the conditions to appropriately care and provide for her child, and that it was in the child's best interest to terminate.

§ 4.9 Best Interest and Determination of Best Interests [17]

A. If Grounds Exist, Court Must Consider Best Interest Factors [7B-1110(a)]

Former statutory language required that once grounds are found, the judge shall terminate unless the court determines that it is not in the child's best interest to terminate. However, this statute was amended by Session Laws 2005-398 applicable to petitions or motions filed on or after October 1, 2005 and currently gives the trial court statutory criteria to determine whether termination of parental rights serves the juvenile's best interest. Evidence presented to the court should address these factors, if relevant.

The statutory considerations are as follows **[7B-1110(a)]**:

- **The child's age;**
- **Likelihood of adoption;**
- **Whether termination will help achieve the permanent plan for the child;**

[17] Note that S.L. 2005-398 renamed this statute "Determination of Best Interests" from "Disposition." This portion of the bifurcated proceeding is still referred to as the dispositional portion of the TPR proceeding.

- **The bond between the child and the parent;**
- **The quality of the relationship between the child and the propose adoptive parent, guardian, custodian, or other permanent placement;**
- **Any relevant consideration.**

1. Burden of proof

At disposition, the petitioner or movant does not have the burden of proving by clear, cogent, and convincing evidence that termination is in the child's best interest. That standard applies at adjudication. At disposition, the petitioner (or movant) does not have an evidentiary burden; the court makes a discretionary determination as to whether to terminate parental rights. *In re Roberson*, 97 N.C. App. 277 (1990). *See also In re Mitchell*, 148 N.C. App. 483 (2002)(vacating a dispositional order because the trial court erroneously put the burden on the mother as to the best interests of the juvenile).

Parents will utilize the dispositional phase of the case to argue that their rights should not be terminated, so parties in favor of TPR must be prepared not only to counter the parents' arguments but to present evidence as to why it is, in fact, in the child's best interest to terminate. Even though there is no burden of proof, all parties must be thoroughly prepared to present evidence and arguments regarding best interest.

2. No separate hearings required

See § 4.6.C.3 in this chapter.

3. Disposition is discretionary

Upon finding grounds for termination, the trial court is not required to terminate parental rights, but is merely given discretion to do so. *In re Montgomery*, 311 N.C. 101 (1984); *In re Webb*, 70 N.C. App. 345 (1984), *affirmed (per curiam)*, 313 N.C. 322 (1985); *In re Parker*, 90 N.C. App. 423 (1988); *In re Carr*, 116 N.C. App. 403 (1994).

a. **The trial court need not make findings regarding its refusal to exercise its discretion** not to terminate parental rights. *In re Caldwell*, 75 N.C. App. 299 (1985).

b. **The child's best interests, not the rights of the parents, are paramount**. It is in the court's discretion to consider such factors as family integrity in deciding whether termination is in the child's best interest. *In re Adcock*, 69 N.C. App. 222, (1984); *In re Tate*, 67 N.C. App. 89 (1984); *In re Smith*, 56 N.C. App. 142, *cert. denied*, 306 N.C. 385 (1982). When the child's and parents' interests conflict, the child's best interests control. *In re Montgomery*, 311 N.C 101 (1984); *In re Tate*, 67 N.C. App. 89 (1984).

c. **Child's potential for adoption as a factor in best interest.** The court is not required to find that the child is adoptable before terminating parental rights. *In re Norris*, 65 N.C. App. 269 (1983), *cert. denied*, 310 N.C. 744 (1984). However, simply showing that a child is doing well in his or her current placement is not enough to show best interest. *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994).

d. Where there was only a "remote chance" that a troubled teenager would be adopted and there was the possibility of benefit from a continued relationship with his mother and other relatives, the trial court abused its discretion in terminating parental rights. *In re J.A.O.*, 166 N.C. App. 222 (2004)(Note that the GAL argued at trial that TPR was *not* in the child's best interest)

4. Evidentiary notes

a. The evidentiary standard is different in the two stages of the termination of parental rights hearing. *In re White*, 81 N.C. App. 82, *disc. review denied*, 318 N.C. 283 (1986).

b. It was error (not prejudicial in this case) for the court to allow the guardian ad litem to give a lay opinion that it was in the children's best interest for parental rights to be terminated. *In re Wheeler*, 87 N.C. App. 189 (1987).

c. **GAL Evidence**. Although the GAL cannot give lay opinion regarding best interest or submit a report during the adjudication phase of the case, but the AA can and should make sure that *all the evidence that led the GAL to his or her conclusion regarding best interest isintroduced.* If adjudicatory and dispositional evidence is separated, once the disposition phase of the case is reached, additional evidence (such as the GAL report or testimony of the GAL) regarding best interest may be offered. If the judge does not automatically present the opportunity, the attorney may request it. If there is no clear separation between adjudication and disposition, the AA can ask that certain evidence be admitted for dispositional purposes only. The AA should ask the right questions of the GAL to prompt him or her to articulate exactly which facts have played a part in the GAL's opinion regarding best interest.

d. Because best interest is a discretionary decision, the judge can consider anything that he or she deems relevant, which may include placement possibilities for the child once termination is final. The reality is that termination will look more attractive if the judge sees the placement options opened up by termination as positive. The AA should consider doing any of the following:

- Show that there is a positive, potential adoptive placement.

- Show in positive terms, what typically would happen to a child in similar circumstances – what is the track record in a similar situation (through testimony by DSS people)?

- Show, through expert testimony, how important it is that the child or any child be in a permanent situation.

B. Painting a Picture of This Child's Life for the Court

When the GAL is in favor of termination*, disposition presents the opportunity to make an impassioned plea for this child's right to have a safe, permanent home as soon as possible. This is the time to argue that the parents have been given an opportunity to improve and demonstrate an ability to be adequate parents but have not been able to do so and that this child cannot continue to wait. To make a powerful argument regarding best interest, the AA must ensure that the evidence presented shows powerful facts supporting that argument.*

To emphasizes the importance of "painting a picture" for purposes of analyzing best interest, see *In re Huff*, 140 N.C. App. 288 (2000), *disc. rev. denied*, 353 N.C. 374 (2001), in which the court said "In the instant case, the picture painted by the transcript and the record portrays parents who have failed over an extended period of time to provide a healthy and safe environment for their children, and who have failed to show any significant improvement in their parental abilities since the removal of the child . . ." *Huff* at 301.

1. What the AA needs to convey to the court to demonstrate best interest:

a. from the child's perspective, what this child's life was like and would be like while living with these parents;

b. what the parents' lives are like, what they are capable of, how they function in the world and interact with their children – whether they are adequate parents; and

c. what the child's life is like now and/or could be like if parental rights are terminated.

2. Ensuring that accurate and vivid details be presented to support the AA's argument by evaluating witnesses and other evidence.

a. To paint this picture, the AA can bring the facts to life through witnesses who are closest to the situation – those who can describe from firsthand knowledge what they have seen and heard about the circumstances surrounding the child or the parents.

b. The AA should consider what it was that convinced her and this guardian or social worker that termination is in the best interest of this child because that is probably what will convince the judge as well. Such evidence may not have been crucial for proving grounds and thus may not have been introduced in adjudication. If not, the AA should seize the opportunity in disposition to introduce such evidence, considering the following:

i. Which of the people interviewed had the most influence on the GAL or social worker's position on termination?

ii. What, specifically, did a particular witness say that stuck in the minds of the GAL, social worker, or AA?

iii. What factors prompted the GAL or social worker to believe this witness?

- credentials?
- background?
- relationship to the child or parent?

§ 4.10 At the Conclusion of Termination Proceedings

A. Court Orders

1. If the court determines that circumstances authorizing termination do not exist, or that the child's best interests require that rights *not* be terminated, the court must dismiss the petition or deny the motion for termination after setting forth findings and conclusions. **[7B-1110]**

> The trial court need not make findings regarding its refusal to exercise its discretion not to terminate parental rights. *In re Caldwell*, 75 N.C. App. 299 (1985).

2. If the court finds it is in the best interests of the juvenile to terminate parental rights, an order must be reduced to writing, signed, and entered within thirty (30) days of the hearing. **[7B-1110(a)]**

> Where a party has failed to show prejudice, the order will not be vacated for failure to comply with time requirements. *In re J.L.K.*, 165 N.C. App. 311 (2004). *But see In re L.E.B.*, 169 N.C. App. 375 (2005)(holding that a six month delay in entry of the termination order was prejudicial to all parties and requires reversal, and recognizing that the legislative intent of the thirty-day requirement was to provide for quick and speedy resolution in juvenile custody cases.

3. Upon entry of the termination order, the court may place the child in custody of the petitioner, some other suitable person, a county DSS, or a licensed child-placing agency, as the child's best interests require. **[7B-1112]**

> 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 at the time of the filing of the petition or motion, including a petition or motion filed by the GAL, that agency shall, upon entry of a termination order, acquire all rights for placement of the child that the agency would have acquired, including the right to consent to adoption, had the parent-respondent released the child to the agency pursuant to the provisions of Part 7 of Article 3 of Chapter 48. *See In re Asbury*, 125 N.C. App. 143 (1997). **[7B-1112(1)]**

4. It was reversible error for a judge other that the one who presided at the hearing to sign the order terminating parental rights. *In re Whisnant*, 71 N.C. App. 439 (1984).

5. Counsel for petitioner must serve a copy of the termination order on
   - the child's guardian ad litem, if any, and
   - the child, if twelve or over. [7B-1110(d)]

6. The court may tax the costs to any party. **[7B-1110(e)]**

7. The trial court must affirmatively state in its termination order that the grounds for termination were proved by clear and convincing evidence. *In re Church v. Joplin*, 136 N.C. App. 654 (2000).

8. The court of appeals found no error where the written termination order contained findings of fact not stated by the trial court in the order rendered following the hearing. *In re Brim*, 139 N.C. App. 733 (2000).

B. Effect of Termination Order

1. Termination order completely and permanently severs all rights and obligations of the parent to the child and the child to the parent; however, the child's right of inheritance does not terminate until a final order of adoption is issued. 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). **[7B-1112]**

2. After termination, the parent is not entitled to notice of adoption proceedings and may not object to or participate in them. **[7B-1112]**

3. 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 Dept. of Social Services*, 347 N.C. 371 (1997).

4. Grandparents of a child placed in DSS custody pursuant to Section 7A proceedings did not have standing to seek custody or visitation of a child after the child had been surrendered for adoption by one parent and the parental rights of the other parent had been terminated. *In re Swing v. Garrison*, 112 N.C. App. 818 (1993).

C. Appeals, Remedies

See Chapter 6 in this manual, titled "Motions, Appeals, and Other Procedural Tools for GAL Representation."

D. Post-Termination of Parental Rights: Reviews, Procedures

See Chapter 5 in this manual, titled "Post-Termination of Parental Rights and Adoption."

CHECKLISTS AND WORKSHEETS

§ 4.11 Missing Parent Checklist

Child's name: _____ Today's date: _____

Missing parent's name: _____
Social Security #: _____ Birth date: _____ Driver's license:
_____

Last known address: _____

Last known phone number:
_____

Date of last contact with agency: _____

Describe contact:

Contact with relatives, friends or acquaintances regarding whereabouts of parent:

Name, address and phone #, date of contact:	Response of contact person:

Letters sent to parent's last known address (list dates sent and whether returned):

_____

_____

Check the following resources:	**Date Check Made:**
1. Local telephone book for parent's name	_____
2. Department of social services (in case receiving benefits)	_____
3. Post office	_____
4. Board of elections	_____
5. Department of Motor Vehicles	_____
6. Department of health for death certificate	_____
7. Department of corrections	_____
8. Local law enforcement	_____
9. Substance abuse treatment programs (if appropriate)	_____
10. Mental health facilities (if appropriate)	_____
11. Internet search	_____
12. Social Security Administration	_____
13. Internal Revenue Service	_____
14. Local telephone book for listing of persons with same last name who may know parent's whereabouts:	
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Visit to last known address and inquiries made to landlord and neighbors date: _____
(description of contact with such persons should be made in table above)

§ 4.12 Putative Father Checklist

A "Putative Father" refers to the person alleged to have fathered the child whose parentage is at issue.

Child's name: _____ Today's date: _____
Date of birth: _____ Place of birth: _____

Birth certificate in file? Yes____ No____
Child's current placement: _____

Mother's name: _____

Address: _____

Phone number: (h) _____ (w) _____

Date of birth: _____ Social Security number: _____

Putative father's name: _____

Address: _____

Phone number: (h) _____ (w) _____

Date of birth: _____ Social Security number: _____

Named father on birth certificate: _____

Have the above named parents ever been married to each other, and if so when?
_____

Have above named parents been divorced? ____ If so, when? _____

Have the above named parents ever been married to anyone else and if so, to whom and when?
_____

Has any court ever dealt with the issue of paternity involving this child, whether or not this putative father was involved and if so, describe what, when and where:
_____
_____

Note: Adapted from the Putative Father Checklist, by Niagara County Department of Social Services, printed in the Child Advocate's Legal Guide by the North American Council on Adoptable Children.

TERMINATION OF PARENTAL RIGHTS

Has there been an inquiry as to whether paternity has been established by affidavit filed in the central registry of the Department of Human Resources? Yes____ No____
If so, date and content of reply from DHR: _____

Has father ever attempted to legitimate the child pursuant to 49-10 or filed a petition for that purpose?
If so, describe where and when:_____
_____

Was father aware of child's birth? Yes____ No____ When did father become aware of pregnancy or birth? _____

Does father hold himself out as the father of this child? _____

Does mother claim this putative father is the actual father of her child?_____
Has mother identified this putative father as the father in a sworn or written statement?
_____
Has mother made statements that contradict that this putative father is the father of the child?
_____
_____

Does the child refer to this putative father as a father? _____

Has father ever lived with this child? Yes____ No____ If so, when? _____
_____

Is father currently in contact with this child? Yes____ No____ If so, describe nature of contact or if not, explain any circumstances that might prevent such contact: _____
_____
_____

Has father ever had caretaking responsibilities for this child? Yes____ No____ If so, describe when, for what period of time, and the circumstances: _____
_____
_____

Does father give financial support to mother and/or child? Yes____ No____ If so, describe whether it is by way of agreement or order, whether it is consistent, how much and how often:
_____
_____

Describe any other facts which make it more likely that this named putative father **is or is not** in fact the father of this child:

§ 4.13 Indian Child Welfare Termination Checklist

Instructions: Once the decision has been made that it is appropriate to begin a termination of parental rights proceeding, use the following partial checklist to make sure that all the necessary ICWA information is in the case file in preparation for review by the agency attorney. This partial checklist can be used to help prepare the petition for termination of parental rights. This is not a separate form that must be filled out; it simply provides guidelines for preparing a case for termination.

CHILD'S NATIVE AMERICAN STATUS

(1) Indian Child

Is the child a member or eligible to be a member of an Indian tribe?

Yes_____ No_____

(2) Tribe Affiliation

Mother's tribe: _____

Father's tribe: _____

(3) Notice to Tribe _____

Has the tribe been notified of the child's placement with the department?

Yes_____ No_____

Date of Notice _____ Proceedings: _____

Copy of notice in file? Yes _____ No _____

(4) Tribe's Legal Intervention _____

Has the tribe requested, accepted, or declined custody of the child? Yes_____ No _____

Date: _____ Proceedings: _____

Documentation in the file? Yes _____ No _____

NOTE: If the child is Native American, special requirements of the Indian Child Welfare Act apply to the termination proceedings: (1) notification of the termination must be given to the child's tribe; (2) the agency must show "active efforts" to reunify the family with an emphasis on culturally appropriate services; and (3) the agency must show serious emotional or physical damage to the child if they are returned to the parent "beyond a reasonable doubt." If these special requirements are not met, the termination can be invalidated.

Adapted from and reprinted with permission, *The Child Advocate's Legal Guide*, North American Council on Adoptable Children, 970 Raymond Ave., Suite 106, St. Paul, MN 55114-1149, 651-644-3036, p. 59, 1995.

§ 4.14 Termination of Parental Rights Worksheet for GAL Attorneys

Volunteer GAL: _____ **GAL staff member:** _____
Date of GAL appointment: _____ **Attorney for mother:** _____
Date of A/N/D adjudication: _____ **Attorney for father:** _____
Date of A/N/D disposition: _____ **DSS contacts:** _____
Current placement of child: _____
_____

Pre-Petition

_____ Date of meeting with GAL volunteer and GAL staff concerning termination of parental rights.

Best Interest: Is it in the best interest of the child to terminate? [7B-1110] Yes/No If no, stop here if initiated by GAL! If so, summarize proof of best interest: _____
_____
_____

Grounds to terminate? [7B-1111] (check all that apply, or put a [?] next to those that are problematic)

____ Abuse:
___ Inflicts or allows to be inflicted upon 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 upon the juvenile **cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior.**
____ Creates or allows to be created **serious emotional damage to the juvenile**, evidenced by severe anxiety, depression, withdrawal or aggressive behavior toward himself or others.
____ **Encourages, directs or approves of delinquent acts** involving moral turpitude committed by the juvenile.
____ **Commits, permits, or encourages the commission of a violation of [certain laws involving sex crimes]** by, with or upon the juvenile.

____ Neglect:
____ **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.**
____ Has been **placed for care or adoption in violation of the law.**
Does the juvenile live in a home where another juvenile has been abused or neglected or killed? _____

____ **Willfully left in foster care** for more than 12 months without showing reasonable progress in correcting the conditions which led to the removal
____ **Failure to pay child support** during continuous 6 month period preceding petition although able to do so
____ **Failure to support child pursuant to decree or custody agreement** for one year when other parent has custody
____ **Father's failure to do any of the following:** legitimate child, establish paternity, and provide financial support and consistent care.
____ **Incapability** resulting in dependency and a reasonable probability that the incapability will continue for the foreseeable future. [Incapability may be due to substance abuse, mental retardation, mental illness, organic brain syndrome or any other similar cause or condition].
____ **Willful abandonment** for 6 consecutive months immediately preceding petition.
____ **Commits or involved in murder, involuntary manslaughter, or felony assault** of own child or child residing in home
____ **Parental rights with respect to another child have been terminated** and parent lacks ability/willingness to establish safe home

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Note: Portions of this worksheet were drawn from materials prepared by Janet Mason of the UNC Institute of Government, materials by Judge Kimberly Taylor, 22nd Judicial District, and "Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases," by the National Council of Juvenile and Family Court Judges. This worksheet is designed to assist GAL attorneys in summarizing each stage of a termination of parental rights case.

Summarize key facts that support the above allegations: _____
_____
_____
_____
_____

Jurisdiction – Describe any problems with jurisdiction: _____
_____
_____

Appointment of Counsel and Guardian ad Litem – Describe any issues concerning appointment of the GAL or parents' attorneys: _____
_____

Does the parent need a Rule 17 GAL due to incapability alleged as a ground under 7B-1111(a)(6) or because he or she is under age 18? _____
_____

Who is filing the TPR petition? _____
Describe any problems with standing to file: _____
_____

Has paternity been established? Yes/No
If not, explain how paternity has been or will be handled: _____
_____
If name or identity of parent is unknown, date of hearing on unknown parent: _____

Does the Indian Child Welfare Act apply to this case? _____
(See checklist for Indian Child Welfare Act)

The TPR Petition

____ This TPR is a **motion in the cause** pursuant to 7B-1102

OR

____ This TPR is a **new petition** and is not filed as a motion in the cause

____ TPR petition or motion has been **drafted**
____ The petition has been **signed, verified, and notarized**
____ All necessary supporting **exhibits and affidavits** have been prepared and attached to the petition or motion.
Affidavits must be **signed** by affiant and **notarized.** Check all of the following that are applicable:

- ____ Affidavit regarding Petitioner's Efforts to Determine Identity or Whereabouts of Parent(s)
- ____ Copy of the Signed Parental Consent to Adoption Form
- ____ Copy of Petition to Adopt Child
- ____ Copy of Order Giving Custody to DSS
- ____ Copy of Order(s) of Adjudication of Abuse or Neglect
- ____ Affidavit regarding parent's failure to make positive response within required time
- ____ Affidavit regarding parent's mental incapacity
- ____ Affidavit regarding abandonment by parent
- ____ Affidavit regarding placement history of children
- ____ Others: _____
  _____

____ For TPR motion in the cause only, insure that **service and notice requirements** of 7B-1102 and -1106.1 have been met, and for new TPR petition, complete and mail to all proper parties a Notice of Hearing**.**

____ Insure that **summons requirements** pursuant to 7B-1106 have been met

____ **File** the summons, any notice given, and the motion or petition with all necessary attachments with the Clerk of Juvenile Court.

____ If the address(es) of the parent(s) named in the petition are known, mail a copy of the completed summons and petition by certified mail to the parent(s) and other necessary parties (parents' attorneys, child, GAL volunteer, county agency attorney). Complete the "Affidavit of Service of Process by Certified Mail" and file it with the Clerk.

For unknown or missing parent: (also see putative father and missing parent checklist)

____ If the identity of a parent is unknown, prepare and file a "Notice of hearing on Unknown Parent" and a "Notice of Service of Process of Unknown Parent by Publication." Prepare the Order Authorizing Service of Process by Publication and have it signed by the judge.

____ If the identity of a parent is known but the whereabouts are unknown, prepare the "Notice of Service of Process by Publication."

____ Arrange for the "Notice of Service of Process by Publication" to be published by a qualified newspaper that is circulated where the parent is believed to be located or, if there is no reliable information concerning the parent's location, then in a newspaper circulated in the county where the action is pending. Arrange to have the notice – with wording exactly as provided in the body of the form – published one time per week for three consecutive weeks.

____ After the notice has run for the third time, complete and file the "Affidavit of Service by Publication".

____ Once service has been properly completed (whether personally, by certified mail, or publication), make sure that the **TPR hearing is set on a court calendar.**

____ Was a written **answer to the petition** filed by the respondent within 30 days after service of the summons and petition/motion or within time prescribed by Rule 4(j1) if by publication? Yes/No
[If not, court can still move forward with hearing and terminate parental rights]

Trial Preparation

____ Received all necessary information from GAL volunteer concerning all relevant facts and perceptions of GAL

How does the child feel about this proceeding? _____
_____

Date of **prehearing conference** (informal or required): _____

Persons present at prehearing conference: _____
_____

DSS general position on the case: ______
_____
_____
_____

Parent(s) general position on the case: _____
_____
_____

Agreed upon **stipulations:**
_____
_____

Contested issues:
_____
_____
_____
_____
_____
_____

Are any **pre-hearing evaluations** of parent(s) or child taking place? If so, are they court ordered?
_____
_____
_____

Has an attempt been made to obtain a **consent agreement** from both parents and has either consented? If not, is there any chance of still reaching an agreement with parent(s)?_____
_____

Are all **prior orders** in the file? _____ Has the **case history** been summarized? _____

Does the child have any **disabilities or special needs**?_____

List services offered to child and parents, whether they were utilized, and why they were or were not successful:

Service:	Utilized?	Successful?
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Summary of evidence expected to be presented by DSS or parent(s)

Social Services' witnesses and exhibits for trial:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

Parent(s)' witnesses and exhibits for trial:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

Problems with DSS's evidence:

_____
_____
_____
_____

Problems with parents' evidence:

_____
_____
_____
_____

Summary of evidence to be presented by GAL:

Witness or Exhibit	Subpoena Status	Significant evidence intended to be presented through this witness or exhibit
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		

Summarize any problems with the above evidence to be introduced by the GAL:
_____
_____
_____
_____
_____
_____

If grounds for termination include a prior adjudication of abuse or neglect, have the parent's circumstances changed since then and is there currently a probability of a repetition of abuse or neglect?
_____
_____
_____

List any pretrial motions being made by any party:
_____
_____
_____
_____

Have GAL witnesses and exhibits had adequate preparation?
_____

Applicable case Law:

Case:	Issue case discusses:
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

TPR Adjudication and Disposition Hearings

Persons who should be present:
Judge _____
Parent(s) _____
Parent(s) attorney(s) _____
Social Services Caseworker _____
GAL Volunteer _____
GAL Attorney Advocate _____
Court Reporter or Recording Equipment _____
Security Personnel _____
Agency Attorney _____
Others _____
_____
_____
_____

Persons whose presence may be needed:
Children _____
Extended Family Members _____
Pre-Adoptive Parents _____
Foster Parents _____
Law enforcement officers _____
Counselor/Therapist _____
Experts (medical or other) _____
Other Service Providers _____
Juvenile Court Counselor _____
Probation or Parole Officer _____
←←Anyone else with specific knowledge about the circumstances surrounding the child or parent that would help support your case.

Summary of key evidence presented at hearing			
	Significant issue addressed by this witness or exhibit:	Significant content of testimony or exhibit:	Points to argue based on this evidence:
Witness: Exhibit: Direct Exam by: Cross Exam by:			
Witness: Exhibit: Direct Exam by: Cross Exam by:			
Witness: Exhibit: Direct Exam by: Cross Exam by:			
Witness: Exhibit: Direct Exam by: Cross Exam by:			
Witness: Exhibit: Direct Exam by: Cross Exam by:			
Witness: Exhibit: Direct Exam by: Cross Exam by:			
Witness: Exhibit: Direct Exam by: Cross Exam by:			
Witness: Exhibit: Direct Exam by: Cross Exam by:			

The Judicial Order

While the final order should be a detailed, descriptive document, the following is a checklist of the key issues that must be addressed in the order, so it is useful to make sure that these issues are adequately addressed in court.

____ List of parties present for hearing
____ Facts establishing subject matter jurisdiction
____ Facts establishing personal jurisdiction
____ Facts establishing that pre-trial procedural requirements have been met
- ____ Hearing for unknown parent within 10 days or next avail. term
- ____ Pre-trial hearing conducted if answer contests material allegations
- ____ Proper notice to parties
- ____ Facts describing dates child has been in DSS custody
- ____ Date of appointment of GAL, GAL name, and length of GAL appointment

____ Facts establishing that procedural and substantive requirements for adjudication have been met
____ Facts based on clear, cogent, convincing evidence
- ____ Specific and detailed facts supporting whether there are grounds for termination (including services that have been provided and whether parent has followed through on such services)
- ____ Incorporate by reference reports, records and any exhibits relied upon by the judge, including prior orders.
- ____ List witnesses who testified
- ____ If continuance is ordered, that it has been done to receive additional evidence, reports or assessments

____ Findings of fact regarding whether it is in the best interest of the child to terminate

____ Conclusions of law:
- ____ That the court has personal and subject matter jurisdiction
- ____ That grounds do or do not exist for termination and if so, which statutory grounds exist: _____
- ____ That it is or is not in the best interest of the child to terminate, and that the adjudication and disposition decisions were made separately:

_____

_____

____ Order:
- ____ Whether parental rights are terminated
- ____ Who will have legal and physical custody of the child following the hearing and specifics concerning such placement: _____

  _____
- ____ Whether costs are taxed to either party

____ Date of 1st Post-TPR review (ideally should take place immediately to speed permanency planning but is required within 6 months):

_____

Who will draft the order and how will it be circulated? (All parties should view order prior to finalizing.)

§ 4.15 TPR Worksheet for GAL Volunteer and Staff

Child Client (prepare one checklist per child): _____
GAL Volunteer: _____ **GAL Staff Member:** _____
GAL Attorney: _____ **Parents' Attorneys:**
_____
DSS Attorney: _____ _____
Original Adjudication: _____

I. Case History

A. **Name and Location of Parents**
Mother's name and last known address:
_____
_____
If whereabouts are unknown, efforts to locate mother: _____
_____
Is paternity an issue? Yes/No
Give name(s) of known father or potential father(s), along with last known address(es):
_____
_____
If whereabouts are unknown, efforts to locate father: _____
_____

B. Name and time of service for all GAL's: Name and time of service for all DSS workers:
_____ _____
_____ _____
_____ _____
_____ _____

C. **Judicial Events**

Date of Event:	Order, report, motion or other document in file relating to this event:
_____	Petition_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Note: For use by North Carolina Guardian ad Litem staff and volunteers preparing to participate in or petition Termination of Parental Rights Cases.

D. **Services provided to family and outcome of such services:**

Name and Type of Service Referral:	**Were Services Provided? If so, when?**	**Contact Name within Service Provider Organization:**	**Outcome of Service Provided (refer to relevant documents in file that discuss such services):**

E. **Location and date of placements for child(ren),** contact name for placement (e.g. foster parent):

From (date) to (date):	Location:	Contact Name:
_____⇒	_____ ⇒	_____
_____⇒	_____ ⇒	_____
_____⇒	_____ ⇒	_____
_____⇒	_____ ⇒	_____
_____⇒	_____ ⇒	_____
_____⇒	_____ ⇒	_____
_____⇒	_____ ⇒	_____

F. **Visitation**

Describe visitation that has occurred (how often, efforts by parent, effect on child):

G. **Compliance with Court Orders**

List significant orders or conditions imposed for placement relating to parents that were made by the court and whether parents complied with such orders [note that orders must fall within authority of 7B-904]:

Order:	**Complied?**
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

II. Termination and This Child

A. **Best Interest**: Is it in the best interest of the child to terminate? [7B-1110] Yes/No If no stop here if initiated by GAL! If so, describe why it is in the best interest of the child to terminate:

B. **Grounds to terminate** [7B-1111] (check all that apply, or put a [?] next to those that are problematic)

____ **Abuse:**

___ Inflicts or allows to be inflicted upon 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 upon the juvenile **cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior.**

____ Creates or allows to be created **serious emotional damage to the juvenile**, evidenced by severe anxiety, depression, withdrawal or aggressive behavior toward himself or others.

____ **Encourages, directs or approves of delinquent acts** involving moral turpitude committed by the juvenile.

____ **Commits, permits, or encourages the commission of a violation of [certain laws involving sex crimes]** by, with or upon the juvenile.

____ **Neglect:**

____ **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.**

____ Has been **placed for care or adoption in violation of the law.**

Does the juvenile live in a home where another juvenile has been abused or neglected or killed? _____

____ **Willfully left in foster care** for more than 12 months without showing reasonable progress in correcting the conditions which led to the removal

____ **Failure to pay child support** during continuous 6 month period preceding petition although able to do so

____ **Failure to support child pursuant to decree or custody agreement** for one year when other parent has custody

____ **Father's failure to do any of the following:** legitimate child, establish paternity, and provide financial

support and consistent care.

____ **Incapability** resulting in dependency and a reasonable probability that the incapability will continue for the foreseeable future. [Incapability may be due to substance abuse, mental retardation, mental illness, organic brain syndrome or any other similar cause or condition].

____ **Willful abandonment** for 6 consecutive months immediately preceding petition.

____ **Commits or involved in murder, involuntary manslaughter, or felony assault** of own child or child residing in home

____ **Parental rights with respect to another child have been terminated** and parent lacks ability/willingness to establish safe home

C. **Summarize key facts that support the above allegations of grounds for termination:**

D. Evidence–names of persons interviewed or involved in the case and documents reviewed:		Description of all documents in file which refer to this person or document:
1._____	⇒	_____
2._____	⇒	_____
3._____	⇒	_____
4._____	⇒	_____
5._____	⇒	_____
6._____	⇒	_____
7._____	⇒	_____
8._____	⇒	_____
9._____	⇒	_____
10._____	⇒	_____
11. _____	⇒	_____
12 ._____	⇒	_____

D.1. Are there any problems with the credibility or availability of any of the above mentioned persons or documents that you are aware of? Please describe:

E. **Is there any possibility that the child is a Native American descendant?**

F. **Describe DSS' general position on the case:**

G. **Describe parent's general position on the case:**

H. **Describe any issues which you think present potential problems in this case**:

I. **Refer to the next page titled "Termination of Parental Rights and Best Interest" by Jane Malpass and Jane Thompson and answer these questions in writing or be prepared to answer them in conversations with the GAL attorney advocate.**

TERMINATION OF PARENTAL RIGHTS AND BEST INTEREST

Termination of parental rights is generally a bifurcated or two-part decision for the court. First, has the agency shown the existence of one or more grounds for TPR? Second, even if the grounds exist, is the very permanent decision to terminate the parent's rights in the child's best interest?

It is important, however, to realize that evidence showing the grounds for TPR is often critical to the "best interest" decision as well. Evidence in a TPR case that has been well "built" will answer these questions for the court:

- Have all appropriate services been offered to the parents in a timely manner?
- Have the parents responded to those services in a way that demonstrates they are now able to provide at least a minimally sufficient level of care for their children?
- If the child has special needs, are the parents able at the time of the TPR hearing to meet those needs?
- Is there a reason to believe that the parents could materially improve the conditions or behavior that led to the removal of their child in the next three months if given the opportunity? Can any improvement be expected to last?
- What type of relationship have the parents maintained with their child since he was removed?
- What type of progress has the child experienced while in foster care?

In addition, the agency must also present evidence that answers these other best interest issues for the court:

What do we have to offer that is better than continued foster care?
- Will the foster parents adopt?
- Do we have other adoptive parents waiting?
- Have we made similar successful placements?

Have we looked at relatives?
- Are they able to provide safety?
- Are they able to provide permanence?
- Is there a previous attachment?

Who are those persons already in the child's life to whom he is attached?
- Can they adopt?
- Can they maintain their contact?
- Will they give "blessing" for the adoptive placement?
- Will siblings remain together? Should they?

How long has the child been waiting?
- How much longer must he wait for a permanent placement?
- What can be done to move things along?

What will happen to this child if TPR is not granted?
- Who will "parent" this child when he is an adult?
- Who will be his "forever " parent?

Jane Thompson, Attorney
N.C. Department of Justice

Jane Malpass, Consultant
N.C. Division of Social Services

§ 4.16 Master Checklist for Termination of Parental Rights*

Pre-Petition

____ Met with GAL volunteer and GAL staff concerning TPR in this case.

____ The GAL feels and the evidence supports that it is in the best interest of the child to terminate parental rights.

____ There is sufficient evidence to show grounds to terminate parental rights:

Grounds are:

____ Abuse

____ Neglect

____ Willful abandonment (6 mos.)

____ Failure to pay child support (6 mos.)

____ Willfully leaving in foster care for more than 12 mos. without reas. progress correcting conditions leading to removal

____ Commits or involved in murder, involuntary manslaughter or felony assault of own child or child residing in home

____ Failure to pay support pursuant to decree or custody agreement.

____ Father's failure to legitimate, establish paternity, or provide financial support and consistent care (if father does none of these).

____ Incapability when child is dependent and parent's incapability will continue for foreseeable future.

____ Parental rights with respect to another child have been terminated and parent lacks ability/willingness to establish safe home

____ The court has jurisdiction.

____ There has been formal appointment of GAL and Attorney Advocate.

____ Parent has counsel and either : ____ has Rule 17 GAL (minor or incapacity) OR ____parent does not need GAL.

____ There is standing to file the petition.

____ Paternity has/has not been established.

____ If paternity has not been established, plan is in place to handle paternity issue.

____ There is/is not a need for a hearing on unknown parent. Date of hearing: _____

____ The Indian Child Welfare Act does/does not apply to this case. (See checklist for ICWA)

The TPR Petition

____ This TPR is a **motion in the cause** pursuant to 7B-1102

OR

____ This TPR is a **new petition** and is not filed as a motion in the cause

____ TPR petition or motion has been **drafted**

____ The petition has been **signed, verified, and notarized**

____ All necessary supporting **exhibits and affidavits** have been prepared and attached to the petition or motion.

____ For TPR motion in the cause only, **service and notice requirements** of 7B-1102 and -1106.1 have been met, and for new TPR petition, notice of hearing has been completed and mailed to all proper parties.

____ **Summons requirements** pursuant to 7B-1106 have been met

____ Summons, any notice given, and the motion or petition have all been filed with all necessary attachments with the Clerk of Juvenile Court.

____ Copies of petition/motion and summons have been appropriately mailed by certified mail to all appropriate parties

____ The "Affidavit of Service of Process by Certified Mail" has been completed and filed with the Clerk.

____ **For unknown or missing parent: (also see putative father and missing parent checklist)** all procedures have been followed with respect to unknown or missing parent.

____ **TPR hearing is set on a court calendar**

____ A written **answer to the petition** was/was not filed by the respondent within 30 days after service of the summons and petition/motion or within time prescribed by Rule 4(j1) if by publication? [If not, court can still move forward with hearing and terminate parental rights]

Trial Preparation

* This checklist is a summary of the GAL TPR Worksheet for Attorneys

____ Received all necessary information from GAL volunteer concerning case.
____ Aware of child's feelings regarding this proceeding.
____ Pre-hearing conference is/is not scheduled. Date: _____
____ Aware of DSS's general position on this case.
____ Aware of parent(s)' general position on this case.
____ Parties have/have not agreed to certain stipulations.
____ Parties have clarified what issues are being contested.
____ Pre-hearing evaluations of parent(s) or child are/are not taking place.
____ Every effort has been made to reach a consent agreement in this case when appropriate.
____ Assessed evidence expected to be presented by DSS.
____ Have knowledge or some idea of evidence to be presented by parent(s), assessed such evidence.
____ Determined what evidence GAL will need to present.
____ Issued all necessary subpoenas.
____ Properly prepared all GAL witnesses and exhibits.
____ Determined whether there are problems with evidence to be presented by any party.
____ Made or properly addressed any pre-trial motions.
____ Researched applicable case law.
____ Prior orders are in file and summarization of case history is complete.
____ Summarization of services offered to child and parents and described outcome is complete.

Adjudication and Disposition Hearings

Persons who should be present:

Judge _____
Parent(s) _____
Parent(s) Attorney(s)_____
Social Services Caseworker _____
GAL Volunteer _____
GAL Attorney Advocate _____
Court Reporter or Recording Equipment _____
Security Personnel _____
Agency Attorney _____
Others: _____
_____
_____

Persons whose presence may be needed:

Children _____
Extended Family Members _____
Pre-Adoptive Parents _____
Foster Parents _____
Law Enforcement Officers _____
Counselor/Therapist _____
Experts (medical or other) _____
Other Service Providers _____
Juvenile Court Counselor _____
Probation or Parole Officer _____
Others: _____
_____

The court must address the following issues:*

____ Whether any allegations in the petition alleging grounds to terminate have been proven by clear, cogent and convincing evidence and if so, what grounds exist (the adjudication phase).
____ If grounds to terminate exist, whether it is in the best interest of the child to terminate (disposition phase).
____ Whether parental rights are in fact terminated.
____ Who will have immediate legal and physical custody of the child and the specifics concerning such placement.
____ Date of 1st post-TPR review: _____

*Note that there are many other specifics that must be addressed in the court's final written order. (see TPR worksheet for GAL Attorneys).

STATUTES

§ 7B-1100. Legislative intent; construction of Article

The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to 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) It is the further purpose of this Article to 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 provisions of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 223, § 5, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999.

§ 7B-1101. Jurisdiction

The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. Provided, further, that the clerk of superior court shall have jurisdiction for adoptions under Chapter 48 of the General Statutes.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 223, § 6, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2000-144, § 18, eff. July 1, 2001; S.L. 2000-183, § 2, eff. Oct. 1, 2000; S.L. 2003-140, § 4, eff. June 4, 2003; S.L. 2005-398, § 14, eff. Oct. 1, 2005.

NOTE: Session Law 2007-152 effective October 1, 2007 and applies to motion in the cause or petitions filed after that date amends 7B-1101 as follows: “The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 and that process was served on the nonresident parent pursuant to G.S. 7B-1106.”

§ 7B-1102. Pending child abuse, neglect, or dependency proceedings

(a) When the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile.

(b) A motion pursuant to subsection (a) of this section and the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:

(1) Service must be in accordance with G.S. 1A-1, Rule 4, if one of the following applies:

a. The person or agency to be served was not served originally with summons.

b. The person or agency to be served was served originally by publication that did not include notice substantially in conformity with the notice required by G.S. 7B-406(b)(4)e.

c. Two years has elapsed since the date of the original action.

(2) In any case, the court may order that service of the motion and notice be made pursuant to G.S. 1A-1, Rule 4.

For purposes of this section, the parent of the juvenile shall not be deemed to be under disability even though the parent is a minor.

(c) When a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court on its own motion or motion of a party may consolidate the action pursuant to G.S. 1A-1, Rule 42.

Added by S.L. 1998-229, §§ 9.1, 26.1, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999. Amended by S.L. 2000-183, § 3, eff. Oct. 1, 2000.

§ 7B-1103. Who may file a petition or motion

(a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by one or more of the following:

(1) Either parent seeking termination of the right of the other parent.

(2) Any person who has been judicially appointed as the guardian of the person of the juvenile.

(3) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

(4) Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.

(5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

(6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

(b) Any person or agency that may file a petition under subsection (a) of this section may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a motion to terminate parental rights.

(c) No 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 may file a petition to terminate the parental rights of another with respect to that juvenile.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 4, eff. Oct. 1, 2000; S.L. 2004-128, § 13, eff. Dec. 1, 2004.

§ 7B-1104. Petition or motion

The petition, or motion pursuant to G.S. 7B-1102, shall be verified by the petitioner or movant and shall be entitled "In Re (last name of juvenile), a minor juvenile"; and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner or movant shall so state:

(1) The name of the juvenile as it appears on the juvenile's birth certificate, the date and place of birth, and the county where the juvenile is presently residing.

(2) The name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by G.S. 7B-1103 to file a petition or motion.

(3) The name and address of the parents of the juvenile. If the name or address of one or both parents is unknown to the petitioner or movant, the petitioner or movant shall set forth with particularity the petitioner's or movant's efforts to ascertain the identity or whereabouts of the parent or parents. The information may be contained in an affidavit attached to the petition or motion and incorporated therein by reference. 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.

(4) The name and address of any person who has been judicially appointed as guardian of the person of the juvenile.

(5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion.

(6) Facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.

(7) That the petition or motion has not been filed to circumvent the provisions of Article 2 of Chapter 50A of the General Statutes, the Uniform Child-Custody Jurisdiction and Enforcement Act.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 223, § 7, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 5, eff. Oct. 1, 2000; S.L. 2004-128, § 14, eff. Dec. 1, 2004.

§ 7B-1105. Preliminary hearing; unknown parent

(a) If either the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner, the court shall, within 10 days from the date of filing of the petition, or during the next term of court in the county where the petition is filed if there is no court in the county in that 10-day period, conduct a preliminary hearing to ascertain the name or identity of such parent.

(b) The court may, in its discretion, inquire of any known parent of the juvenile concerning the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a diligent search for the parent. Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and the parent shall be summoned to appear in accordance with G.S. 7B-1106.

(c) Notice of the preliminary hearing need be given only to the petitioner who shall appear at the hearing, but the court may cause summons to be issued to any person directing the person to appear and testify.

(d) If the court is unable to ascertain the name or identity of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the juvenile to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

(1) Designate the court in which the petition is pending;

(2) Be directed to "the father (mother) (father and mother) of a male (female) juvenile born on or about .....(date) in ..... County, ... (city), ...(State), respondent';

(3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);

(4) State that a petition seeking to terminate the parental rights of the respondent has been filed;

(5) Direct the respondent to answer the petition within 30 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j1); and

(6) State that the respondent's parental rights to the juvenile will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

(e) The court shall issue the order required by subsections (b) and (d) of this section within 30 days from the date of the preliminary hearing unless the court shall determine that additional time for investigation is required.

(f) Upon the failure of the parent served by publication pursuant to subsection (d) of this section to answer the petition within the time prescribed, the court shall issue an order terminating all parental rights of the unknown parent.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999.

§ 7B-1106. Issuance of summons

(a) Except as provided in G.S. 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the juvenile;

(2) Any person who has been judicially appointed as guardian of the person of the juvenile;

(3) The custodian of the juvenile appointed by a court of competent jurisdiction;

(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the child has been given by a court of competent jurisdiction; and

(5) The juvenile.

Provided, no summons need be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency nor to any parent who has consented to the adoption of the juvenile by the petitioner. The summons shall notify the respondents to file a written answer within 30 days after service of the summons and petition. Except that the summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed, service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j). But the parent of the juvenile shall not be deemed to be under a disability even though the parent is a minor.

(b) The summons shall be issued for the purpose of terminating parental rights pursuant to the provisions of subsection (a) of this section and shall include:

(1) The name of the minor juvenile;

(2) Notice that a written answer to the petition must be filed with the clerk who signed the petition within 30 days after service of the summons and a copy of the petition, or the parent's rights may be terminated;

(3) Notice that if they are indigent, the parents are entitled to appointed counsel; the parents may contact the clerk immediately to request counsel;

(4) Notice that this is a new case. Any attorney appointed previously will not represent the parents in this proceeding unless ordered by the court;

(5) Notice that the date, time, and place of the hearing will be mailed by the clerk upon filing of the answer or 30 days from the date of service if no answer is filed; and

(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

(c) If a county department of social services, not otherwise a party petitioner, is served with a petition alleging that the parental rights of the parent should be terminated pursuant to G.S. 7B-1111, the department shall file a written answer and shall be deemed a party to the proceeding.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, §§ 10, 27, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 13, eff. Oct. 1, 2000; S.L. 2001-208, § 28, eff. Jan. 1, 2002.

§ 7B-1106.1. Notice in pending child abuse, neglect, or dependency cases

(a) Upon the filing of a motion pursuant to G.S. 7B-1102, the movant shall prepare a notice directed to each of the following persons or agency, not otherwise a movant:

(1) The parents of the juvenile.

(2) Any person who has been judicially appointed as guardian of the person of the juvenile.

(3) The custodian of the juvenile appointed by a court of competent jurisdiction.

(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the juvenile has been given by a court of competent jurisdiction.

(5) The juvenile's guardian ad litem if one has been appointed pursuant to G.S. 7B-601 and has not been relieved of responsibility.

(6) The juvenile, if the juvenile is 12 years of age or older at the time the motion is filed.

Provided, no notice need be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency nor to any parent who has consented to the adoption of the juvenile by the movant. The notice shall notify the person or agency to whom it is directed to file a written response within 30 days after service of the motion and notice. Service of the motion and notice shall be completed as provided under G.S. 7B-1102(b).

(b) The notice required by subsection (a) of this section shall include all of the following:

(1) The name of the minor juvenile.

(2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.

(3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.

(4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.

(5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.

(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

(c) If a county department of social services, not otherwise a movant, is served with a motion seeking termination of a parent's rights, the director shall file a written response and shall be deemed a party to the proceeding.

Added by S.L. 2000-183, § 6, eff. Oct. 1, 2000.

§ 7B-1107. Failure of parent to answer or respond

Upon the failure of a respondent parent to file written answer to the petition or written response to the motion within 30 days after service of the summons and petition or notice and motion, or within the time period established for a defendant's reply by G.S. 1A-1, Rule 4(j1) if service is by publication, the court may issue an order terminating all parental and custodial rights of that parent with respect to the juvenile; provided the court shall order a hearing on the petition or motion and may examine the petitioner or movant or others on the facts alleged in the petition or motion.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 7, eff. Oct. 1, 2000.

§ 7B-1108. Answer or response of parent

(a) Any respondent may file a written answer to the petition or written response to the motion. The answer or response shall admit or deny the allegations of the petition or motion and shall set forth the name and address of the answering respondent or the respondent's attorney.

(b) If an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601. A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. The appointment, duties, and payment of the guardian ad litem shall be the same as in G.S. 7B-601 and G.S. 7B-603, but in no event shall a guardian ad litem who is trained and supervised by the guardian ad litem program be appointed to any case unless the juvenile is or has been the subject of a petition for abuse, neglect, or dependency or with good cause shown the local guardian ad litem program consents to the appointment. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days given by the petitioner or movant to the respondent who answered or responded, and the guardian ad litem for the juvenile to determine the issues raised by the petition and answer or motion and response.

Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition or motion and responsive pleading.

(c) In proceedings under this Article, the appointment of a guardian ad litem shall not be required except, as provided above, in cases in which an answer or response is filed denying material allegations, or as required under G.S. 7B-1101; but the court may, in its discretion, appoint a guardian ad litem for a juvenile, either before or after determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile.

(d) If a guardian ad litem has previously been appointed for the juvenile under G.S. 7B-601, and the appointment of a guardian ad litem could also be made under this section, the guardian ad litem appointed under G.S. 7B-601, and any attorney appointed to assist that guardian, shall also represent the juvenile in all proceedings under this Article and shall have the duties and payment of a guardian ad litem appointed under this section, unless the court determines that the best interests of the juvenile require otherwise.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 8, eff. Oct. 1, 2000; S.L. 2003-140, § 7, eff. June 4, 2003.

§ 7B-1109. Adjudicatory hearing on termination

(a) The hearing on the termination of parental rights shall be conducted by the court sitting without a jury and shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court shall inquire whether the juvenile's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them, counsel shall be appointed to represent them in accordance with rules adopted by the Office of Indigent Defense Services. The court shall grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition or motion. In the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were knowing and voluntary. This examination shall be reported as provided in G.S. 7A-198.

(c) The court may, upon finding that reasonable cause exists, order the juvenile to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the juvenile's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the juvenile is at issue, the court may order a similar examination of any parent of the juvenile.

(d) The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

(e) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent.

The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

(f) The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence. No 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.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-144, § 19, eff. July 1, 2001; S.L. 2000-183, § 9, eff. Oct. 1, 2000; S.L. 2001-208, §§ 7, 22, eff. Jan. 1, 2002; S.L. 2003-304, § 2, eff. July 4, 2003; S.L. 2005-398, § 16, eff. Oct. 1, 2005.

§ 7B-1110. Determination of best interests of the juvenile

(a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this determination, the court shall consider the following:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing. If the order is not entered within 30 days following completion of the hearing, the clerk of court for juvenile matters shall schedule a subsequent hearing at the first session of court scheduled for the hearing of juvenile matters following the 30-day period to determine and explain the reason for the delay and to obtain any needed clarification as to the contents of the order. The order shall be entered within 10 days of the subsequent hearing required by this subsection.

(b) Should the court conclude that, irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the juvenile require that rights should not be terminated, the court shall dismiss the petition or deny the motion, but only after setting forth the facts and conclusions upon which the dismissal or denial is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, making appropriate findings of fact and conclusions.

(d) Counsel for the petitioner or movant shall serve a copy of the termination of parental rights order upon the guardian ad litem for the juvenile, if any, and upon the juvenile if the juvenile is 12 years of age or older.

(e) The court may tax the cost of the proceeding to any party.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 10, eff. Oct. 1, 2000; S.L. 2001-208, § 23, eff. Jan. 1, 2002; S.L. 2005-398, § 17, eff. Oct. 1, 2005.

§ 7B-1111. Grounds for terminating parental rights

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by said decree or custody agreement.

(5) The father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights:

a. Established paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Health and Human Services; provided, the court shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. Legitimated the juvenile pursuant to provisions of G.S. 49-10 or filed a petition for this specific purpose; or

c. Legitimated the juvenile by marriage to the mother of the juvenile; or

d. Provided substantial financial support or consistent care with respect to the juvenile and mother.

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision 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 and the parent lacks an appropriate alternative child care arrangement.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

(8) The parent has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child residing in the home; has 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 has committed murder or voluntary manslaughter of the other parent of the child. The petitioner has the burden of proving any of these offenses in the termination of parental rights hearing by (i) proving the elements of the offense or (ii) offering proof that a court of competent jurisdiction has convicted the parent of the offense, whether or not the conviction was by way of a jury verdict or any kind of plea. If the parent has committed the murder or voluntary manslaughter of the other parent of the child, the court shall consider whether the murder or voluntary manslaughter was committed in self-defense or in the defense of others, or whether there was substantial evidence of other justification.

(9) The parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

(b) The burden in such proceedings shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, §§ 11, 28, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 11, eff. Oct. 1, 2000; S.L. 2001-208, § 6, eff. Jan. 1, 2002; S.L. 2001-291, § 3, eff. July 19, 2001; S.L. 2003-140, § 3, eff. June 4, 2003; S.L. 2005-146, § 1, eff. June 30, 2005.

§ 7B-1112. Effects of termination order

An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship, except that the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued. The parent is not thereafter entitled to notice of proceedings to adopt the juvenile and may not object thereto or otherwise participate therein:

(1) If the juvenile had been placed in the custody of or released for adoption by one parent to a county department of social services or licensed child-placing agency and is in the custody of the agency at the time of the filing of the petition or motion, including a petition or motion filed pursuant to G.S. 7B-1103(6), that agency

shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of the juvenile as the agency would have acquired had the parent whose rights are terminated released the juvenile to that agency pursuant to the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes, including the right to consent to the adoption of the juvenile.

(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the juvenile in the custody of the petitioner or movant, or some other suitable person, or in the custody of the department of social services or licensed child-placing agency, as may appear to be in the best interests of the juvenile.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-183, § 12, eff. Oct. 1, 2000.

§ 7B-1113. Repealed by S.L. 2005-398, § 18, eff. Oct. 1, 2005

CHAPTER 5
POST-TERMINATION OF PARENTAL RIGHTS AND ADOPTION

Table of Contents

§ 5.1 Post-Termination of Parental Rights Placement Court Review [7B-908]

A. Purpose [7B-908(a)]

The purpose of each placement review is to ensure that every reasonable effort is being made to provide for a permanent placement plan for the child who has been placed in the custody of a county director or licensed child-placing agency, which is consistent with the child's best interest.[1]

B. Evidence to Be Considered [7B-908(a)]

At each review hearing the court may consider information from the Department of Social Services; the licensed child-placing agency; the guardian ad litem; the child; any foster parent, relative, or preadoptive parent providing care for the child; and any other person or agency that the court determines is likely to aid in the review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

C. Under What Circumstances Does Placement Review Take Place? [7B-908(b)]

1. Reviews are to be conducted when parental rights have been terminated by a petition brought by any person or agency designated in G.S. 7B-1103(2) through (5) and a county director or licensed child-placing agency has custody of the juvenile.

If the child has been placed for adoption prior to the date scheduled for the review, written notice of the placement shall be given to the clerk to be placed in the court file and the review hearing shall be canceled, with notice of the cancellation given by the clerk to all persons previously notified. [*But see* G.S. 48-2-102, which would seem to eliminate the requirement that the review be canceled.]

2. Reviews are also to be conducted under the following circumstances set out by 7B-909:

a. when *one parent surrenders* the child for adoption and there is no TPR proceeding initiated on the other parent within six months, or

b**.** *both parents surrender* and there is no adoptive placement within six months,

c. *adoption is dismissed or withdrawn* and the child returns to foster care.

In any of the above three scenarios, the following must occur:

i. DSS must notify the clerk within thirty days of the child's return to calendar the review hearing for the agency's plan.

ii. Notification is by petition for review, which sets forth circumstances necessitating

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Note: Two primary resources for Chapter 5 were two separate outlines on post-termination and adoption written by Ilene Nelson and Judy Kornegay.

[1] *Note that although a post-termination hearing ("post-TPR review") is only held once termination has occurred, that hearing is not governed by the TPR statutes but by the statutes governing abuse, neglect, and dependency proceedings. This can be important with respect to some procedural issues.*

review.

iii. Review must be conducted within thirty days (unless the court directs otherwise).

iv. A review must take place every six months until a new adoption petition is filed.

v. Such reviews are conducted pursuant to G.S. 7B-908.

D. Timing [7B-908(b)]

1. **Initial review within 6 months:** The court shall conduct a placement review not later than six months from the date of the termination hearing.

2. **Subsequent reviews**: The court shall conduct reviews every six months thereafter until the child is placed for adoption and the adoption petition is filed by the adoptive parents.[2]

There is no reason that reviews cannot be conducted sooner or more often and the GAL may be the first to notice that a review should occur sooner, in which case a motion for such review is appropriate.

Continued jurisdiction until adoption is final: G.S. 48-2-102 states that if the child for whom a petition for adoption is filed is the subject of a proceeding under Chapter 7B, the district court continues to have jurisdiction over the matter until the adoption is final.
[*Also see In the Matter of N.C.L.,* 89 N.C. App. 79 (1988), prior to change in law.]

Although the statute says that the reviews must continue until the child is placed for adoption and the adoption petition is filed, the language in G.S. 48-2-102 giving the district court jurisdiction until the adoption is final seems to indicate that the reviews could continue until the adoption is final. In other words, the court may, but is not required to, continue such reviews after the adoption petition and placement but before the adoption order is final.

E. Notice of Review [7B-908(b)(1)]

1. No more than thirty days and no less than fifteen days prior to each review, the clerk shall give notice of the review to the child if he is at least twelve years of age, the legal custodian of the child, any foster parent, relative, or preadoptive parent providing care for the child, the guardian ad litem, if any, and any other person or agency the court may specify.

2. Nothing in this subdivision shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding based solely on receiving notice and an opportunity to be heard.

F. Who Should Attend [7B-908(b)(1)]

The statute says that only the juvenile, if the juvenile is at least 12 years of age, the legal custodian of the juvenile, any foster parent, relative, or preadoptive parent providing care for the juvenile, and the guardian ad litem shall attend the review hearings, except as otherwise directed by the court. **[7B-908(b)(1)]**

[2] Session Law 2007-279 effective October 1, 2007 will require that reviews under both 7B-908 and 7B-909 continue until "the juvenile is the subject of a decree of adoption."

From a practical standpoint, however, it is often beneficial for children under twelve to attend the hearing as well, and the GAL is free to make such a request when appropriate. See Volume 1, § 2.7.H. for more information on having the child in court.

G. If a GAL Has Not Yet Been Appointed [7B-908(b)(2)]

If a guardian ad litem for the child has not been appointed previously by the court in the termination proceeding, the court, at the initial six-month review hearing, may appoint a guardian ad litem to represent the child. The 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.

H. What the Court Shall Consider at Review [7B-908(c)]

The court shall consider at least the following in its review:

1. **The adequacy of the plan** developed by the county department of social services or a licensed child-placing agency for a permanent placement relative to the child's best interest and the efforts of the department or agency to implement such plan;

2. **Whether the child has been listed for adoptive placement** with the North Carolina Adoption Resource Exchange, the North Carolina Photo Adoption Listing Service (PALS), or any other specialized adoption agency; and

3. **The efforts previously made** by the department or agency to find a permanent home for the child.

The GAL should be prepared to present evidence and make arguments regarding any of the above three factors that are important in advocating for the child's best interests.

I. The Court's Decision [7B-908(d)]

The court, after making findings of fact, shall affirm the county department's or child-placing agency's plans or require specific additional steps which are necessary to accomplish a permanent placement which is in the best interests of the child.

[Until adoption placement occurs, the court still has the authority to make any dispositional option provided in G.S.7B-903.]

J. The GAL's Role in Post-TPR Review Hearings

The GAL remains on the case until the adoption petition is filed and the child is placed for adoption, so he or she must continue to monitor the needs of the child. Once termination has occurred, the GAL can focus on ensuring a permanent home for the child.

1. **The GAL's investigative responsibilities after termination** may include the following:
    - determining the child's wishes and whether the child is happy
    - determining the child's needs and whether they are being met
    - determining what services or changes might address needs that are not being met
    - obtaining any records on the child

- talking to the DSS caseworker
- interviewing anyone with knowledge or input about the child, her needs, and her permanent placement (including foster parents and potential adoptive parents)

2. **The GAL AA's responsibilities in court post-termination** may include the following:
   - expressing the child's wishes to the court if the child desires
   - offering evidence and presenting or examining witnesses
   - presenting court reports
   - making motions as needed
   - advocating for the child's needs, including services, placement, sibling contact or joint sibling placement, etc., based on the child's best interests
   - addressing the adequacy of the agency plan and efforts to implement the plan
   - reviewing proposed order for accuracy and completeness
   - getting information from DSS regarding adoption selection
   - evaluating adoption selection to be in a position to determine whether abuse of discretion regarding the selection should be raised

The statute allows the GAL the opportunity to allege that DSS abused its discretion in its decision for adoptive placement. Consequently, it is very important that the GAL stay involved in the case after termination because it is the only way to know whether the placement arranged by DSS is appropriate.

§ 5.2 Adoption and the GAL

[Because the GAL does not formally participate in adoption, this manual will not discuss adoption law except as it relates to the role of the GAL. See Chapter 48 of the General Statutes, which governs adoption cases.]

A. Jurisdiction in Adoption Cases

Adoption proceedings are special proceedings before the clerk of superior court, but if a child who is the subject of the adoption is also the subject of a pending district court case under the Juvenile Code, then the district having jurisdiction under Chapter 7B, shall retain jurisdiction until the final order of adoption is entered. G.S. 48-2-100(a); 48-2-102(a); *In re Asbury*, 125 N.C. App. 143 (1997). Although the adoption is a special proceeding, it is a special proceeding in the district court division. *See* N.C.G.S. 48-2-203, 48-9-105(b); 48-10-101(d); 48-10-102(c); 48-10-105(c).

B. DSS Is Responsible for Adoptive Placement

The process of selection of specific adoptive parents shall be the responsibility of and within the discretion of the county department of social services or licensed child-placing agency. **[7B-908(f)]**

C. GAL's Limited Role in Adoption

1. GAL may consult with DSS in the selection process: The GAL does not have a formal say in selecting an adoptive placement for the child, because adoptive placement is in the discretion of DSS. However, the guardian ad litem may request information from and consult with the county department or child-placing agency concerning the selection process. **[7B-908(f)]** The GAL is not automatically part of the adoption selection process although GALs in some cases may be asked to participate.

2. GAL may request and receive information on the selection process within five days: If the guardian ad litem requests information about the selection process, the agency shall provide the information within five days. **[7B-908(f)]**

a. The North Carolina Court of Appeals supported a GAL's request for information on adoption from DSS in the cases of *In re Wilkinson v. Riffel*, 72 N.C. App. 220 (1985) and *In the Matter of N.C.L.*, 89 N.C. App. 79 (1988).

i. In *Wilkinson*, DSS was appealing a judge's order to respond to the GAL's request for information. The court of appeals stated as follows:

> This section [7A-586 now 7B-601] gives the Guardian ad Litem more responsibilities and duties than a Guardian ad Litem ordinarily has. The Guardian ad Litem has the continuing duty to conduct follow-up investigations and to report to the court when the needs of the juveniles are not being met. The section specifically gives the Court the power to order that the Guardian ad Litem have confidential information which in the opinion of the Guardian ad Litem is relevant to the case. The placement of a juvenile for adoption is relevant to a determination by the Guardian ad Litem as to whether the needs of the child are being met. The fact that the information gathered by the Department about adoptive parents shall be confidential under section 48-25 is not relevant because 7A-586 (now 7B-601) provides that the Guardian ad Litem is entitled to confidential information.

ii. In *N.C.L.*, the court held that the duty of the Guardian ad Litem is to see that the child's interest and needs are being met. This duty extends to involvement in the placement of the juvenile for adoption. The court went on to emphasize the GAL's right to confidential information as it had in *Wilkinson*.

3. GAL may raise abuse of discretion within ten days: Any issue of abuse of discretion by the county department or child-placing agency in the selection process must be raised by the guardian ad litem within ten days following the date the agency notifies the court and the guardian ad litem *in writing* of the filing of the adoption petition. **[7B-908(f)]**

GAL should raise concerns about potential adoptive placements as soon as those concerns arise but cannot bring abuse of discretion before the court until an adoption petition has been filed. Although the statute gives the GAL the authority to raise abuse of discretion within ten days of notification of filing, any concerns should be raised as soon as they come up, in an effort to avoid a problematic situation for the child. Because the GAL has the right to request information on the selection process and is still involved in the case, he or she can protect and advocate for the child by being vocalizing to DSS any concerns surrounding the adoption process as early as possible to avoid further problems. However, while the GAL may raise concerns to DSS, it **may not make a motion for abuse of discretion until after an adoption petition has been filed**. (*See In re Asbury*, 125 N.C. App. 143 (1997).)

4. GAL's responsibility is intact during ten-day abuse of discretion period. During the ten-day period in which abuse of discretion may be raised, the GAL's responsibility to the child for the purpose of raising any issue of abuse of discretion is intact and cannot be fulfilled without certain information obtained from DSS. *In the Matter of N.C.L.*, 89 N.C. App. 79 (1988).

5. The statute sets up no role or authority for the GAL beyond this ten-day abuse of discretion period. However, since post-TPR reviews are to continue until the adoption petition is finalized, the GAL should remain appointed to represent the child in these hearings and to monitor the adoption process.

CHECKLISTS AND WORKSHEETS

§ 5.3 Post-Termination of Parental Rights Worksheet and Checklist

Has the child been placed for adoption prior to the date of the Post-TPR Review? Yes/No If so, where has the child been placed?

_____

[If the child has been placed for adoption, the review hearing is canceled, but see 48-2-102, which may allow the hearing to proceed until adoption is final.]

Where does the GAL want to see the child placed permanently and why?

_____
_____
_____

Preparation for Post-TPR Review Hearing

	GAL's Information and Views on Each of the Following	**Witnesses and Evidence Needed for Review Hearing**
The adequacy of the plan developed by the agency for a permanent placement		
Whether such plan is in the best interest of the child		
The efforts of the agency to implement such plan		
Whether the child has been listed for adoption with any adoption agency		
The efforts previously made by the agency to find a permanent home for the child		

Summary of Post-TPR Review Hearings (to be conducted at least every 6 months)

Issues to Be Considered at Post-TPR Reviews	**Date of Review 1**	**Date of Review 2**	**Date of Review 3**
The adequacy of the plan developed by the agency for a permanent placement			
Whether such plan is in the best interest of the child			
The efforts of the agency to implement such plan			
Whether the child has been listed for adoption with any adoption agency			
The efforts previously made by the agency to find a permanent home for the child			
Whether the court affirmed the agency's plans or required specific additional steps to accomplish permanent placement			

STATUTES

§ 7B-908. Post termination of parental rights' placement court review

(a) The purpose of each placement review is to ensure that every reasonable effort is being made to provide for a permanent placement plan for the juvenile who has been placed in the custody of a county director or licensed child-placing agency, which is consistent with the juvenile's best interests. At each review hearing the court may consider information from the department of social services, the licensed child-placing agency, the guardian ad litem, the child, any foster parent, relative, or preadoptive parent providing care for the child, and any other person or agency the court determines is likely to aid in the review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

(b) The court shall conduct a placement review not later than six months from the date of the termination hearing when parental rights have been terminated by a petition brought by any person or agency designated in G.S. 7B-1103(2) through (5) and a county director or licensed child-placing agency has custody of the juvenile. The court shall conduct reviews every six months thereafter until the juvenile is placed for adoption and the adoption petition is filed by the adoptive parents:

(1) No more than 30 days and no less than 15 days prior to each review, the clerk shall give notice of the review to the juvenile if the juvenile is at least 12 years of age, the legal custodian of the juvenile, any foster parent, relative, or preadoptive parent providing care for the juvenile, the guardian ad litem, if any, and any other person or agency the court may specify. Only the juvenile, if the juvenile is at least 12 years of age, the legal custodian of the juvenile, any foster parent, relative, or preadoptive parent providing care for the juvenile, and the guardian ad litem shall attend the review hearings, except as otherwise directed by the court. Nothing in this subdivision shall be construed to make any foster parent, relative, or preadoptive parent a party to the proceeding solely based on receiving notice and an opportunity to be heard. Any individual whose parental rights have been terminated shall not be considered a party to the proceeding unless an appeal of the order terminating parental rights is pending, and a court has stayed the order pending the appeal.

(2) If a guardian ad litem for the juvenile has not been appointed previously by the court in the termination proceeding, the court, at the initial six-month review hearing, may appoint a guardian ad litem to represent the juvenile. The 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.

(c) The court shall consider at least the following in its review:

(1) The adequacy of the plan developed by the county department of social services or a licensed child-placing agency for a permanent placement relative to the juvenile's best interests and the efforts of the department or agency to implement such plan;

(2) Whether the juvenile has been listed for adoptive placement with the North Carolina Adoption Resource Exchange, the North Carolina Photo Adoption Listing Service (PALS), or any other specialized adoption agency; and

(3) The efforts previously made by the department or agency to find a permanent home for the juvenile.

(d) The court, after making findings of fact, shall affirm the county department's or child-placing agency's plans or require specific additional steps which are necessary to accomplish a permanent placement which is in the best interests of the juvenile.
(e) If the juvenile has been placed for adoption prior to the date scheduled for the review, written notice of said

placement shall be given to the clerk to be placed in the court file, and the review hearing shall be cancelled with notice of said cancellation given by the clerk to all persons previously notified.

(f) The process of selection of specific adoptive parents shall be the responsibility of and within the discretion of the county department of social services or licensed child-placing agency. The guardian ad litem may request information from and consult with the county department or child-placing agency concerning the selection process. If the guardian ad litem requests information about the selection process, the county shall provide the information within five days. Any issue of abuse of discretion by the county department or child-placing agency in the selection process must be raised by the guardian ad litem within 10 days following the date the agency notifies the court and the guardian ad litem in writing of the filing of the adoption petition.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, §§ 9, 26, eff. July 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2003-62, § 4, eff. May 20, 2003; S.L. 2005-398, § 8, eff. Oct. 1, 2005.

Note: Session Law 2007-276 effective October 1, 2007 amends subsection (b) by replacing “placed for adoption an the adoption petition is filed by the adoptive parents” to “[juvenile is] the subject of a decree of adoption,” under subsection (b)(1) replaces “an opportunity” to be heard with “the right” to be heard. The result is that the juvenile court will continue to have reviews under this subsection until the adoption petition is finalized.

§ 7B-909. Review of agency's plan for placement

(a) The director of social services or the director of the licensed private child-placing agency shall promptly notify the clerk to calendar the case for review of the department's or agency's plan for the juvenile at a session of court scheduled for the hearing of juvenile matters in any case where:

(1) One parent has surrendered a juvenile for adoption under the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes and the termination of parental rights proceedings have not been instituted against the nonsurrendering parent within six months of the surrender by the other parent, or

(2) Both parents have surrendered a juvenile for adoption under the provisions of Part 7 of Article 3 of Chapter 48 of the General Statutes and that juvenile has not been placed for adoption within six months from the date of the more recent parental surrender.

(b) In any case where an adoption is dismissed or withdrawn and the juvenile returns to foster care with a department of social services or a licensed private child-placing agency, then the department of social services or licensed child-placing agency shall notify the clerk, within 30 days from the date the juvenile returns to care, to calendar the case for review of the agency's plan for the juvenile at a session of court scheduled for the hearing of juvenile matters.

(c) Notification of the court required under subsection (a) or (b) of this section shall be by a petition for review. The petition shall set forth the circumstances necessitating the review under subsection (a) or (b) of this section. The review shall be conducted within 30 days following the filing of the petition for review unless the court shall otherwise direct. The court shall conduct reviews every six months until the juvenile is placed for adoption and the adoption petition is filed by the adoptive parents. The initial review and all subsequent reviews shall be conducted pursuant to G.S. 7B-908. Any individual whose parental rights have been terminated shall not be considered a party to the review unless an appeal of the order terminating parental rights is pending, and a court has stayed the order pending the appeal.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2005-398, § 9, eff. Oct. 1, 2005.

Note: Session Law 2007-276 effective October 1, 2007 deletes subsection (b), and under subsection (c) replaces "place for adoption and the adoption petition is filed by the adoptive parents" to "the subject of a decree of adoption." The result is that the juvenile court will continue to have reviews under this subsection until the adoption petition is finalized.

CHAPTER 6
MOTIONS, APPEALS, AND OTHER PROCEDURAL TOOLS FOR GAL REPRESENTATION

Table of Contents

Sec.

§ 6.1 Motions Generally [1]

A. Introduction

Asking the trial court to make an order or ruling involving a specific issue in a case may require a formal motion to the court. The appropriate mechanism for asking the court for an order in civil juvenile court proceedings is to make a motion. Rule 7(b) of the **Rules of Civil Procedure in N.C.G.S. 1A-1** and Rule 6 of the General Rules of Practice (as well as any pertinent local rules) lay out the requirements for motions practice in district and superior court. Many different types of motions are used in GAL representation, some standard and some the brainchild of the applicant. Several motions relating to GAL representation will be discussed in this chapter.

Many motions and orders can be done by using forms available from the Administrative Office of the Courts. It is typically preferable to use AOC forms (when they are available) since such forms are designed to address issues or contain specific language that is required by statute and often can save time in drafting.. Relevant AOC forms are available on the AOC website at http://www.nccourts.org/Form/FormSearch.aspand most are in a format that is fillable.

Please see the Appendix in this manual for a variety of sample motions and an index of relevant AOC forms.

B. Requirements for Motions [G.S. 1A-1, Rule 7(b); Rule 6, N.C. Gen. R. Prac.]

1. **Written/Oral Motions**: The motion may be oral only if it is made during a hearing or trial or at a session at which a cause is on the calendar for that session. Otherwise the motion must be in writing. (The requirement for writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.)

2. **Grounds for the motion and the relief or order that is sought must be stated in a written motion.** Furthermore, a motion, whether written or oral, must state the rule number or numbers under which the movant is proceeding (e.g. Rule 45(c)(1) to quash a subpoena).

3. **The rules applicable to form of pleadings** (G.S. 1A-1, Rule 10) apply to all motions.

4. **Service and filing of motions** is made pursuant to G.S. 1A-1, Rule 5.

5. **The timing of motions** is governed by G.S. 1A-1, Rule 6 and generally requires service no later than five days prior to hearing. However in emergency situations when service five days in advance is impossible, other remedies may be sought. For example, when there is an immediate need to remove a child from his or her present placement, one can request that a temporary order be granted pending a hearing and opportunity for opposing parties to prepare, under 7B-500. It is also possible to request that parties waive the notice requirement. Remember that communication and collaboration can sometimes solve issues.

6. **Evidence on motions**: When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. [G.S. 1A-1, Rule 43(e)]

[1] Some of the information pertaining to pretrial motions was initially obtained from conference materials titled “Pretrial Proceedings” by Judith Kornegay and Jayne Norwood.

7. **For an ex parte motion**, which can be made only under certain circumstances, the above requirements may differ.

C. Motions in the Appellate Court[2]

Motions in the appellate courts are governed by N.C. Appellate Rule 37. This is the appropriate rule to cite in seeking an extension of time. It is also the rule to use if you believe that an appeal is subject to dismissal. Motions may be filed at any time up until the date of the case's hearing. The motion must be written. *Hoyle v. Bagby*, 253 N.C. 778, 780, 117 S.E.2d 760, 761 (1961). Motions may not be in a brief, but instead must be contained in a separate filed document. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858, *disc. rev. and cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996).

1. **Format**. In the caption of a motion address to an appellate court should specifically state the type of motion. A generic "Motion to Dismiss" is not sufficient. See below:

NO. COA07-000 5th JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

IN RE A.B.C.,) From Wake County
) 07 J 123
Minor Child.)

****

APPELLEE GUARDIAN AD LITEM'S MOTION TO DISMISS APPELLANT'S APPEAL AS INTERLOCUTORY

****

Just underneath the caption, the reason for the motion should be cited along with the rule to which it is pursuant. For example:

NOW COMES the Guardian ad Litem ("GAL"), pursuant to N.C.G.S. § 7B-1001 and Rule 37 of the North Carolina Rules of Appellate Procedure, and respectfully moves this Court to dismiss Appellant's appeal from the trial court's 21 April 2006 permanency planning order.

After this introduction, it is customary to explain the reasons for the motion in detail in enumerated paragraphs. For example:

[2] This section was drafted by Pamela N. Williams, GAL Appellate Coordinator.

1. Section 7B-1001 provides for a right to appeal from "any final order of the court in a juvenile matter." N.C. Gen. Stat. § 7B-1001 (2005). A "final order" is defined as any order: (1) finding absence of jurisdiction; (2) which determines the action and prevents a judgment from which appeal might be taken; (3) of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or (4) modifying custodial rights. *Id.*

2. This Court has held that not every juvenile permanency planning order is subject to immediate appeal. *See e.g., In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888 (2005).

3. The April 21, 2006 permanency planning order in this case does not change custody of the juvenile, nor does it modify Appellant's custodial rights. The order is, therefore, interlocutory in nature and not subject to appeal under N.C.G.S. § 7B-1001.

After the reasons for the motion have been adequately explained, the motion should conclude with language indicating that a respectful request for the Court to rule in your favor. An attorney should be specific with the remedy that he/she are seeking. For example:

For these reasons, the Guardian ad Litem respectfully asks this Court to dismiss Respondent's appeal pursuant to N.C. Gen. Stat. § 7B-1001 of the North Carolina Juvenile Code because the order from which Respondent appeals is interlocutory.

Respectfully submitted this ___ day of Month 2007.

By:
Your Name
Bar Number
Address
Telephone Number
Guardian ad Litem Attorney for Child

2. Service

You must serve a copy of your motion on every party and include a certificate or service page. Motions may be filed electronically at the Supreme Court. N.C.R. App. P. 26 (a). However, at the Court of Appeals, motions must be mailed in. A motion is deemed filed on the date of mailing as evidenced by the proof of service or, if filed by electronic means, at the time it is received electronically. *Id*. Motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. *Id*.

Service of motions can be accomplished by hand delivery, by mail, or by electronic mail. Service can be accomplished by electronic mail only if the motion was filed electronically. N.C.R. App. P. 26 (c). Service by hand delivery can be made to the attorney of record or the party or by leaving a copy of the motion at the attorney's office with a partner or employee. Id. Service by mail is deemed complete when the motion, enclosed in a postpaid, properly addressed wrapper is deposited in a Post Office or official depository under the exclusive care and custody of the United States Post Office. Id. Service should be at or before the time of filing. N.C.R. App. P. 26(b). A certificate of service indicating the date and manner of service and the person served must be attached to the copy of the motion filed in the appellate court. N.C.R. App. P. 26(d). Absent such a certificate, the appellate court is likely to dismiss the motion. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. N.C.R. App. P. 37(a).

3. Types of Appellate Motions

a. Motions to Dismiss. This is, perhaps, the most common of the motions filed at the appellate courts. A motion to dismiss for rule violations should specifically set out each and every violation of the N.C. Rules of Appellate Procedure found in an opponent's brief.

1. Parent failing to sign the notice of appeal.
2. Opponent's brief filed untimely.
3. Overly argumentative statement of facts.
4. No notice of appeal filed.
5. Appeal is interlocutory.
6. No legal authority cited within the argument.

b. Motions for extension of time. GAL appellate attorney should generally disfavor motions for extensions of time out of respect for the child client's sense of time. Further Rule 3A of the Rules of Appellate Procedure that governs appeals in abuse, neglect and dependency proceedings also disfavors motions for an extension of time.

c. Motion to treat brief as timely filed. This motion can be used if a filing deadline is missed.

d. Motion to amend the record on appeal. This motion can be utilized if the GAL appellate attorney realizes that a significant document has been omitted from the record.

4. Responses to Motions

A non moving party has 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, to file and serve copies of a response in opposition to the motion. N.C.R. App. P. 37(a). If the motion was served by mail, three additional days are added to the response time pursuant to N.C. R. App. P. 27(b). A response to a motion is considered filed pursuant to N.C. R. App. P. 26(a)(1) when it is received in the clerk's office. The appellate court may shorten or extend the time for responding to a motion either upon request by a party or on its own motion. N.C. R. App. P. 37(a).

The appellate courts routinely rule upon motions for extensions of time ex parte, see N.C. R. App. P. 27(d), and routinely hold motions to dismiss appeal for the requisite response period. Other motions may be ruled upon immediately or held for a response at the discretion of the appellate courts depending upon the specifics of the motions.

The appellate court can also act upon a motion at any time even if not all the parties were given notice and even without waiting for responses. N.C. R. App. P. 37(b). Except in extraordinary circumstances, however, the court is unlikely to allow a motion without affording the adverse parties an opportunity to respond. *See* N.C. R. App. P. 37(b) Drafting Committee Note. If a party did not receive notice of a motion or the appellate court ruled upon a motion without awaiting a response, that part may file a motion for reconsideration, vacation, or modification if adversely affected by the ruling. Id.

Any response to a motion filed in the appellate courts cannot include the name of a juvenile, in compliance with Rule 3(b). N.C. R. App. P. 37(c).

5. Rulings by the Appellate Court

The appellate courts endeavor to rule upon motions in a prompt fashion. The amount of time it takes to obtain a ruling depends on whether the motion is held for a response and on the complexity of the motion. Motions for the extension of time (except those held for responses) are often ruled upon by the next business day after receipt by the appellate court, but they sometimes take longer. Motions that are held for a response typically are ruled upon within a few days after all responses have been received or after the response time has expired.

At the Court of Appeals, motions filed after a case has been calendared may not be ruled upon as promptly as those filed before calendaring. Depending on the type of motion filed, motions filed after a case has been calendared may not be ruled upon until the panel assigned to the case has filed an opinion.

Motions to dismiss appeal filed in the Court of Appeals take longer for ruling because they are held for a response and because the rulings are made with much deliberation. If the Court chooses to make a final determination on a motion to dismiss appeal rather than entering an interim order referring to the motion to the panel assigned after the case is calendared, it will ordinarily try to do so prior to any then existing deadlines for the filing of briefs by the parties.

When it is apparent that the Court will not be able to rule upon a motion to dismiss appeal prior to the deadline for the filing of a brief (because of the required response time or some other reason), the party who is to file that brief should file a motion for extension of time in order to avoid the potential waste of time and money in drafting and filing the brief. The party could ask for an extension of a certain length or to be allowed to file a certain amount of days after the Court has ruled on the motion to dismiss. Even if an extension is granted until a certain number of days after a ruling is made on the motion to dismiss, the party seeking the extension should be aware that an order of the Court referring the motion to the panel assigned to the case is a "ruling" which begins the time running for the filing of the brief.

6. Meanings of Rulings.

Allowed: if the Appellate Court simply "allows" the motion, the requests in the motion are considered to have been granted in full. However, appellate court rulings commonly include additional language explaining or limiting the ruling. For example, the motion for extension of time may be "allowed," but additional language in the order may indicate that only a portion of the time requested has been granted.

Denied: the appellate court has ruled upon the motion on its merits. Occasionally, a motion will be "denied without prejudice to refile" upon the fulfillment of certain conditions. The appellate courts do not ordinarily explain in an order why a motion was denied.

Dismissed: A dismissal is not a ruling on the merits of a motion. Instead, a dismissal indicates that the appellate court will not consider the motion for one of a number of reasons. Some of those reasons—the appellate court's lack of jurisdiction is one example—may not be correctable. Other reasons—the motion is premature or some other prerequisite for filing has not been met—are probably correctable. The appellate court's order may not explain the reason for the dismissal but occasionally will specify that the motion has been "dismissed without prejudice" upon the fulfillment of certain conditions

Referred: At the Court of Appeals, some motions are "referred to the panel to which the case is assigned." This interim ruling means the ultimate disposition of the motion is deferred until all briefs have been filed and the case has been calendared. The panel of judges assigned to hear the appeal will then rule upon the motion while it has the entire case under consideration and may not do so until the opinion is filed. There is no reason to contact the Clerk's Office inquiring as to a ruling on the motion if the case has not yet been assigned to a panel for hearing.

This interim hearing is made most often with regard to motions to dismiss appeal. However, the ruling is not automatic when a motion to dismiss has been made. The Court of Appeals strives to dispose of motions to dismiss appeal at the earliest time in order to spare the parties the expense and time of filing briefs if this is unnecessary. The interim deferral is made only when the Court of Appeals believes a more thorough consideration of the entire case is needed before entering a ruling on a motion to dismiss. Since an appellee may file a motion to dismiss an appeal prior to the filing of its brief (or even prior to the filing of the appellant's brief), the practical effect of the interim ruling is that all briefs, including appellee's brief, must be filed before a final ruling is made.

D. Extraordinary Writs [3]

1. Writ of Certiorari

A writ of certiorari is appropriate in the following circumstances: (a) when the right to appeal has been lost for failure to take timely action; (b) when no right of appeal from an interlocutory order exists; or (c) for review of an order denying a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1422(c)(3).

Rule 21 of the N.C. Appellate Rules addresses writs of certiorari. Rules 21(b) and (c) address the filing and content requirements of a petition for a writ of certiorari as well as which court should receive the petition. Under Rule 21(b), the petition should be filed in the appellate court to which an appeal "might lie from final judgment." While Rule 21(c) does not impose a time limitation for filing the petition, it does state that it "shall be filed without unreasonable delay." The petition must also be accompanied by proof of service upon all parties. The petition for writ of certiorari must contain the following: (1) statement of facts, (2) statement of reasons why the writ should be issued and (3) certified copies of the judgment, order or portions of the record which are necessary to an understanding of the matters presented in the petition. Counsel or petitioner must verify the petition.

2. Writ of Mandamus and Prohibition

A writ of mandamus is proper when a party seeks to have the appellate court compel the trial court to perform a particular act, usually a mandatory duty or ministerial act. It is usually issued in response to abuses of judicial power or "compel a judicial action erroneously refused." *Stevens v. Guzman*, 140 N.C. App. 780, 538 S.E.2d 590 (2000) (citations omitted).

[3] This section was drafted by Pamela N. Williams, GAL Appellate Coordinator.

A writ of prohibition is the process by which a court of superior jurisdiction prevents an inferior court from exceeding its jurisdiction in matters over which it has powers or usurping matters not within its jurisdiction to determine. The writ of prohibition is directed to the judge, commanding him/her to cease performing certain actions. A writ of prohibition is proper where a motion for a judge to recuse herself on the basis of interest or bias and the judge has refused to do so. *See In re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991).

Rule 22 of the N.C. Appellate Rules addresses writs of mandamus and prohibition. Petitions for writs of mandamus and prohibition must contain: (1) statement of the facts, (2) statement of the issues and relief sought, (3) statement of the reasons why the writ should be issued and (4) certified copies of the opinion, order or portions of the record that are necessary to an understanding of the matters presented in the petition. Counsel or petitioner must verify the petition.

3. Writ of Supersedeas

A writ of supersedeas stays the execution of judgments, orders or other trial court determinations where an action is not automatically stayed by filing an appeal or a petition for writ of certiorari, mandamus or prohibition. Rule 23(a) addresses the petition for writ of supersedeas that arises from the trial court proceedings. The party seeking the writ must have either (1) motioned the trial court for a stay or (2) demonstrated "extraordinary circumstances" which render a motion for a stay to the trial court "impracticable." Unless the Supreme Court initially dockets the case, the writ of supersedeas must be made to the Court of Appeals.

Rule 23(b) addresses the writ of supersedeas that arises from a decision of the Court of Appeals. In this case, no motion for a stay in the Court of Appeals is necessary before petitioning the Supreme Court. Rule 23(c) describes the requirements for the petition. Similar to the other extraordinary writs, the petition must be verified and accompanied by proof of service on all parties to the action. If the petition is filed in the Court of Appeals, it must include a statement showing either: (1) the impracticability of a motion for a stay in the trial court; or (2) the order granting or denying the stay. Rule 23(c) also requires the following contents: (1) statement of facts needed to understand the basis upon which the writ is sought; (2) statement of the reasons why the court should issue the writ "in justice to the applicant;" and (3) supporting affidavits and certified portions of the record that support issuance of the writ.

Rule 23(d) permits other parties to respond to the petition within 10 days of service. Responses must be accompanied by affidavits or certified copies of documents not filed with the original petition as needed. The response must include proof of service of the response on all parties. The rule does not allow a brief or oral argument in response to a petition for writ of supersedeas unless the appellate court so orders.

Under Rule 23(e), applicants for a writ of supersedeas may also apply for a temporary stay of enforcement of the underlying order. This application can be made separately or in the petition for writ of mandamus. If the application for temporary stay is made separately from the petition for writ of mandamus, the application must comport with the filing and service requirements of Rule 23. This order may be issued *ex parte*.

For additional information on appeals, see §6.8 below.

§ 6.2 Motions and Tools Related to Evidence and Witnesses

A. Motion to Quash or Modify a Subpoena

1. When this motion might be used: If the GAL or child has been subpoenaed to testify and the attorney advocate (AA) believes that testifying is not in the best interest of the child, the AA can file a motion to quash or modify the subpoena pursuant to G.S. 1A-1, Rule 45(c)(1), (3) and (5). Such a motion also could be filed if there is an issue with a witness other than the child that would make it problematic for that person to testify or if the GAL or child is subpoenaed to testify at a non-juvenile hearing.

2. Evidence for the motion: The AA will probably need compelling evidence, most likely from a professional, to show why the child or other witness should not have to testify. If the AA has an opportunity to be heard on this motion, he or she would want to call as a witness anyone who could present reasons that the witness should not testify. Whether or not the AA has an opportunity to be heard, the AA should attach to the motion an affidavit of statements by certain professionals or individuals stating why the witness should not testify. In addition, some of the information being sought may be considered work product and therefore privileged in any event. See Volume 1, § 7.2 in this manual relating to the child witness for more information about children's testimony and alternatives to courtroom testimony, such as allowing the child to testify in chambers. In drafting and arguing the motion, it is often effective to follow the statutory (rule)language.

See Appendix for sample motions to quash.

B. Motion for Expert Witness [G.S.7A-454]

The GAL may petition the court to allow the GAL to call an expert witness to be paid by the state if such an expert is necessary for some contemplated dispositional purpose. Normally DSS would call and pay for expert witnesses for its case in chief, but there could be circumstances in which the GAL would need an expert other than the DSS expert at adjudication. The motion must be made in advance of hearing, and the motion must be granted in order for the state to set and pay for the expert's fees. Thus, the AA should identify the expert in advance and get the expert's fee rate. The expert may agree to allow the fee to be set at or after the hearing. This information should be provided to the court with the motion. (See Appendix for samples.)

C. Motion in Limine

Motions in limine are used when there are issues that any party considers not competent or relevant to the child protection case, but which may be brought up in the case. However, a major drawback to using a motion in limine is that the *judge who will hear the case will rule on the motion, thereby giving the judge the very information sought to be excluded.*

D. Motion for Order to Show Cause Why Person Should Not Be Held in Contempt

(See samples in Appendix.)

1. For failure to produce records: This can be used for service providers who refuse to honor the GAL's appointment order powers and turn over records pursuant to a subpoena. Note that the GAL's appointment order itself is not an order directing a specific third party to turn over specific documents. When someone will not turn over documents on the basis of the GAL's appointment order alone, the GAL should address this by issuing a subpoena or a subpoena duces tecum.[4] Until a subpoena has been issued and ignored, the GAL cannot make a motion to show cause.

2. For failure to appear or comply with court orders: G.S. 7B-904(e) addresses the issue of contempt for parents who don't comply with certain court orders under 7B-904. This tool also can be used against a parent who disobeys a juvenile summons and fails to show up in court. A juvenile form is available from the AOC expressly for this purpose.

3. For failure to provide services: When the court orders certain services to be provided by an agency and the agency fails to provide such services, the attorney can consider an order to show cause to compel service delivery.

4. Advantages and disadvantages: An order to show cause may get the parent's (or agency's) attention and prevent further problems. When it comes to a parent who fails to appear, taking this step may be preferable to adjudicating without the parent's presence. Having the real opportunity to be heard and confront witnesses as well as to hear the judgment of the court can prevent problems later. One disadvantage, however, is that some parents do not find a few days in jail to be much of a deterrent; fines and other punitive measures can be substituted for jail in such cases.

E. Depositions

Depositions are governed by Rules 27 - 32 in the Rules of Civil Procedure. Rule 32 and G.S. 8-83 set out the circumstances under which a deposition may be used in court. A deposition may be used as a fact-finding tool and can be helpful in preparing to examine or cross-examine witnesses, or in determining whether a potential witness should be subpoenaed. Sometimes a parent's attorney will wish to depose the child. In most cases subjecting a child to a deposition is not in the best interest; however, it may be that a deposition could prevent the child's testimony at trial and can be done in a more relaxed setting.

F. Notice of Intention to Introduce Hearsay

If any party intends to introduce hearsay that is not or may not be covered by the standard exceptions to the hearsay rule, that party must give advance notice of the intention to introduce hearsay if proceeding under the residual hearsay rule. If the district requires a pretrial conference, this matter should be addressed at that time. The requirements of notice are primarily set out by case law and are covered in § 7.3.E of this manual. See Rules of Evidence 803(24) and 804(5).

[4] See §6.3.F below.

§ 6.3 Motions Related to Access to Information

A. Discovery Motions

If requests for information do not provide the desired results, any party can utilize standard discovery techniques as provided in the Rules of Civil Procedure. However, typical discovery tools are often too slow for child protection proceedings. Also see § 6.2.E above regarding depositions.

B. Regulation of Discovery and Protective Orders [7B-700 and 1A-1, Rule 26(c)]

1. Upon written motion of a party and a findings of good cause, the court may at any time order that discovery be denied, restricted, or deferred. **[7B-700(a)]**

2. The court may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. Thereafter, if the court enters a protective order, the material submitted in camera must be made available to the Court of Appeals in the event of an appeal. **[7B-700(b)]**

3. The GAL should consider the use of a protective order to protect the best interests of a child-client. A protective order can also be sought if a party is attempting to request information out of a confidential GAL file.

C. Motion and Order to Release Information

Attorney advocates are sometimes hampered by confidentiality constraints that prevent the sharing of information that could help a minor client. When there is doubt about whether certain information can be released and it is in the child's best interest to release such information, a motion should be made to obtain an order to release that information. This also can be handled by a specific or blanket clause in the nonsecure order (or any order) that provides for the sharing of certain information between specific individuals. [Also see 7B-3100, which permits certain agencies to share information in juvenile cases, as well as Chapter 1 in this manual relating to confidentiality, discovery, and 7B-3100.] (See samples in Appendix.)

D. Notifying Opposing Parties of Representation of the Child by a Guardian ad Litem

One of the most important roles the GAL may play is that of governing access by other attorneys to the juvenile. The North Carolina Revised Rules of Professional Responsibility, RPC 61 and RPC 249, prohibit certain individuals from talking to the minor victim represented by a GAL without the knowledge and consent of the GAL attorney. These individuals include the respondent parent's attorney, the district attorney and any law enforcement officers acting as agents of the DA, the DSS attorney, and the criminal attorney for a defendant in a criminal case arising from the same fact situation as the juvenile petition. To prevent attempts by counsel to talk to the juvenile, it is useful to send a formal notice of appointment, with a copy of the GAL appointment form and applicable RPCs attached, directly to any other attorneys involved in the case; a copy should be put in the criminal file and in the juvenile file. This clears up any questions later about whether the attorney knew that a GAL attorney represented the juvenile in a related case. (See sample letter in Appendix.)

E. Motion for Access to Substance Abuse Records

All medical records that identify or diagnose a person as a substance abuser, a term that includes alcoholics, or which contain substance abuse treatment records are protected by Title 42, Subchapter A, Part 2 of the Code of Federal Regulations (42 CFR Part 2). Section 42 prohibits the release of such records without an executed "consent to release records" form that conforms to the CFR or through court proceedings under the federal regulations. These federal laws supersede the state statutory investigatory powers of DSS and the GAL and standard discovery procedures. State courts do not have authority to override these regulations through court orders except as provided by 42 CFR, Chapter 1, Subchapter A, Part 2. See Chapter 11 for detailed information as well as § 1.9.A.2 for a recommended procedure to follow, and the Appendix for sample motions, orders, and forms.

F. Motion for Access to School Records and FERPA

The Family Educational Rights and Privacy Act (FERPA) is a federal law that protects the privacy interests of parents and students with regard to education records. It applies to public elementary and secondary schools and virtually every postsecondary institution in the country. FERPA protects educational records unless a parent of a child under 18 or a student 18 or older consents to release. However, the law states a number of exceptions setting forth circumstances under which educators do not need prior consent to release. FERPA does not govern an educator's decision to share information concerning students based on his or her personal knowledge or observation, provided the information does not rely on the contents of an education record. [FERPA: 20 U.S.C. Sec. 1232g][5] For detailed information on FERPA, see Chapter 11 in this manual, as well as the Appendix.

G. Subpoena for Production of Documentary Evidence ("Subpoena Duces Tecum")

[G.S. 1A-1, Rule 45(c)]

This kind of subpoena commands a person to appear and produce the records, books, papers, documents or tangible items designated therein. The details of such a subpoena are governed by G.S. 1A-1, Rule 45(c). To address problems getting witnesses to cooperate with a request to produce documentary evidence, or to simply ensure that witnesses bring all relevant documents with them to court, attorney advocates should issue this type of subpoena. It is important to remember, however, that such a subpoena still does not guarantee that a witness will produce the necessary evidence.[6]

§ 6.4 Motions Related to Services and Placement

A. Motions for Prehearing Services to Child or Parents

It is not unusual for children or families to need services prior to adjudication. This can be a difficult time because families may not want services, and, because the petition has not yet been adjudicated, the court does not have the same authority over parents that it has after adjudication. When DSS faces reluctant or uncooperative parents or is unsure whether a petition will be upheld by the court, the agency may be cautious about the extent to which it can provide services or obtain compliance with a protection or service plan. If there is a nonsecure custody order, any party can make a motion to the court under

[5] Resource for FERPA information: Shay Bilchik, "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," Program Report released by the U.S. Department of Justice and the U.S. Department of Education, June, 1997.

[6] See § 6.2.D above regarding a motion to show cause why one should not be held in contempt for failure to respond to a subpoena.

G.S. 7B-506 for an order providing for services or other efforts aimed at returning the juvenile home promptly. Arguably, any party can make a motion for provision of any service that a juvenile under the jurisdiction of the court may need prior to adjudication under this provision. Note that in the absence of a nonsecure custody order, there is no authority or mechanism for such motion or order.

B. Motion for Review to Address Needed Services

If there is a need to have the court examine issues related to services, any party may make a motion to have the abuse, neglect, or dependency case reviewed. For example, if the GAL believes that a child is not getting necessary services and has been unable to obtain those services for the child, the GAL can make a motion to have the case heard. At the review hearing, the GAL could put on evidence concerning the needed services and seek a court order to obtain those services.

C. Motions and Tools to Address Placement

If the GAL wants to address the court concerning placement, the GAL may request a review hearing to address those issues. The GAL should not hesitate to subpoena witnesses who can testify about the best placement for the child. Remember that 7B-905(d) requires DSS to give the GAL notice of its **intent** to change placement of a child, unless *extraordinary circumstances* exist, in which case seventy-two (72) hours notice of the change must be given. In the event that the GAL disagrees with the placement change and is attempting to prevent DSS from moving a child and cannot get a regular review hearing soon enough, the GAL may want to consider other avenues such as those outlined in § 6.6 below.

§ 6.5 Motions and Tools to Address Procedural Issues

A. Amendment of Petitions

Amendment of petitions is controlled by G.S. 7B-800, which states, "The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based." Note that the statute differs from Rule 15 of the Rules of Civil Procedure about amended and supplemental pleadings. The case law involves only delinquency proceedings under the old statute.

B. Pretrial Conference Order

If there is a pretrial conference, it is wise to put the matters covered and determined in the form of a pretrial conference order. Often the need to change the petition arises because further investigation reveals that the facts differ from what was alleged initially, or new information is discovered or revealed, giving rise to a different allegation. In these instances, it may be necessary to file a new petition.

C. Stipulation as to Facts

If the parties can agree in advance on any of the facts or issues, to save time in court, they should reduce the agreement in writing and provide it to the judge.

§ 6.6 Seeking Immediate Action

[*In addition to the explanation below, see G.S. 1A-1, Rule 65, and case citations in an annotated version of this statute for more details and procedural requirements;* ***also see Appendix for samples****.]*

Relationship between an injunction and a restraining order: A party can try to obtain a temporary restraining order and also move for a preliminary injunction, in which case a hearing on the preliminary injunction should be heard as soon as possible. **(See G.S. 1A-1, Rule 65.)**

A. Injunctions [G.S. 1A-1, Rule 65(a)]

1. Notice to the adverse party and a hearing are required with a preliminary injunction (unlike a temporary restraining order).

2. The decision of whether to grant the injunction is within the judge's discretion. See *Lambe v. Smith,* 11 N.C. App. 580 (1971).

3. Purpose of a preliminary injunction is to preserve the status quo pending hearing on the merits. *Setzer v. Annas,* 286 N.C. 534 (1975), *Pruitt v. Williams,* 288 N.C. 368 (1975).

4. Distinction between prohibitory and mandatory injunctions: A prohibitory injunction seeks to preserve the status quo pending a determination of the issues by restraining the party from doing particular acts. A mandatory injunction restores the status quo and requires action by a party. A mandatory injunction is comparable in nature and function to a writ of mandamus and ordinarily will be granted only where the injury is immediate, pressing, irreparable, and clearly established. *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634 (1972).

5. Grounds for preliminary injunction

a. Probable cause that plaintiff will be able to establish the right he asserts, and

b. Reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or appears reasonably necessary to protect plaintiffs' rights during the litigation. *See Setzer v. Annas*, 286 N.C. 534 (1975), *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co*., 15 N.C. App. 634 (1972).

6. Example situations for utilizing an injunction: to prevent a parent from discussing allegations with a child so that the evidence will not be tainted or the child influenced; to prevent a caretaker or custodian from returning the child to a parent; to prevent DSS or others from placing the child in placement the GAL considers inappropriate or harmful; to prevent one from concealing or destroying evidence, or to prevent one from withholding information.

7. Advantages and disadvantages of utilizing injunctions: one advantage is that it can be an effective, forceful tool that sends a strong message that can prevent harm to children. The disadvantages include that they are time consuming with immediate deadlines, andcourts may be reluctant to enter injunctions, particularly against a public agency.

B. Temporary Restraining Order (TRO) [G.S. 1A-1, Rule 65(b)]

1. Purpose

To preserve the status quo pending a full hearing. See *Huff v. Huff*, 69 N.C. App. 447 (1984). [Note that G.S. Section 50B proceedings for domestic violence often involve restraining orders, and those statutes should be consulted where domestic violence is involved.]

2. Criteria

A TRO may be granted without notice to the adverse party but must meet the following criteria: If it is clear that **immediate and irreparable injury, loss, or damage** will result to the applicant before notice can be served and a hearing had thereon, shown from specific facts in an affidavit or verified complaint.

3. Duration of TRO must be specified and cannot exceed 10 days.

4. Example situations for utilizing a restraining order

This is a useful tool to prevent parents or caretakers from tainting evidence by talking to children about their alleged abuse, trying to get them to retract statements, or doing anything else that interferes with the case or is disruptive to the child**.** Other examples include prevention or removal of visitation; keeping the alleged perpetrator from having contact with the child or with a parent; preventing removal of a child from current placement or from school.

§ 6.7 Seeking Relief from a Ruling or Judgment

A. Modifying or Vacating a Judgment

1. Authority to modify or vacate. G.S. 7B-1000 states, "Upon motion in the cause or petition, and after notice, the judge may conduct a review hearing to determine whether the order of the court is in the best interest of the juvenile, and the judge may modify or vacate the order in light of changes in circumstances or the needs of the juvenile."

"In any case where the judge finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated." **[7B-1000(b)]**

Note that **G.S. 1A-1, Rule 59** provides an avenue for seeking to have the court open the judgment, hear new evidence, and make modifications on that judgment, but Rule 59 would be used only when the statute within the Juvenile Code, such as 7B-1000, is not applicable.

2. Motion to amend judgment. If the issue is that the order entered is missing necessary findings of fact, then a motion can be made pursuant to **G.S. 1A-1, Rule 52(b)** as follows: "Upon motion of any party made **not later than 10 days** after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion can be made with a motion for a new trial pursuant to Rule 59."

B. Relief from Judgment or Order [G.S. 1A-1, Rule 60]

1. Reasons for a motion for relief under Rule 60: An attorney can make a motion for relief from the operation of a final judgment under Rule 60. Rule 60(b) lists several reasons for such a motion, including the following:

a. mistake, inadvertence, surprise, or excusable neglect;
b. newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
c. fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
d. the judgment is void;
e. the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment have prospective application; or
f. any other reason justifying relief from the operation of the judgment.

2. Must be on a final judgment or order: A 60(b) motion can be made only on a "final" judgment or order. The Juvenile Code, in explaining the right to appeal (7B-1001), states that a final order includes any order modifying custodial rights; any order finding absence of jurisdiction; any order of disposition after an adjudication of abuse, neglect, or dependency; and any order that in effect determines the action and prevents a judgment from which appeal might be taken.

a. In *In re Brenner*, 83 N.C. App. 242 (1986), an order was considered final where it changed the custody of juveniles adjudicated neglected from the mother to the custody of DSS and scheduled another review.

b. In a domestic case involving a 60(b) motion, the Court of Appeals stated that a custody order was final even though it was changeable. *Dishman v. Dishman*, 37 N.C. App. 543 (1978), *overruled on other grounds*, *Pulliam v. Smith*, 348 N.C. 616 (1998).

c. There are also cases in which an appeal was made from an order entered in a review hearing, as opposed to a disposition hearing, and there was apparently no problem with the order being "final." See *In re Chasse*, 116 N.C. App. 52 (1994), *In re Reinhardt*, 121 N.C. App. 201 (1995) [overruled on other grounds]. In the case of *In re Hawkins*, however, the order was not considered "final" because the court "had not ruled on all matters raised in the petition," failing to refer to the dependency allegation raised in the petition. *In re Hawkins*, 120 N.C. App. 585 (1995). *But see In re B.N.H.*, 170 N.C. App. 157 (2005)(holding that a permanency planning order that did not modify custodial rights was not a final order under 7B-1001).

3. A 60(b) motion does not affect the finality of a judgment nor suspend its operation. (See G.S. 1A-1, Rule 62 regarding stay of proceedings pending a 60(b) motion.)

4. Criteria for deciding on a 60(b) motion: While 60(b)(6) appears to be a "catch-all" reason for relief from judgment, case law has stated that a trial judge should set aside judgment under 60(b)(6)

only "where (1) extraordinary circumstances exist and (2) there is a showing that justice demands it." *Howell v. Howell*, 321 N.C. 87, 91 (1987), *rev'd on other grounds* in *Stegall v. Stegall*, 336 N.C. 473 (1994); *Baylor v. Brown*, 46 N.C. App. 664, 670 (1980). *Baylor v. Brown* also sets out certain factors that a court should consider in granting a 60(b)(6) motion.

5. Appropriateness of motion

a. In the case *In re Wheeler*, 87 N.C. App. 189 (1987), the court stated that "the proper avenues for Respondent to attack the adjudication of neglect and abuse and the dispositional order granting custody to Petitioner were 1) appeal, pursuant to N.C. Gen. Stat. Sec. 7A-666 [now 7B-1001], or 2) a motion for relief pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 60."

b. For a private custody case involving a Rule 60 motion, a motion for temporary stay, and a writ of supersedeas, see *Sharp v. Sharp*, 124 N.C. App. 357 (1996).

6. Jurisdiction after appeal: Regarding jurisdiction to consider a Rule 60 motion after an appeal has been taken, see *In re Scearce*, 81 N.C. App. 662 (1986).

7. Timing

a. There is more leeway with a motion under this rule than under Rule 59. Under Rule 60, it can be made "within a reasonable time, and for reasons 1 - 3 not more than one year after the judgment, order or proceeding was entered or taken."

b. A motion made pursuant to Rule 60 does not toll the time for filing notice of appeal from the underlying judgment. *Mitchell County DSS v. Carpenter*, 127 N.C. App. 353 (1997). (Mitchell involved a situation where the mother in a termination of parental rights case was making a Rule 60(b) motion based on excusable neglect.)

There is a great deal of case law relating to Rule 60, and the reader should become familiar with such law when utilizing this rule. Consulting an annotated version of Rule 60 is recommended.

See G.S. 1A-1, Rule 62, Stay of Proceedings, below, for obtaining a stay pending the decision on a Rule 60 motion.

C. Motion for a New Trial [G.S. 1A-1, Rule 59]

1. Reasons for a New Trial: Rule 59 sets out specific reasons for getting a new trial on all or part of the issues, including the following:

a. any irregularity by which any party was prevented from having a fair trial;
b. misconduct of the jury or prevailing party;
c. accident or surprise that ordinary prudence could not have guarded against;
d. newly discovered evidence material for the party making the motion that he could not, with reasonable diligence, have discovered and produced at the trial;
e. manifest disregard by the jury of the instructions of the court;
f. excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
g. insufficiency of the evidence to justify the verdict or showing that the verdict is contrary to law;

h. error in law occurring at the trial and objected to by the party making the motion; or
i. any other reason heretofore recognized as grounds for new trial.

2. Advantages and disadvantages of a Rule 59 motion: One advantage is that in the event of an error that cannot be addressed any other way, a motion for a new trial may be the only possible relief. Obvious disadvantages of a completely new trial include the delay in the process and having the child wait longer, plus loss of witnesses and poorer recollection by witnesses. This remedy is probably not advisable if what is needed is another chance to argue the case or to argue reasons that the decision was wrong; such a motion essentially asks the judge who made the ruling to change his or her original judgment (an admission of error, in a sense), and the judge is unlikely to do so without a new reason.

3. Timing and service: A motion for a new trial or to amend the judgment shall be served not later than 10 days after entry of the judgment. See Rule 59 for details regarding timing and service.

There is a great deal of case law relating to Rule 59 which should be consulted when utilizing this rule.

See Rule 62, Stay of Proceedings, below, for obtaining a stay pending the decision on a Rule 59 motion.

D. Extraordinary Writs [7]

1. Writ of certiorari [Rule 21 of the Rules of Appellate Procedure]

a. A writ of certiorari is used for

i. review of the judgments and orders of trial tribunals by the court of appeals or the state supreme court in the following circumstances:
- when the right to appeal has been lost for failure to take timely action,
- when no right of appeal from an interlocutory order exists, or
- for review of an order denying a motion for appropriate relief pursuant to G.S. 15A-1422(c)(3).

ii. review of the judgments and orders of the court of appeals by the state Supreme Court
- when the right to appeal or petition for discretionary view has been lost by failure to take timely action;
- or when no right of appeal exists.

b. "Appropriate circumstances" are required, and cases under the old law discussed appropriate reasons for granting a writ (sometimes discussing whether an excuse for missing filing deadline was sufficient, etc. . . .) See annotations that follow Rule of Appellate Procedure 21.

c. Details regarding filing, service, and content are contained in Rule 21 of the Rules of Appellate Procedure.

2. Writ of mandamus and prohibition [Rule 22 of the Rules of Appellate Procedure]

[7] Also see § 6.1(D) covering appellate motions, including extraordinary writs.

a. Which court to petition: A petition for the writ of mandamus or prohibition is filed with the court to which appeal of right might lie from a final judgment. See Rule of Appellate Procedure 22 for details on service requirements, contents of the petition, and other procedural information.

b. Definition and reasons for a writ of mandamus

i. This writ may be sought in order to seek to have the appellate court compel or command the trial judge to perform a particular act specified, usually ministerial act or mandatory duty. It is usually issued in response to abuses of judicial power, where a judge refuses to take some action he or she is required to take, or takes some action he or she is not empowered to do.[8] An action for a writ of mandamus lies only where the plaintiff shows a clear legal right to the action demanded and has no other adequate remedy. *Snow v. N.C. Board of Architecture*, 273 N.C. 559, 570 (1968).

ii. *Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 384 (1980): **"The technical distinction between a writ of mandamus and an injunction** is that ordinarily a writ will not issue unless there has been an actual default of a clear legal duty, as distinguished from a threatened or anticipated omission to act, in which case injunction, and not mandamus, is the appropriate remedy. 52 Am. Jur. 2d Mandamus s 9 (1970). Also, the mandatory injunction is distinguished from the mandamus, in that the former is an equitable remedy operating on a private person while the latter is a legal writ to compel the performance of an official duty." (citing *Ingle v. Stubbins*, 240 N.C. 382 (1954).)

iii. "Mandamus is the proper remedy to compel public officials to perform a purely ministerial duty imposed by law; it generally may not be invoked to review or control the acts of public officers respecting discretionary matters. (*Citing Hospital v. Joint Committee*, 234 N.C. 673 (1952)). However, mandamus will lie to review discretionary acts when the discretion appears to have been abused or the action taken arbitrarily, capriciously, or in disregard of law." (Citing *Ponder v. Joslin*, 262 N.C. 496 (1964); *Pue v. Hood*, 222 N.C. 310 (1942)). *In re Alamance County Court Facilities*, 329 N.C. 84, 104 (1991).

c. Definition and reasons for writ of prohibition

A writ of prohibition is the process by which a court of superior jurisdiction prevents an inferior court from exceeding its jurisdiction in matters over which it has powers, or usurping matters not within its jurisdiction to hear or determine. The writ of prohibition is directed to the judge, commanding him or her to cease from performing certain actions. A writ of prohibition might be applied for where a motion has been made to a trial judge to recuse himself or herself on the basis of interest or bias, and the judge has refused to do so.[9]

d. Timing: According to Rule of Appellate Procedure 22, the petition should be filed "without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused."

[8] Janice Perrin Paul, *The Appealing Attorney: The Appellate Process in Juvenile Cases*, prepared for a conference titled "Collaboration on Behalf of the Child," sponsored by the Guardian ad Litem Program, July 1994.
[9] *Id.*

3. Writ of supersedeas [Rule 23 of the Rules of Appellate Procedure]

a. Which court to petition: Unless initially docketed in the supreme court, application for a writ of supersedeas must be made to the court of appeals (unless seeking relief from a ruling of the court of appeals). See specific language in Rule 23(a)(2) and (b).

b. Purpose/circumstances: The purpose for a writ of supersedeas is to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal under the following circumstances:

- when such judgment is not automatically stayed by the taking of appeal or 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.

c. Temporary stay: Pending a determination on the writ of supersedeas, an application can be made for a temporary stay, and for good cause shown, the court may issue an order for a temporary stay ex parte.

d. Details concerning filing, service, content, response, etc. are explained in Rule 23 of the Rules of Appellate Procedure.

E. Appeals

Obviously, an appeal is another avenue for seeking relief from a judgment. See Appeals in § 6.8, directly following this section.

§ 6.8 Appeals [10]

* This section on appeals is a summary of participation in a Guardian ad Litem appeal. For a comprehensive understanding of Guardian ad Litem appeals, please see Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals*, which is available from the Guardian ad Litem State Office. Attorney advocates should be aware that GAL Program Policy requires state office approval for appeals. In addition, the Guardian ad Litem Program has an Appellate Coordinator and a Pro Bono Project to help with appeals. Please contact the GAL State Office for assistance with appeals.

A. Expedited Appeals Procedure

A new expedited appeals process for Guardian ad Litem appeals became effective in May 2006. The new Rule 3A of the N.C. Rules of Appellate Procedure explains the changes of which you should be aware. In its entirety, Rule 3A provides the following:

[10] This section on Appeals was drafted and edited by Pamela N. Williams, GAL Appellate Coordinator. Some material remains from the 2002 edition from materials adapted from Janice Perrin Paul, *The Appealing Attorney: The Appellate Process in Juvenile Cases*, prepared for a conference titled "Collaboration on Behalf of the Child," sponsored by the Guardian ad Litem Program, July 1994.

Rule 3A. Appeal in qualifying juvenile cases -- How and when taken, special rules.

(a) Filing the notice of appeal. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/r neglect, appealable pursuant to G.S. 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the general Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the special pro visions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) Special provisions. For appeals filed pursuant to this rule and for extraordinary writs filed incases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced only by the use of initials in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to subdivision (b)(1) below or Rule 9(c).

In addition, appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) Transcripts. Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcript to the case. Within thirty-five days from the date of the assignment, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the office of the Clerk of the Court of appeals and provide copies to the respective parties to the appeal at the addresses provided. 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.

(2) Record on Appeal. Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:

1. a notice of approval of the proposed record;
2. specific objections or amendments to the proposed record on appeal, or
3. a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the Clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the Clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the Clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:

1. the appellant shall file his or her proposed record on appeal, and

2. an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the Clerk of the Court of Appeals as provided herein.

(3) Briefs. Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the Clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(c) Calendaring priority. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

N.C. R. App. P. 3A (2007).

The new Rule 3A shortens the length of GAL appeals by a year or more, marking a major step forward in expediting permanency for the children GAL represents. GAL attorneys should pay particular attention to Rule 3A's two most important timesaving features: Production of the transcript under Rule 3A(b)(1) and of the record on appeal under Rule 3A(b)(2).

Under Rule 3A(b)(1), the AOC Court Reporting Coordinator assigns the transcriptionist to the appeal. The transcriptionist must then deliver the transcript within 35 days to both parties and the Court of

Appeals. Any motions for extension of time to complete the transcript are now filed in the Court of Appeals, rather than in the trial court. Although this requirement is not clearly stated in Rule 3A, it is implied in the text of the Rule. The Court of Appeals has, by ruling on such motions to extend even though the appeal has not yet been docketed in the Court, acknowledged this requirement. Motions to extend the time to produce the transcript are filed by counsel for appellants, not the transcriptionist.

Rule 3A(b)(2) requires the appellant to serve the proposed record on appeal upon all other parties on appeal within 10 days after receiving the transcript. These parties must then submit any objections to the proposed record within 10 days of receiving it from the appellant. If the parties agree to the settled record within 20 days after the appellant received the transcript, or if the appellee serves neither notice of approval nor objection to the proposed record, then the duty falls on the appellant to file three copies of the record with the Court of Appeals. However, if the parties cannot agree to a settled record within 30 days after the appellant's receipt of the transcript, then the appellant must file the proposed record, and the appellee must file any objections or amendments or the proposed alternative record on appeal.

The rule speeds up the appeals process in two other provisions. First, absent extraordinary circumstances, the court will not grant extensions of time to prepare the transcript, record and briefs. In the past, these areas led to huge delays. Also, Rule 3A gives "calendaring priority" to GAL cases. Unless otherwise ordered by the Court of Appeals, the rule limits cases to being heard only on the record and briefs – without oral argument.

The briefing schedule remains essentially the same as it was under Rule 3, with one important exception. Under Rule 3A(b)(3), the appellant's brief is due within 30 days after the settled record has been filed with the appellate court. In the past, the date the record was mailed to the parties triggered the 30-day briefing schedule. Finally, Rule 3A requires that both the appellant and the appellant's attorney sign the notice of appeal. The rule also prohibits trial counsel from withdrawing from the case until the record has been filed with the appellate court.

B. Preserving the Record on Appeal

1. The appellate court will only review a claim, defense, or theory that is presented in the trial court.

2. An error by the trial court will not be reviewed in the absence of a timely objection setting forth the specific grounds on which it is based. (See Rule of Appellate Procedure 10.)

a. Rule 46 of the Rules of Civil Procedure governs the instances in which objections must be made in order to preserve an exception on appeal. Objections need to be made regarding the admissibility of evidence. It is wise to be very familiar with Rule 46.

b. With respect to rulings and orders not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. A party need only apprise the court of the objection to the court's action or make known the action he/she desires the court to take and the ground therefor; however, if a party has no opportunity to object or except to a ruling when made, the absence of an objection/exception does not prejudice the party. G.S. 1A-1, Rule 46(b)

c. The "plain error doctrine" is not applicable to civil cases. *In re Gleisner*, 539 S.E.2d 362 (2000). (A "plain error" is a fundamental error that is so prejudicial as to result in a miscarriage of justice or in the denial to appellant of a fair trial, and justifies relief on appeal though not objected to in the trial court.) *Id*.

3. See Rule of Appellate Procedure 9 regarding the composition of the record on appeal.

4. Practical advice on preserving the record

a. Admit all relevant evidence, both documentary and testimonial. Remember that argument is not evidence.

b. Object and state the grounds for the objection. A specific objection will preserve the evidentiary error on appeal to the extent of the particular objection; a general objection raises only the objection of relevancy and waives any other ground for exclusion. (See 1 Wigmore, Evidence, Sec. 18.)

c. Move to strike a question or answer when appropriate, especially when the question is asked and answered before you have a chance to object. Failure to do so will constitute a waiver on appeal.

d. Avoid producing evidence that you objected to as inadmissible. If you object to inadmissible evidence and then produce similar evidence through your own witnesses, you will be deemed to have waived your objection. However, you may object to the testimony of a witness and then cross-examine that witness to the extent that your cross is limited to explaining or rebutting the improper evidence.

e. Make an offer of proof to preserve for review an error in excluding evidence. When making an offer of proof, state for the record the legal basis for the admissibility of the evidence offered. This includes stating what the evidence would have tended to show or to what the witness would have testified. (See G.S. 1A-1, Rule 43.)

f. Don't use a motion in limine as a substitute for objections. A pretrial motion in limine cannot serve as a substitute for making timely trial objections.

g. Generally insist that everything be on the record. Politely resist "at the bench" or "in chambers" conferences – or make sure that such discussions are recorded by the court reporter, or have the court or a party summarize on the record the substance of the off-the-record conference.

h. Request a ruling if the judge fails to rule on a motion or objection, and ask for clarification of ambiguous rulings.

i. Make motions in writing whenever possible. File a supporting brief or memorandum of law if necessary.

j. Make an on-the-record checklist of exhibits admitted into evidence.

k. State your objection on the record to such things as egregious nonverbal behavior by opposing counsel or the trial judge.

l. Review proposed orders carefully. Make sure all relevant facts and conclusions are incorporated into the order.

m. Ensure that all reports are incorporated into the order and made a part of the record. Be sure that the GAL's recommendations are expressly made a part of the order. Even if the court does not order what the GAL recommended, or does not want to incorporate the report, ask that the order recite what the GAL recommended or objected to.

C. When Not to Appeal

Practical advice: Do not appeal just because you are angry with the other side. Don't appeal when you disagree with the judge's decision but are satisfied there are no grounds for reversible error. Don't appeal procedural or technical errors in a final order if the evidence would support the order, or on remand the judge would find the omitted facts. Don't appeal when the issue is not important and does not advance an ultimate goal in the case; appeal only if you would have a different result if you won the appeal.

D. Appropriate Courtesy to Trial Judge on Appeal

Practical advice: When possible, it is best to avoid surprising the judge in his or her courtroom at the end of the case with your intent to appeal. Filing a written motion for a court reporter or giving the judge a memorandum of law prior to hearing that indicates that the issue before the court is important might alert the judge to the possibility of an appeal. Send the judge a copy of the appellate documents and materials.

E. Appeals of Rulings Made Pursuant to Abuse, Neglect and Dependency Proceedings

1. Proper Parties to Appeal. Under §7B-1001, those who may appeal a final order under §7B-1001 include the juvenile, a county department of social services, a parent, guardian or custodian; and any party who sought but failed to obtain a termination of parental rights.

2. Proper Order to Appeal. Under § 7B-1001, only a final order can be appealed. These orders include the following: (a) any order finding absence of jurisdiction; (b) any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken; (c) any initial order of disposition and the adjudication order upon which it is based; (d) any order, other than a nonsecure custody order, that changes legal custody of a juvenile; (e) any order relieving D.S.S. of reunification efforts; and (f) any order terminating parental rights or denying a petition/motion for termination of parental rights.

The order from which the appeal flows must be entered at the trial court, meaning it must be "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2007).

3. Notice of Appeal. The notice of appeal must be signed by both the attorney (if any) and the appealing party. N.C. R. App. P. 3A. The appellant has 30 days to appeal an order.

F. Appeals from Termination of Parental Rights Orders

1. Right to Appeal. The following parties may appeal a termination of parental rights order: the juvenile, a county department of social services, a parent, guardian or custodian; and any party who sought but failed to obtain a termination of parental rights.

2. Timing and Notice. The appellant has 30 days to file a notice of appeal and must serve all parties as is customary.

G. Other Important Requirements for All Appeals: The Rules of Appellate Procedure [11]

The Rules of Appellate Procedure are mandatory and failure to follow them subjects an appeal to dismissal. *See State v. Hart*, 361 N.C. 309; 644 S.E.2d 201 (2007); *Viar v. N.C. Dept. of Transportation*, 359 N.C. 400, 610 S.E.2d 360 (2005).

1. Filing the Notice of Appeal. Pursuant to Rule 3A, as noted above, the appellant must also sign the notice of appeal, along with counsel, if any. In addition, all documents referring to the juvenile must not include his/her name, address, social security number and date of birth. Refer to the juvenile with his/her initials or use a pseudonym.

2. DSS and GAL Joining on Appeal. When GAL and DSS have the same position on appeal, it is appropriate and wise for them to join on appeal, which will lessen the time the appellate judge and clerks will spend learning that position. It is not uncommon for the two parties to join and share the duties in authoring the joint brief. However, if GAL differs at all from the DSS position, the GAL attorney advocate should prepare his/her own full-length brief, as GAL is a party to the action. The GAL brief is on behalf of the children involved in the case. *See* N.C. R. App. P. 28 for an explanation on what should be in an appellant and appellee brief.

3. Preparation of the transcript and record on appeal shall be pursuant to Rule 3A, as set out above, which provides timelines that are <u>different</u> from other civil appeals.

4. For pointers on how to write an effective GAL brief and what to do for oral arguments, please see Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

5. The appendices to the Rules of Appellate Procedure are extremely useful. They provide specific charts and examples to assist attorneys in meeting the requirements of the Rules. See also the timetables for juvenile appeals in Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

§ 6.9 Stay of Proceedings Pending Judgment

A. Stay of Proceedings, Disposition Pending Appeal

[See statutes for more details.]

1. Disposition pending appeal

a. In nontermination proceedings: Pending disposition of an appeal, the judge may enter a temporary order affecting the custody or placement of the juvenile for compelling reasons, which must be stated in writing, as the judge finds to be in the best interest of the juvenile. When the child has suffered physical abuse by one with a history of violent behavior, the court shall consider the opinion of the mental health professional who performed an evaluation under 7B-503(b) before returning the juvenile to the custody of that individual. For placement in foster care, the provisions of subsections (b), (c), and (d) of G.S. 7B-905 shall apply to such order. **[7B-1003]**

[11] For an in-depth discussion of the Rules of Appellate Procedure and Guardian ad Litem appeals, please consult Williams and Gruber, *The Survivor's Guide to Guardian ad Litem Appeals* (2007).

b. In termination proceedings: "Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State." **[7B-1113]**

2. Automatic stay of proceedings for all judgments until time to appeal has expired [G.S. 1A-1, Rule 62(a)]

Judgments shall not be executed nor proceedings be taken for enforcement of judgment until expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment.

3. Stay upon appeal, application for relief from denial of stay [G.S. 1A-1, Rule 62(d), Rule of Appellate Procedure 8]

a. When an appeal is taken, the appellant may obtain a stay of execution. (See G.S. 1A-1, Rule 62(a) and G.S. 7B-1003.)

b. Procedure for seeking relief for denial of a stay is set out in Rule 8 of the Rules of Appellate Procedure.

B. Stay on Motion in the Trial Court for New Trial, Amendment, or Relief from Judgment [Rule of Civil Procedure 62(b)]

The trial court may stay the execution of proceedings in its discretion and on such conditions for the security of the adverse party as are proper, pending the disposition of a motion made under the following rules:

- New trial or to amend a judgment (Rule 59)
- Motion for relief from a judgment (Rule 60)
- Motion for judgment (Rule 50)
- Motion for amendment to the findings (Rule 52(b))

CHAPTER 7
EVIDENCE RELATING TO ABUSE, NEGLECT AND DEPENDENCY PROCEEDINGS

Table of Contents

Sec.

§ 7.1 Introduction

This Chapter on evidence attempts to highlight some of the major issues that a GAL attorney advocate (AA) might face in the course of representing child clients.[1] Rules of evidence are discussed in this Chapter and some of the major cases that explain those rules are also mentioned or discussed.

Case law is essential in explaining the applicability of complex rules of evidence to various factual circumstances. Many cases involving child victims are appealed, so there is a great deal of case law addressing evidentiary matters in such cases. ***However, the vast majority of case law relating to evidentiary matters involving child victims comes from the criminal context.*** Normally, these criminal cases can still be appropriately used to provide direction in civil matters, because the evidentiary rules and issues are the same in the criminal and civil context. One issue that separates criminal evidence from civil in these cases, however, is that of confrontation; the confrontation clause of the Sixth Amendment states that it applies specifically to criminal prosecutions. [See § 7.2.E below discussing confrontation rights.] When applying principles from criminal cases to civil cases, it is always important to remember the difference in what is at stake in each case, because that is where different lines may be drawn with respect to the constitutional rights of the parties involved.

§ 7.2 The Child Witness

A. Introduction

Whether or not to have a child testify is a major decision that some GALs and attorney advocates must make. Whether the child will be an effective witness, whether the child will be traumatized, how to get the child's testimony in a nontraditional setting, and how to prepare the child are all important issues that must be considered. There is a tremendous amount of literature on the topic of children as witnesses. One who desires further information on this topic should have no problem locating books, law journal articles, psychological journal articles, and other resources addressing this issue.

B. Competency [Rule 601]

1. Definition of competency: Under Rule 601(a) of the Rules of Evidence, "Every person is competent to be a witness except as otherwise provided in these rules." Under 601(b), "A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth."

> The test of competency is whether the witness understands the obligation of an oath or affirmation and has sufficient intelligence to give evidence that will assist the jury in reaching its decisions. *State v. Higginbottom*, 312 N.C. 760 (1985).

[1] A primary resource for this chapter was initially an evidence outline written by Ilene Nelson, 1998. Some material here was reproduced from that outline. NOTE: This chapter will discuss common evidentiary issues that arise in abuse, neglect, and dependency proceedings, focusing on issues unique to such proceedings. This chapter is not intended to be a general guide to all areas of evidence in juvenile or civil court. See Chapter 12 on ethics for more information about children in court.

2. Procedure

a. Voir dire, findings of fact, and conclusions of law:

A voir dire hearing is the typical method of determining competency. Through voir dire, a thorough examination of the witness may be made on specific matters relating to competency without mixing in other matters in the case. This allows a determination of competency to be made prior to any other questioning of the witness in the case in chief. In the case of a child, such a hearing might be made in a more informal setting, such as the judge's chambers.

Failure to conduct a voir dire hearing and make specific findings of fact and detailed conclusions of law regarding competency might be considered only harmless error, if error at all, since every witness is presumed competent. See *State v. Eason*, 328 N.C. 409 (1991); *State v. Huntley*, 104 N.C. App. 732 (1991); *State v. Gilbert*, 96 N.C. App. 363 (1989) *State v. Gilbert*, 96 N.C. App. 363 (1989); *State v. Spaugh*, 321 N.C. 550 (1988); *State v. Rael*, 321 N.C. 528 (1988).

Examples of voir dire questions for a child to establish competency:

- What is your name?
- How old are you?
- Where do you live?
- What are the names of the people in your family?
- How old are [the people in your family]?
- Where do you go to school?
- What is your favorite subject at school?
- Do you know what it means to tell the truth?
- What happens if you don't tell the truth?

b. Personal observation is necessary: *State v. Fearing*, 315 N.C. 167 (1985), says that a judge must not enter an order about incompetence without seeing the child and making findings. In *Fearing*, the attorneys had stipulated to such incompetence, and this was found to be in error.

c. Only the trial court has discretion to determine competency: The determination of competency is within the discretion of the trial court, which has the opportunity to observe and examine the witness. *See, e.g.*,; ; *In re Clapp*, 137 N.C. App. 14 (2000); *State v. Ford*, 136 N.C. App. 634 (2000); *State v. Jenkins*, 83 N.C. App. 616 (1986), *cert. den.*, 319 N.C. 675 (1987); *State v. Fields*, 315 N.C. 191 (1985). **Parties cannot stipulate to competency or incompetency**. The judge must make that determination after personal observation and examination. *See, e.g.*, *State v. Fearing*, 315 N.C. 167 (1985).

3. Criteria for competency

Note: Many cases discuss competency of a child witness and the following are merely a few on this subject. Consult casenote citations in an annotated version of the statutes for more cases.

a. The fact that a child fidgets, is inconsistent, forgets, or is not a great witness does not make him or her incompetent, as these factors go to weight and credibility rather than admissibility. *See, e.g.*, *State v. Ward*, 118 N.C. App. 389 (1995).

b. Religious perspective: In *State v. Weaver*, 117 N.C. App. 434 (1994), it was not necessary that a child understood the obligation to be truthful from a religious perspective, only that the child understood the obligation to be truthful. *See also State v. Ford*, 136 N.C. App. 634 (2000).

c. Mental/physical capacity or retardation: In *State v. DeLeonardo*, 315 N.C. 762 (1986), the court addressed the issue of incompetency with a nine-year-old boy who was mildly retarded, discussing the issue of mental capacity (such as retardation) as it relates to competency, and upholding the finding of competence. In *State v. Washington*, 131 N.C. App. 156 (1998), the court of appeals supported a finding of incompetency of a victim with cerebral palsy based on her impaired ability to speak, which made it difficult to understand her.

d. Age: "There is no age below which one is incompetent, as a matter of law, to testify." *State v. Turner*, 268 N.C. 225, 230 (1966). *See also State v. Rael*, 321 N.C. 528 (1988) and *State v. Cooke*, 278 N.C. 288, 290 (1971)(citing the United States Supreme Court's statement that there is no precise age to determine competency but that "no one would think of calling as a witness an infant only two or three years old." *Wheeler v. U.S.*,159 U.S. 523 (1895)).

- Obviously, a child needs to at least be able to communicate, and a two or three-year-old who cannot communicate cannot be a competent witness.

e. Fear of retribution: In *State v. Everett*, 98 N.C. App. 23, *rev'd on other grounds*, 328 N.C. 72 (1991), the court discussed the competency of a witness who was unable to understand her obligation to tell the truth from a religious perspective and *did not have fear of certain retribution* for mendacity. The court allowed a finding of competence since the child indicated an understanding of the difference between the truth and a lie.

4. A finding of incompetence does not address the qualifications of the child as a declarant out of court to truthfully relate personal information and belief. Incompetence is not inconsistent as a matter of law with a finding the child may still be qualified as an out-of-court declarant to truthfully relate personal information and belief. But when the declarant's unavailability is due to an inability to tell truth from falsehood or reality from imagination, then previous statements could lack the requisite guarantees of trustworthiness to justify admission as residual hearsay. *See, e.g., State v. Stutts*, 105 N.C. App. 557 (1992); *State v. Wagoner*, 131 N.C. App. 285 (1998). In the *Wagoner* case, at the time the events occurred, the trial court found that the victim was able to truthfully relate personal information and was able to discern truth from fantasy. Two years later, at the time of the trial, the court concluded that the victim could not understand the obligation of the oath, the duty to tell the truth, and could not express herself articulately in court. The court stated that its conclusion that the child was incompetent to testify did not invalidate prior statements made truthfully with personal knowledge and nothing suggests that at the time of the assault, the victim was incapable of telling the truth or distinguishing reality from imagination. *See also State v. Holden*, 106 N.C. App. 244 (1992). [The issue of unavailability of the child due to incompetence and the resulting possibility of the introduction of certain hearsay statements by the child is discussed in § 7.2.D below titled, "Unavailability of a Witness: Hearsay Exceptions."]

5. Relevance: Whether or not the child is competent, the child's testimony will not be admissible unless it is relevant. If a child is found competent to testify, an argument that the child's testimony would be irrelevant may still prevent the child from testifying.

6. Improper to focus on detriment suffered by testifying: In the case of *In re Faircloth*, 137 N.C. App. 311 (2000), the court of appeals stated that in making a determination as to whether a witness is competent to testify, it is improper to focus on the detriment which would result to the children if they were to testify. It is possible for a child's presently existing mental condition to affect a child's ability to relate events and to understand the obligation to tell the truth as to render the child incompetent but no such evidence was presented in this case. It was improper to focus the determination of competence on the effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and their ability to relate events.

C. Leading Questions

In *State v. Hannah*, 316 N.C. 362 (1986), the North Carolina Supreme Court held that "[I]t is settled law in this state that leading questions are necessary and permitted on direct examination when a witness has difficulty understanding the question due to immaturity, age, infirmity or ignorance or when the inquiry is into a subject of a delicate nature such as sexual matters." (*quoting State v. Higginbottom*, 312 N.C. 760 (1985)). *See also State v. Joyce*, 97 N.C. App. 464, *disc. rev. denied*, 326 N.C. 803 (1990); *State v. Murphy*, 100 N.C. App 33 (1990). Leading questions are also allowed on voir dire. *See State v. Oliver*, 302 N.C. 28 (1981).

While the use of leading questions is permissible, an open question that allows a well-prepared child witness to give a full answer may result in more credible testimony than would a mere yes or no response to a leading question.

D. Use of Anatomically Correct Dolls

It is not uncommon to use anatomically correct dolls to assist children in illustrating their story. North Carolina courts have permitted children to use such dolls in the courtroom to aid in their testimony. *See State v. Fletcher*, 322 N.C. 415 (1988); *State v. Watkins*, 318 N.C. 498 (1986); *State v. DeLeonardo*, 315 N.C. 762 (1986). In such a case, the doll should be referred to by exhibit number, and the child's actions should be narrated for the record.

Courts have also permitted other witnesses to testify about the child's use of the dolls outside the courtroom when the child has testified in court. *State v. Chandler*, 324 N.C. 172 (1989). In *State v. Fearing*, however, the court questioned the reliability of such hearsay testimony when the witnesses describe the child's use of the dolls but the child does not testify in court. *See State v. Fearing*, 315 N.C. 167 (1985). *See also State v. Waddell*, 130 N.C. App. 488 (1998); *State v. Wagoner*, 131 N.C. App. 285 (1998).

E. Child Testimony in a Non-Traditional Setting and the Right to Confrontation

1. Introduction

A child witness may be intimidated or traumatized by testifying in a traditional courtroom setting. Sometimes the issue is the trauma caused by seeing the person who has allegedly harmed the child or testifying in front of that person or other individuals who intimidate the child. Other times, the difficulty lies simply in speaking to a large group of individuals in a formal, unfamiliar setting. A component of the issue of trauma is the potential that the content

of the child's testimony may be affected if the child must testify in front of the alleged perpetrator or others who intimidate the child.[2]

Attorneys and judges have employed various strategies to deal with these issues. Such strategies include having the child testify in chambers (with or without the defendant's attorney), testimony over closed-circuit TV, clearing the courtroom, altering the courtroom layout, turning the witness chair away from the defendant, or other such measures to protect the child.

The barrier attorneys often face when attempting to protect a child witness from testifying in a traditional setting is the Confrontation Clause of the Sixth Amendment. The Sixth Amendment states: "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." [U.S. Const. amend. VI.] However, the Confrontation Clause typically is not applied in civil cases and is therefore usually addressed in North Carolina case law in the criminal context. [3] *See In re D.R.*, 172 N.C. App. 300 (2005)(holding that the Sixth Amendment right of confrontation does not apply in civil juvenile abuse, neglect, and dependency proceedings).

It can be argued that the most fundamental rights are at stake in termination proceedings when a parent is faced with losing parental rights to a child.[4] An argument might also be made that (to a lesser degree) such rights are at stake in other abuse and neglect proceedings due to the possibility that such proceedings will lead to termination of parental rights. With little guidance from case law involving civil proceedings, AAs must seek to protect the child's best interests without creating issues in a case that will become problematic on appeal. As such, an attorney can strive to afford the parent's rights to confrontation to the same degree as is necessary in a criminal case whenever there would be no sacrifice in protection of the child's best interests. Nevertheless, it is reasonable to argue that parents cannot necessarily expect the same right to confrontation in civil proceedings as they have in criminal proceedings when those rights are infringed upon in order to meet the best interests of the child. *Note that the following cases are from the criminal context.*

2. United States Supreme Court

a. The Court in *Coy v. Iowa*, 487 U.S. 1012 (1988), struck down a statute that provided for the use of a screen to protect a child from viewing the defendant. Justice Scalia wrote a plurality opinion finding it unconstitutional, saying that the essence of the Sixth Amendment right of confrontation was eyeball-to-eyeball contact between the defendant and the witness. In a concurring opinion, Justice O'Connor said that this confrontation was not absolute and that there could be a set of circumstances where protection from the defendant for the witness would be permissible.

b. In *Maryland v. Craig*, 497 U.S. 836 (1990), Justice O'Connor wrote for the majority that when there were specific findings that there would be harm to an individual child the child

[2] *See In re Faircloth*, 137 N.C. App. 311 (2000), for a discussion of the relevance of detriment suffered by testifying.
[3] *See* John E. B. Myers, Evidence in Child Abuse and Neglect Cases, Volume 2, pp. 411-13, 1997; *see also Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).
[4] *See*, John E. B. Myers, *supra* note 1.

could testify outside the presence of the defendant. This had to be more than generalized legislation that imposed a presumption of trauma. The court held that the states' interest in the child's physical and psychological health was a significant state interest that could be balanced along with the defendant's rights under the confrontation clause.

3. North Carolina Courts

a. *State v. Jones*, 89 N.C. App. 584 (1988), used the *Maryland v. Craig* standard in a voir dire process in a criminal hearing to determine trauma to the child during a competency hearing even though *Jones* was decided prior to *Maryland*. In *Jones*, an expert testified that the child could suffer emotional harm if forced to testify in the defendant's presence. Based upon that testimony, the trial judge excluded the defendant in the judge's chambers with a closed circuit television when the victim was examined. The television allowed defendant to see and hear the child's testimony on voir dire for the purposes of determining competency. The Court of Appeals held that the defendant's rights were not infringed upon since the defendant had an opportunity for effective cross-examination of the child through his attorney plus an opportunity to interact freely with his attorney. The closed circuit TV allowed the defendant to hear and refute the evidence.

b. The Court of Appeals dealt with *Maryland v. Craig* directly in the case of *In the Matter of Johnny Stradford*, 119 N.C. App. 654 (l995). Two juvenile petitions were filed alleging that Johnny Stradford committed one count of first-degree rape and one count of first degree sex offense against a seven-year-old child. The court allowed the complaining witness to testify outside the presence of the defendant via closed circuit television due to the child's probable inability to communicate if forced to testify in the defendant's presence. The trial court held an evidentiary hearing prior to ruling that the child could so testify. The defendant argued that there was no statutory authority for such procedures. The state argued that the court has the authority to exercise "reasonable control" over the courtroom pursuant to N.C.G.S. 8C-1 Rule 611 (a). Citing *Maryland*, the state also argued that such testimony did not abridge the defendant's federal or state constitutional right to confront witnesses against him. The court of appeals analyzed *Maryland* and then *State v. Jones* and found that the trial court properly authorized the remote testimony of the child witness. The court held that despite the absence of face-to-face confrontation, the remote testimony preserved the essence of effective communication. The child testified under oath and was subject to full cross-examination and was able to be observed by the judge and the defendant as she testified.

c. In the case *In re Nolen*, 117 N.C. App. 693 (1995), the children, aged five and seven, were unwilling to take the witness stand. The judge then allowed the children to testify in chambers with counsel present. The proceedings were not recorded. After the children testified, the recording of the hearing resumed and the court summarized for the record the children's testimony. N.C.G.S.§7A-289.30(a) [now 7B-1109] states that the reporting for the hearing on termination shall be as provided by §7A-198 for reporting civil trials. The respondent argued that because the children's testimony was not recorded, he must receive a new hearing. The court held that a mere violation of the chapter was not enough; there had to be a showing of prejudice, and there was no such showing.

4. The reality of a non-traditional setting in North Carolina juvenile courts

Neither the North Carolina Court of Appeals nor the Supreme Court in North Carolina has fully examined all of the alternatives to a traditional courtroom setting for a child witness, and the issue has been raised only in the criminal setting. With limited guidance on the issue, attorneys must also factor in the difference between the confrontation rights of a defendant in the criminal setting versus the rights of the alleged perpetrator in the civil setting. Clearly, closed-circuit TV is acceptable, based on *Maryland v. Craig* and *In re Johnny Stradford*, making it the best option for being safe on appeal. While local districts may not have access to such audiovisual equipment, the Administrative Office of the Courts (AOC) has special equipment that allows live testimony to be broadcast; and although it is not referred to as "closed-circuit TV," it seems to accomplish the same. This equipment can be delivered to any courtroom in the state.

This equipment from the AOC is called the Remote Video Witness system and can be set up in one of two ways. The witness can testify from a room adjacent to the courtroom with the defendant in the courtroom with the judge, or the witness can testify in the courtroom with the defendant watching from an adjacent room. Either way the broadcast is live and in color. Throughout the proceeding the defendant is allowed to have confidential communication with his attorney over a secure phone line. Normally the defense attorney is in the room with the witness. To get this equipment, the AOC can be contacted directly (Mike Unruh at 919-212-5753 or email at michael.j.unruh@nccourts.org), but it is advisable to seek a court order from the judge to utilize such equipment, ordering the clerk to procure it from the AOC so that it is clear that the equipment will be used before it is delivered. The AOC would prefer at least two weeks' notice to get this equipment to a courtroom. *See Appendix in this manual for a sample motion.*

In reality, many judges allow children to talk to them in chambers, without the alleged perpetrator present. While courts have not specifically ruled on the circumstances under which such testimony in chambers would be permissible, clearly it is preferable to have the testimony recorded (see *Nolen*, above), and to have the perpetrator's attorney present in chambers to provide some safeguard of his or her client's rights and to cross-examine the child if necessary.

In some situations, clearing the courtroom of all but those who are essential may decrease the child's anxiety with respect to large groups of people. The judge has the discretion to take such an action. Also, the AA can always make a motion for a closed hearing pursuant to 7B-801(a).

5. Making a motion to get the child's testimony in a nontraditional setting or a finding of unavailability

Regardless of the method employed to protect the child, the question always comes back to a balance of interests between the child and the perpetrator. As such, it is wise for a GAL AA who is attempting to get a child out of the traditional courtroom setting to have the support of professionals and any other witnesses who have reason to believe that testimony in a traditional setting would be unwise.

An AA can make a motion to allow the child to testify in some particular nontraditional setting, in which case affidavits from a professional relating to potential trauma should be attached when possible. *See appendix in this manual for a sample motion and order.* There may need to be a hearing on the issue, in which case the AA should subpoena any individual, professional or not, who can contribute information about the child witness and how he or she will be affected. Besides professionals, foster parents, relatives, or others may provide information on the child's behavior upon seeing the perpetrator or having to discuss the events leading to the petition.

If the potential trauma is tremendous, the judge may find that the child will be so affected by the trauma as to be unavailable as a witness. *See State v. Chandler*, 324 N.C. 172 (1989)

F. Admissibility of Character Evidence of Victim (child)

1. General character: While character evidence is typically inadmissible to prove action in conformity with character under Rule of Evidence 404(a), Rule 404(a)(2) makes an exception and admits "evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same." This rule, however, is typically not applicable in abuse and neglect proceedings, because a child is the victim. With a child as the victim, it is unlikely that there is any character trait of the child that is pertinent (would make a difference in the case) since the child is typically blameless regardless of the circumstances. The perpetrator may, however, try to invoke this rule to show that the victim has a reputation for false allegations,[5] also relating to Rule of Evidence 608. **Rule 404(b)** also provides an exception for certain types of evidence not admitted to prove character in order to show action in conformity therewith, but for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

2. Evidence of victim's prior sexual history

a. **Rule of Evidence 412** "shields" the victim from having evidence offered regarding the victim's sexual behavior (often referred to as the "Rape Shield" statute). The Rule sets out certain exceptions for certain types of evidence that are admissible. Rule of Evidence 412:

(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

[5] See Myers, *supra* note 1, discussing evidence of child's character in such cases.

(d) & (e) See statute [The remainder of the statute applies primarily in criminal cases involving a jury]

While this statute is used primarily in a criminal setting with adult victims, in certain circumstances it would be applicable in a setting involving a child. For example, the defendant may utilize the second exception to show that the perpetrator was someone else, or the fourth exception to show that the allegations are false (but could use 404(a) as well).

b. In *State v. Bass*, 121 N.C. App. 306 (1996), the defendant appealed his conviction for taking indecent liberties and first-degree sexual offense. He claimed that he should have been allowed to introduce evidence that the uncle similarly abused the victim when she was three, some three years before. Rule 412 of the rules of evidence prohibits the introduction of evidence concerning "the previous sexual activity of a complainant in a rape or sex offense case." Any "sexual activity of the complainant other that the sexual act which is at issue in the indictment on trial. . ." is deemed irrelevant unless an exception applies. Here none of the exceptions applied. The court identified several situations where the prior acts would be admissible such as to impeach the witness or to show prior inconsistent statements. The court found that where the probative value of the proffered evidence in challenging the witness' credibility is high and the degree of prejudice present by reference to previous sexual activity is low, the proffered evidence might be admissible, at least for impeachment purposes. In this case, the court held that the evidence was not admissible because there was no evidence that the prior accusations were false and that the evidence would show that someone other than the defendant committed the assault. [*See also State v. Trogden*, 135 N.C. App. 85 (1999), another case discussing Rule of Evidence 412 in the context of a child sex abuse case and also discussing the *Bass* case.]

§ 7.3 Hearsay and Hearsay Exceptions Commonly Used in Cases Involving Child Victims

A. Introduction

This subsection specifically addresses the issue of getting a child's out-of-court statements admitted into evidence. Obviously, such exceptions apply to witnesses in general, but this subsection focuses on those most often used with child witnesses.

B. Is Necessity a Prerequisite to the Introduction of Out-of-Court Statements?

The North Carolina Court of Appeals set up a two-part test for introducing hearsay in a criminal trial, requiring that 1) there is a showing of the necessity for using hearsay testimony, and 2) the inherent trustworthiness of the original declaration must be established. *State v. Jones*, 89 N.C. App. 584 (1988). But the origin of this two-part test is the Confrontation Clause, which is specifically applicable in criminal cases. (See Chapter II.E. above, discussing the non-applicability of the Confrontation Clause to civil cases.) As such, it can be argued that such a test is irrelevant to civil abuse, neglect, and dependency proceedings. Nevertheless, with a lack of guidance from case law involving civil abuse and neglect, it is wise to be aware of the position of the courts in criminal matters.

In addition, the U.S. Supreme Court in *White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736 (l992), eliminated the requirement of showing necessity when the hearsay is within a well-established hearsay exception.

In *White*, the Court reasoned that there is no need for such a requirement because of the inherent reliability of testimony within hearsay exceptions. "We note first that evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out of court declarations are made in a context that provide substantial guarantees of trustworthiness. But the same factors that contribute to statements' reliability cannot be recaptured even by later in-court testimony." *White* at 356. The court went on to note that exclamation at the time carries more weight with the trier of fact than similar statement in the calm of the courtroom. "We therefore think it clear that out-of-court statements admitted in this case had substantial probative value, value that cannot be duplicated simply by the declarant testifying in court." *Id.* at 743.

Finally, in 1998, the North Carolina Supreme Court dealt directly with this issue, following *White* and holding that *where hearsay offered by the prosecution comes within a firmly rooted exception to the hearsay rule, there is no requirement of necessity or trustworthiness. State v. Jackson*, 348 N.C. 644 (1998). *See also State v. Wagoner*, 131 N.C. App. 285 (1998). In *Wagoner*, the court made it clear that necessity and trustworthiness were required for statements admitted as residual hearsay but not for statements falling within a firmly rooted hearsay exception.

C. Statements Not Excluded as Hearsay When Availability of Declarant Is Immaterial (Hearsay Exceptions)

l. Medical Diagnosis and treatment. Rule of Evidence 803(4) makes an exception to the hearsay rule based on medical diagnosis and treatment. "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." G.S. 8C-1, Rule 803. This exception is based on the premise that people have a strong basis for telling the truth to their doctor.

a. The two-part inquiry: Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment. *State v. Hinnant*, 351 N.C. 277 (2000).

b. *State v. Hinn*ant and the "new law" for this exception: In *State v. Hinnant*, 351 N.C. 277 (2000), the North Carolina Supreme Court overruled some previous cases (to a certain extent) involving children's hearsay statements admitted under the medical diagnosis and treatment exception. Prior to *Hinnant*, a number of North Carolina cases had permitted children's hearsay statements to be admitted under the medical diagnosis and treatment exception, some without strict application of the two-part inquiry stated above. In *Hinnant*, the Court stated that it was inappropriate to admit statements under this exception unless the proponent of such testimony affirmatively establishes 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. This statement provided a more strict application of the two-part inquiry than many past cases and the court even said that "to the extent that cases such as *State v. Jones*, 89 N.C. App. 584 (1988), are inconsistent with our holding, they are overruled." *Id.* at 287. [Such holding applies only to trials commenced on or after the certification date of the *Hinnant* opinion.]

The Court recognized the difficulty of determining the declarant's intent and stated that "the trial court should consider all objective circumstances of record surrounding declarant's

statement in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 288. The court acknowledged (in citing other cases) that some such circumstances might include the setting the child is in (e.g. if it is a medical setting), the nature of the questioning, and the fact that a young child is more likely to possess the requisite treatment motive when speaking to medical personnel. In addition, the court indicated that the evidence that the medical purpose of the examination and importance of truthful answers were explained to the declarant can help establish treatment motivation. *Id.* at 289. *Hinnant* also stated that "Rule 803(4) does not include statements to non-physicians made after the declarant has already received initial medical treatment and diagnosis." *Id.* at 289.

- For cases involving *Hinnant* in a juvenile abuse, neglect, dependency proceeding, *see e.g. In re B.D.*, 174 N.C. App. 234 (2004); *In re Mashburn*, 162 N.C. App. 386 (2004).

c. Pre-*Hinnant* cases involving admission of children's hearsay statements under the medical diagnosis and treatment exception.

i. statements made to physicians

- Some North Carolina cases dealt with statements admitted under the medical diagnosis and treatment exception prior to recent cases declaring necessity and trustworthiness as unnecessary prerequisites to a firmly rooted hearsay exception. The court in *State v. Gregory*, 78 N.C. App. 565 (1985), held that statements a child made to her doctor about what her father had done to her were admissible because even a young child has a strong motivation to tell the truth for the purpose of medical diagnosis and treatment. The court also held that because of Sixth Amendment right of confrontation, the hearsay had to meet the two- prong test of necessity and trustworthiness in a criminal proceeding. The Court of Appeals in *State v. Ward*, 118 N.C. App. 389 (1995) followed the same two- prong test outlined above in *Gregory* despite the fact that it was decided after *White.*

- The medical person may testify as to the cause of the injuries as long as is reasonably pertinent to diagnosis and treatment. The medical person can also identify the perpetrator because it is directly related to the treatment, which may include removal or other course of treatment that is different if a nonrelative is the perpetrator. Details of the offense provided by the child are also admissible. *See, e.g., State v. Hughes*, 114 N.C. App. 742, *disc. rev. denied*, 337 N.C. 687 (1994); *State v. Smith*, 315 N.C. 76 (1985); *State v. Rogers*, 109 N.C. App. 491, *disc. rev. denied*, 334 N.C. 625 (1993).

- However, the statements are not admissible when, as in *State v. Stafford*, 317 N.C. 568 (1986), the court has held that statements were not made to the physician for diagnosis and treatment but for preparation for court.

- In *State v. Aguallo*, 318 N.C. 590 (1986), in order to determine whether the statements were made during the course of treatment or for preparation for court, the court balanced such factors as length of time between the incident and seeing a doctor or between seeing the doctor and the trial, as well as who referred the victim for treatment. In *Aguallo*, the child saw the doctor several months before trial, was referred by the social worker, not law

enforcement, and the physician went on to treat the child. The court held that the doctor's statement was admissible.

- In *State v. Woody*, 124 N.C. App. 296 (l996), the court found that a doctor could testify regarding statements made by a sexual abuse victim during examination. The doctor made her diagnosis based both on physical examination of the child and the statements the child made to her. The statements included how she felt about her father and the fact that she loved him before but not after the event.

ii. Statements made to others (not physicians)

The following cases, all decided ***prior*** to *Hinnant*, were cases in which a child's hearsay statements to persons who were not physicians were discussed under the medical diagnosis and treatment exception: *State v. Jones*, 89 N.C. App. 584 (1988); *State v. Figured*, 116 N.C. App. 1 (1994); *State v. Smith*, 315 N.C. 76 (l985); *State v. Richardson*, 112 N.C. App. 58 (1993); *State v. Hammond*, 112 N.C. App. 454 (1993). However, *Hinnant* is now controlling and regardless of the admissibility of statements in these cases, there must now be a finding that the declarant possessed the requisite intent when the statements were made.

d. Post-*Hinnant* cases

i. *State v. Waddell*, 351 N.C. 413 (2000), was a case in which the court concluded that statements should not have been admitted under the medical diagnosis and treatment exception because there was no evidence of a medical treatment motivation on the part of the child making the statement.

ii. *In re Clapp*, 137 N.C. App. 14 (2000), was a case in which treatment motivation was shown. The court of appeals distinguished this case from *Hinnant* saying the child's motivation in making the statement was shown because she made it after she left the bedroom (where she had been sexually abused), pulling at her panties and telling of the abuse. *See also State v. Youngs*, 141 N.C. App. 220 (2000), *disc. review denied*, 353 N.C. 397 (2001), a case in which statements the child made to the doctor were admissible.

iii. *State v. Bates*, 140 N.C. App. 743 (2000), *disc. review denied*, 353 N.C. 383 (2001), was a case in which the trial court reversed and remanded the case because the record failed to show that the child had a treatment motive when she made statements that were admitted under the medical diagnosis and treatment exception. *See also State v. Watts*, 141 N.C. App. 104 (2000), a similar case.

iv. For other illustrative cases, *See State v. Lewis* 172 N.C. App. 97 (2005)(allowing videotapes of interview as substantive evidence as they were in medical center by registered nurse and the children understood that the nurse would share the information with the doctor who would peform the medical exam); *State v. Thorton*, 158 N.C. App. 645 (2003) (statements by child to social worker conducting exam with the pediatrician

were admissible); *State v. Stancil*, 146 N.C. App. 234 (2001); *but see State v. Reeder*, 105 N.C. App. 343 (1992)(exam was for purpose of evaluating whether child was sexually abused, not for purposes of diagnosis or treatment, so child's statement to doctor was inadmissible under hearsay exception).

2. Excited utterances

An excited utterance is 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." [Rule 803(2) of the North Carolina Rules of Evidence]. How long after the event does the stress of excitement still exist? For adults, even a few minutes between a startling event and a statement can negate the exception, but the time is longer for children. When looking at the spontaneity of statements made by a young child, there is more flexibility with the length of time between the startling event and the statement because for children the "stress and spontaneity" invoking the exception is present longer for young children than adults. *State v. Boczkowski*, 130 N.C. App. 702 (1998).

In order to fall within this hearsay exception, "there must be (1) a sufficiently startling experience suspending relative thought; and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *In re J.S.B.*, --- N.C. App. ---, 644 S.E.2d 580 (2007)(quoting *State v. Smith*, 315 N.C. 76 (1985)).

a. In *State v. Smith*, 315 N.C. 76 (l985), the event took place sometime between Friday night and Monday morning. When the children returned on Monday, they told their grandmother; the court admitted her testimony under this exception. *See also State v. Ford*, 136 N.C. App. 634 (2000), where the court said a statement made by the child to her mother hours after the event could have been admitted as an excited utterance. *See also In re Clapp*, 137 N.C. App. 14 (2000), where child made statement as she left the bedroom where the abuse occurred.

b. In *State v. Jones*, 89 N.C. App. 584 (1988), the court held that a statement made ten hours after a child left the defendant's custody could still be excited.

c. In *State v. Rogers*, 109 N.C. App. 491 (1993), the statement was made three days later and was told to a friend's mother. The court found that it was still excited even after she told others.

d. In *State v. Thomas*, 119 N.C. App. 708(1995), the defendant was convicted of first degree sexual offense and taking indecent liberties with a child. On appeal, the defendant argued that the trial court had erred in admitting testimony of the mothers of his daughter's classmates. The victim told two of her kindergarten classmates that her father had sexually abused her, and these children told their mothers. Each of the mothers testified in court over the defendant's objection. The court held that it was error to admit the testimony. Although the children could testify about what their classmate had told them under the excited utterance rule, their mothers' testimony did not come within the same rule. The children's statements to their mothers were in the nature of reporting the day's events ("narrative rather than instinctive character") and not in the nature of an excited utterance. This was a double hearsay and there was no exception for the mother's testimony. The court held that it was prejudicial error because of the substantial importance of the testimony as the only direct evidence pointing to the defendant's guilt.

e. In *State v. Perkins*, 345 N.C. 254 (l997), a seven-year-old girl was raped and killed by her grandmother's boyfriend while her three-year-old brother watched. The court allowed the

juvenile investigator to testify during the criminal trial about what the three-year-old had told her ten hours after the murder under the excited utterance exception. The Supreme Court ruled that the testimony was properly allowed.

f. In *In re J.S.B.*, --- N.C. App. ---, 644 S.E.2d 580 (2007), a nine-year-old girl made statements to a detective sixteen hours after witnessing conduct that led to her brother's death including seeing her mother hit her brother on the head. During the interview, the child was teary and withdrawn even to the extent of being on the floor in a fetal position. The Court of Appeals rules that under these circumstances that it was proper to admit her statements in the abuse and neglect adjudication under the excited utterance exception to hearsay.

3. Present sense impression: Rule of Evidence 803(1) states an exception to the hearsay rule as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

Utilizing this exception is certainly possible where a child victim or other witness relays what happened immediately after the event occurs. In *State v. Odom*, 316 N.C. 306 (1986), ten minutes was not too remote to be admissible. In *State v. Cummings*, 326 N.C. 298 (1990), statements made by a victim to her mother when she went to her mother's house following the event were admitted as present sense impression.

4. State of mind: Under Rule of Evidence 803(3), an exception to hearsay is a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Courts have distinguished statements of fact from statements of emotion, saying that the former does not qualify as a "state of mind" exception. *See State v. Marecek*,130 N.C. App. 303 (1998); *State v. Hardy*, 339 N.C. 207 (1994). Examples of "state of mind" statements include "I'm frightened" or "I'm angry." *Hardy.* In *State v. Thompson*, 139 N.C. App. 299 (2000), the court found it proper to admit evidence of physical abuse of the victim's siblings and the family pet because they occurred in the presence of the victim and were introduced to show the victim's state of mind – why she was afraid of the defendant and did not report the abuse – and was not introduced to show the defendant's character or propensity to commit such an act.

5. Residual hearsay: See subsection E. below on residual hearsay.

D. Unavailability of a Witness; Hearsay Exceptions

1. In general. Certain types of out-of-court statements are admissible if the declarant has been deemed unavailable as a witness. [Rule of Evidence 804] Those types of statements include the following:

a. Former testimony
b. Statement under belief of impending death
c. Statement against interest
d. Statement of personal or family history
e. Other exceptions: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, under certain circumstances (See residual hearsay, below in subsection E).

Note: While the residual hearsay exception is available for declarants who are available or unavailable, the fact that the declarant is unavailable may make it easier to meet the requirements for using the residual hearsay exception.[6]

2. Definition of unavailability [Rule of Evidence 804]

Unavailability as a witness includes situations in which the declarant:

- is exempted from testifying on grounds of privilege
- persists in refusing to testify despite a court order[7]
- testifies to a lack of memory of the statement
- is unable to be present or to testify because of death or then existing physical or mental illness or infirmity
- is absent from the hearing and the proponent of his statement is unable to procure his attendance by process or other reasonable means

3. Unavailability of child witness

a. **Generally**: A child witness may fall into one of the above definitions of unavailability due to a refusal to testify, or an inability to testify due to trauma, incompetence, or other factors. (*See, e.g*., *State v. Deanes*, 323 N.C. 508 (1988); *State v. Chandler*, 324 N.C. 172 (1989); *State v. Ward*, 118 N.C. App. 389 (1995); and *State v. Jones*, 89 N.C. App. 584 (1988).

b**. "De facto" unavailability**: The case of *State v. Ward*, makes no mention of an actual order by the trial court telling the child to testify, nor did the trial court make a finding of unavailability (in fact the trial court had found her competent to testify), yet the court of appeals held that this victim was in fact unavailable to testify (on a *de facto* basis). *See also State v. Chandler*,where the child had taken the stand but had been unable to answer questions despite various efforts by the court to make her more comfortable, and the NC Supreme Court said "Under the circumstances, the judge's declaration that the child 'is simply going to be unable to testify,' amounts to an implicit declaration of unavailability within the meaning of Rule 804(a)(4)." *Id*.at 181. *But see State v. Linton* mentioned in footnote 7.

c. **Unavailability does not necessarily result in incompetency even though incompetency can result in unavailability**: In the case *In re Faircloth*, 137 N.C. App. 311 (2000), the trial court had found children "unavailable" to testify based on the potential detrimental effect on the mental condition of the children if they were to testify. However, the competence of the children was at issue, not the unavailability of the children (there was no issue of admitting hearsay statements pursuant to the exceptions for unavailable witnesses), and the Court of Appeals found that the trial court should not have applied standards related to unavailability in order to determine competence.

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[6] *See, e.g., State v. Jackson*, 348 N.C. 644 (1998); *State v. Ward*, 118 N.C. App. 389 (1995); *State v. Gregory*, 78 N.C. App. 565 (1985), *disc. rev. denied*, 316 N.C. 382 (1986). When the witness is "unavailable," it may be easier to show that the statement is more probative of the point than other evidence that could be procured through reasonable efforts (since the victim herself is not testifying), and to show that the general purpose of the rules and the interests of justice will best be served by admission of the statement, both of which are factors to be considered in determining admissibility.

[7] *See State v. Fowler*, 353 N.C. 599 (2001), where witness to a murder refused to testify and was declared unavailable; *but see State v. Linton*, 145 N.C. App. 639 (2001), *rev. denied*, 355 N.C. 498 (2002), where witness was declared unavailable because of refusal to testify but the court of appeals disagreed and said that because the trial court never ordered the victim to testify after the victim initially refused to do so, the trial court erred in declaring the victim "unavailable".

d. **Unavailability due to incompetency**: Unavailability can be based on incompetency. *See State v. Pretty*, 134 N.C. App. 379 (1999), *review denied*, 351 N.C. 117 (1999); *State v. Rogers*, 109 N.C. App. 491 (1993); *State v. Jones*, 89 N.C. App. 584 (1988); *State v. Deanes*, 323 N.C. 508 (1988); and *State v. Gregory*, 78 N.C. App. 565 (1985).

e. **Then-existing physical or emotional condition**. Under Rule 803(a)(4), before finding a child witness unavailable, the court may have to determine whether various accommodations such as closed-circuit television testimony would enable the child to testify.

E. Residual Hearsay: Statements Not Excluded by Hearsay Rule for Available and Unavailable Witnesses

An out-of-court statement may be admissible when the statement does not fit any other category of hearsay exceptions and has circumstantial guarantees of trustworthiness equivalent to those of the other exceptions [Rule 803 (24) for available witnesses and Rule 804(b)(5) for unavailable witnesses].

1. Prerequisites for admission as residual hearsay [See specifics of Rule 803(24), 804(b)(5), and *see State v. Wagoner*, 131 N.C. App. 285 (1998); *State v. Swindler*, 339 N.C. 469 (1994); an *State v. Smith*, 315 N.C. 76 (1985).]

a. Written notice, including intention to offer the statement, particulars of the statement, name and address of declarant, to adverse party sufficiently in advance of offering the statement to provide an opportunity to prepare
b. The hearsay is not covered by any other exception
c. The statement is trustworthy
d. The statement is offered as evidence of material fact
e. The statement is more probative of the point than other evidence that could be procured through reasonable efforts
f. Whether the general purpose of these rules and the interests of justice will best be served by admission of the statement

Necessity as another requirement in criminal cases: Another requirement for admission of statements as residual hearsay in *criminal* cases is that of necessity. *State v. Wagoner*, 131 N.C. App. 285 (1998); *State v. Waddell*, 130 N.C. App. 488 (1998); also see § 7.3.B. above, discussing necessity. Although trustworthiness is one of the six requirements above and necessity is not, it can be argued that if one can meet the other requirements, the requirement of necessity will be met. In fact, cases have stated that the necessity prong is adequately demonstrated by the unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements. *See, e.g., State v. Jackson*, 348 N.C. 644 (1998); *State v. Gregory*, 78 N.C. App. 565 (1985), *disc. rev. denied*, 316 N.C. 382 (1986);.

2. Factors to be utilized to inquire about trustworthiness: *State v. Smith*, 315 N.C. 76 (l985), discussed factors that courts have used to guide the trial judge's determination of trustworthiness, and these are set out below. However, *Smith* stated that such factors are not conclusive and that the judge should focus upon factors that bear on the declarant at the time of making the statement and should be aware of the peculiar factual context within which the statement was made.

The factors are as follows:

i. Whether the declarant has personal knowledge of the underlying event
ii. The declarant's motivation to speak the truth
iii. Whether the declarant ever recanted
iv. Whether there is practical availability of the declarant at trial for meaningful cross-examination

See also Idaho v. Wright, 497 U.S. 805 (1990) discussed below in § 7.3.E.4.

3. Trial judge's duties when considering residual hearsay: When the trial judge is considering allowing residual hearsay, he or she must have the record reflect such consideration and then may proceed to analyze admissibility using the six-part inquiry required by the Rule. The record must reflect not only the judge's conclusion but also the reasoning in reaching it and findings of fact and conclusions of law as to trustworthiness. *Smith, supra; see also In re Gallinat*o, 106 N.C. App. 376 (1992). Attorneys should insist on findings by the court because failure of the judge to make findings is error.

4. Case notes

a. In *Idaho v. Wright*, 497 U.S. 805 (1990), the United States Supreme Court dealt with a case where the doctor's testimony as to whom the child accused was not within the medical diagnosis exception in Idaho and addressed the admissibility of the statement under the residual hearsay rule. The Court held that because this did not fall within an established hearsay exception it needed a particularized guarantee of trustworthiness surrounding the making of the statement itself and that corroboration of another witness did not provide support for such trustworthiness. The Court also mentioned a few factors used to determine trustworthiness, including the declarant's mental state and the use of terminology unexpected of a child of similar age, relating to whether the child was particularly likely to be telling the truth when the statement was made.

b. In *State v. Deanes*, 323 N.C. 508 (1988), the court admitted testimony that the child made to the social worker after making the specific findings required in *Smith*. The court said that five-year-olds would be motivated to speak truthfully to a person in authority and the fact that the social worker initiated the conversation was not controlling as to truthfulness. Even inconsistencies in the statement did not necessitate exclusion because such inconsistencies would go to the weight of the evidence. The court also looked to the fact that statements were consistent with the physical findings.

c. In *In re Gallinato*, 106 N.C. App. 376 (1992), the Court of Appeals reversed an adjudication of abuse, holding that the trial court erred in allowing a social worker and daycare workers to testify about statements made to them by the children, who had been found incompetent to testify, without making the six-step inquiry required for admission under the residual hearsay exception to the hearsay rule. The statements did not have the sufficient indicia of trustworthiness.

d. In *State v. Stutts*, l05 N.C. App. 557 (1992), a four-year-old was found unavailable because of her inability to discern truth from falsehood or to understand the difference between reality and imagination. The court held that it was illogical to find that the out of court statements were admissible because they possessed guarantees of trustworthiness. "The very fact that a

potential witness cannot tell truth from fantasy casts sufficient doubt on the trustworthiness of their out of court statements to require excluding them." (*But see Rogers*, below)

e. In *State v. Rogers,* 109 N.C. App. 49l (1993), the mother testified, friends of the mother testified, the doctor testified, and the psychologist testified. The defendant argued that since the court had found the victim incompetent to testify, the statements the child had made to the witnesses were per se unreliable. The court rejected this analysis. The court did not find it inconsistent as a matter of law that when the trial court finds a child incompetent it may also find that the child may nevertheless be qualified as a declarant out of court to relate truthfully personal information and belief.

A child's inability to communicate to the jury at the time of trial might be relevant as to whether an earlier hearsay statement possessed particularized guarantees of trustworthiness. However, a per se rule of exclusion would frustrate the truth-seeking purpose of the Confrontation Clause. The court also stated that even if the out-of-court statement properly falls within an exception to the hearsay rule, it nonetheless must be excluded at a criminal trial if it infringes on the defendant's constitutional right to confrontation. (Note that the court goes through necessity and inherent trustworthiness analysis after *White v. Illinois* and *Idaho v. Wright.)*

f. In *State v. Wagoner,* 131 N.C. App. 285 (1998), certain factors, independent of corroborating physical evidence, supplied sufficient guarantees of trustworthiness. The factors included consistent repetition of the victim's account of what happened, her spontaneity, her mental state on certain dates, her use of terminology unexpected of a child of similar age, her lack of motive to fabricate, the absence of recantation, and the use of anatomically correct dolls and drawings.

g. In *State v. Waddell*, 351 N.C. 413 (2000), the notice requirements for residual hearsay were met and although the state kept waffling as to whether the statements should be admitted as residual hearsay or statements of medical diagnosis and treatment, ultimately the state made it clear they were attempting to get them in under medical diagnosis and treatment and so they could not be admitted as residual hearsay.

h. In *State v. Fowler,* 353 N.C. 599 (2001), the court allowed hearsay statements made by a witness to a murder who had since left the country and refused to return to testify. The N.C. supreme court found that the trial court had properly determined that the statements fell within the residual hearsay exception, Rule 804(b)(5) – including the fact that the witness was unavailable, that none of the other hearsay exceptions outlined in Rule 804(b) apply, and that the trial court had properly considered the six-prong inquiry outlined in *State v. Ali*, 329 N.C. 394 (1991). The Supreme Court then conducted an independent inquiry and found that the guarantees of trustworthiness offered by the state met the demands of the Confrontation Clause.

§ 7.4 Corroboration and Impeachment

A. Corroboration

Prior statements of the witness are admissible as corroboration if they add weight or credibility to witness statements.

1. In *State v. Ramey*, 318 N.C. 457 (1986), the court stated that additional or new information obtained in a witness statement but not offered in trial testimony may be admitted as corroborative evidence.

2. In *State v. Richardson*, 112 N.C. App. 58 (1993), the Court of Appeals stated that if the court instructs the jury to consider adult testimony that corroborates children only to the extent that it actually corroborates, then it is admissible.

3. In *State v. Connell*, 127 N.C. App. 685 (1997), the inconsistencies in statements to a social worker and the testimony at trial were deemed to be only slight variations. The social worker's testimony was therefore admissible as corroborative, strengthening and adding credibility to the victim's testimony.

4. In *State v. McGraw*, 137 N.C. App. 726, *rev. denied*, 352 N.C. 360 (2000), the child victim had testified at trial that the defendant "touched her in her private part," and that it hurt. Later, the child's mother testified that the child had explained the defendant touched her in her "private part," was "rubbing her hard," and that it hurt. Since the testimony of the child and her mother were "nearly identical," the mother's statements were properly admitted as corroborative of the child's testimony.

B. Impeachment

A witness's testimony may be impeached with evidence that the witness told a different story prior to testifying. *See United States v. Hale*, 422 U.S. 171 (1975). Children may be impeached with prior inconsistent statements and attorneys must be prepared to respond. [See Rule of Evidence 613] In some cases, the attorney can "point to developmental and situational reasons for a child's inconsistency -- reasons that explain away the impeaching value of the inconsistency."[8]

Under Rule 806 of the Rules of Evidence, "When 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. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination." G.S. 8C-1, Rule 806.

§ 7.5 Expert Witnesses

A. Rules of Evidence Specifically Applicable to Expert Witnesses

Rule 702 of the N.C. Rules of Evidence: "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." G.S. 8C-1, Rule 702(a).

Rule 703 of the N.C. Rules of Evidence: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." G.S. 8C-1, Rule 703.

[8] John E. B. Myers, Evidence in Child Abuse and Neglect Cases, p. 170 of Volume 2, 1997.

Rule 704 of the N.C. Rules of Evidence: "Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." G.S. 8C-1, Rule 704.

Rule 705 of the N.C. Rules of Evidence: "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question." G.S. 8C-1, Rule 705.

Rule 706 of the N.C. Rules of Evidence: Court appointed experts

B. Qualifying a Witness as an Expert

1. Judge's determination: The determination of whether a witness qualifies as an expert is solely within the province of the judge and is a question of fact. *See State v. Bullard*, 312 N.C. 129 (1984); *State v. Parks*, 96 N.C. App. 589 (1989).

2. Criteria for qualification: Under Rule 702, one must possess special knowledge, skill, experience, training, or education to qualify as an expert. An expert need not be experienced with the identical subject area in a particular case or be licensed, a specialist, or engaged in a specific profession. **What is necessary is that the witness, through study or experience, is better qualified than the jury to render an opinion on a certain matter**. *See State v. Bullard*, 312 N.C. 129 (1984); *State v. Howard*, 78 N.C. App. 262 (1985), *appeal dismissed*, 316 N.C. 198 (1986).

> In a Court of Appeals case, the guardian ad litem sought the expert opinion of a witness about treatment of adult child abusers. The witness had no direct clinical experience treating adults and the trial court did not let the witness testify. The Court of Appeals ruled that this was error, stating that an expert need not have had clinical experience in the very subject at issue, rather it is enough that through study or experience, the expert is better qualified that the fact finder to render an opinion on the particular subject. *In re Chasse*, 116 N.C. App. 52 (1994).

3. **Sufficient foundation must be laid** to show that a witness is an expert in the area for which he or she will give an opinion, and the expert must testify as to his or her qualifications. *See State v. Goodwin*, 320 N.C. 147 (1987); *State v. Oliver*, 85 N.C. App. 1, *cert. denied*, 320 N.C. 174 (1987). For a case in which the court found sufficient foundation was not laid for expert testimony, *see State v. Grover*, 142 N.C. App. 411 (2001).

C. Admissibility of Expert Testimony

1. Expert opinion: Under Rule 702, the expert may testify in the form of an opinion if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

2. Basis of opinion: Under Rule 703, the basis of an opinion or inference may be facts or data perceived by or made known to the expert at or before the hearing. If such facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

3. Subject matter of testimony

a. Child's truthfulness

i. The expert may not testify that the child's testimony at trial was truthful or that the child was not fantasizing about a particular incident. *See State v. Heath*, 316 N.C. 337 (1986).

ii. An expert can testify about the truthfulness or lack of it in sexually abused children in general. *State v. Oliver*, 85 N.C. App. 1 (1987). While expert testimony on the credibility of a witness is prohibited, an expert can testify as to whether a victim's behavioral characteristics are consistent with sexual abuse, or about a witness' mental condition that would generally affect the witness' ability to distinguish reality from fantasy. *See State v. Teeter*, 85 N.C. App. 624 (1987).

iii. An expert qualified in the fields of pediatric medicine and child sexual abuse testified that it was her expert opinion that children in general do not lie about sexual abuse and that, based on her examination, the child was sexually abused. On redirect, over strenuous objection, the doctor testified that she had not picked up on anything to suggest that someone had told the victim what to say or that the victim had been coached. The Court of Appeals ruled that an expert witness may not testify regarding the veracity of the prosecuting witness in a sexual abuse trial. The court held that the challenged testimony was a comment on the victim's credibility and was inadmissible. *State v. Baymon*, 108 N.C. App. 476 (1993). The supreme court reversed that ruling, holding as Judge Walker had in dissent, that there is a distinction between testimony from a witness, such as a doctor, that a child victim was truthful or untruthful, which is inadmissible, and testimony that the expert found no evidence that the child had been coached, which is admissible. This ruling was based, in large part, on the fact that the defendant had "opened the door" for this testimony in cross-examination. *State v. Baymon*, 336 N.C. 748 (1994).

iv. The North Carolina Supreme Court held that the trial court erred in allowing a teacher of the victim to relate specific incidents when the child told the truth. The teacher also stated that she had no reason to doubt that what the victim told her was true. The Supreme Court ruled that this testimony as to these specific instances of conduct were improper under Rule 608(b) of the North Carolina Rules of Evidence. Specific instances of conduct pertaining to a witness for character for truthfulness or untruthfulness is prohibited, but evidence of the character of a person may be made by testimony as to reputation or by testimony in the form of an opinion. Rule 405(a). The court held that this error was prejudicial and ordered a new trial. *State v. Baymon, supra.*

v. In *State v. Richardson*, 112 N.C. App. 58 (l993), the court held that evidence of general credibility and characteristics of sexually abused children was admissible if it helped the jury to understand behavior patterns of sexually abused children.

vi. An expert may give his opinion that a child was sexually abused but may not testify about the truthfulness of a particular witness. The rule is that the opinion related to a diagnosis based on the expert's examination of a witness is admissible, while opinion about credibility is not. *State v. Figured*, 116 N.C. App. 1 (1994).

vii. In *State v. Dick*, 126 N.C. App. 312 (1997), the defendant had objected to admission of the testimony of a social worker qualified as an expert in clinical social work. Among other things, the social worker testified that the child waited two years to tell of sexual abuse because she was waiting to disclose in a safe place. The court ruled such testimony admissible as specialized knowledge, helpful to the jury. Furthermore, the defendant had asked questions about failure to disclose for two years and had thereby opened the door to such testimony.

viii. In *State v. Marine*, 135 N.C. App. 279 (1999), the defendant argued that the victim's family counselor, testifying as an expert, improperly commented on the victim's credibility, in violation of Rule of Evidence 405(a) (prohibiting expert testimony regarding a witness' character) and 608(a) (allowing reputation or opinion testimony in order to bolster another witness' credibility). The Court of Appeals stated that the counselor had expressed an opinion that the victim suffered from post traumatic stress syndrome ("PTSSD") and that it was appropriate for the counselor to explain how she concluded that the victim has suffered from PTSSD, including testifying as to the victim's mental and emotional state and as to the reliability of the information used to formulate her opinion. In formulating her opinion, the counselor explained that one of the indicators of PTSSD is that the victim "has experienced actual or threatened serious injury or threat to her physical integrity." The testimony complained of here simply seeks to explain why the counselor felt the victim had experienced a traumatic event: the victim's behavior and lack of sexual education convinced the counselor that the information she was using to formulate her opinion was reliable. In short, this testimony went to the reliability of the counselor's diagnosis, not to the victim's credibility and was therefore permissive use of expert testimony under Rule 702.

b. Medical findings

Parents and caretakers may offer explanations of injuries to children that are anything but abusive. Medical professionals are sometimes in a position to refute an explanation or provide information on the injuries, using medical evidence to show why or how an injury did or did not occur. An expert may testify as to medical findings. The medical professional may even offer an opinion on the probable cause of the injury. *See State v. Brown*, 300 N.C. 731 (1980).

i. In *State v. Bright*, 320 N.C. 491 (1987), a medical doctor testified that in her opinion the victim's vagina had been penetrated, but not recently, and the penetration could have been by a vibrator. A psychologist was permitted to testify as to her opinion of the gender of the perpetrator (and therefore the identity) because the defense attorney had "opened the door" in cross-examination.

ii. Additionally, in *State v. Everett*, 328 N.C. 72 (1991), the North Carolina Supreme Court allowed a medical doctor to state his opinion as to the number of times that penetration took place based on his medical findings concerning the state of the vagina. The court found that the expert's conclusion was admissible because it still left to the jury the task of deciding how much weight to accord to the expert's opinion.

iii. Medical expert testimony on penetration may, of course, be rebutted by alternative explanations for an opening in the hymen and any tears therein. *See, e.g., State v. Baron*, 58 N.C. App. 150 (1982) (evidence of attempted prior use of tampons by the

alleged rape victim held admissible and relevant as consistent with the puncturing of the hymen).

iv. It was not error to allow two medical experts to testify that the nature of injuries to a four-month-old were consistent with intentionally inflicted injuries. The defendant had argued that the testimony was improper because it permitted the experts to testify about a precise legal standard and conclusion. The Court of Appeals found that the testimony was within each physician's area of expertise and was helpful to the jury. *State v. McAbee*, 120 N.C. App. 674 (l995).

v. In *State v. Youngs*, 141 N.C. App. 220 (2000), the defendant argued that a psychologists' diagnosis of the victim's psychological disorder was improperly admitted to prove that the defendant was the perpetrator, but the Court of Appeals disagreed and stated it was admitted only to establish the victim's condition and the expert's resulting opinion that the child was the victim of sexual abuse. The court went on to say that the identity of the offender is important for diagnosis in child sexual abuse cases and is therefore admissible. The reasons the identity is important include: First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home.

c. Child's symptoms

i. An expert may also testify about symptoms and characteristics of sexually abused children in general and that the symptoms exhibited by the victim were consistent with sexual abuse. *State v. Richardson*, 112 N.C. App. 58 (1993).

ii. In *State v. Hammond*, 112 N.C. App. 454 (1993), the defendant was prosecuted for indecent liberties with a minor. The court held that it was not error to allow an expert to discuss the symptoms and characteristics of sexually abused children and to express her expert opinion about whether the minor child exhibited these characteristics. The expert could also testify about pictures introduced into evidence as part of medical diagnosis and treatment exception to the hearsay rule. This type of testimony can involve consideration and elaboration of the general characteristics of sexually abused children such as secrecy, helplessness, delayed reports, initial denial, depression, extreme fear, nightmares, poor relationships, etc.

iii. The doctor who examined the victim in a first degree rape trial testified that the findings were strongly suggestive of possible sexual abuse. The court held that it was proper for the expert to list the symptoms and characteristics of sexually abused children and to express her expert opinion as to whether the victim showed similar characteristics. *State v. Hughes*, 114 N.C. App. 742 (1994). *See also State v. Hall*, 330 N.C. 808 (1992); *State v. Murphy*, 100 N.C. App. 33 (1990).

iv. In *State v. Robertson*, 115 N.C. App. 249 (1994), the trial court properly excluded expert testimony on the suggestibility of child witnesses where the witness had never examined or evaluated the victim or anyone else connected with the case. The court stated that potential prejudice outweighed probative value.

d. Syndromes

i. Battered Child Syndrome [9]

Purpose and admissibility of battered child syndrome: The North Carolina Supreme Court in *State v. Atkins*, 349 N.C. 62 (1998), again confirmed its approval of the admission of expert testimony with respect to battered child syndrome, stating that "evidence demonstrating battered child syndrome 'simply indicates that a child found with [certain injuries] has not suffered those injuries by accidental means.' " *Id.* at 99, quoting *State v. Wilkerson*, 295 N.C. 559 (1978).

A child with a pattern of injuries that appears to have happened over a span of time and that is inexplicable or inconsistent with any explanation given by a parent or caretaker may be a victim of the "battered child syndrome." Medical testimony to the effect that a particular child is an example of the "battered child syndrome" will generally support an inference that the child's injuries were intentionally inflicted by other than accidental means -- an essential element of proof in child abuse cases. However, in *State v. Byrd*, the court did not find that the evidence was sufficient to withstand defendant's motion to dismiss in spite of the proper introduction of evidence regarding battered child syndrome. *State v. Byrd*, 309 N.C. 132 (1983), *rev'd*, on other grounds; *See also State v. Childress*, 321 N.C. 226 (1987); *State v. Noffsinger*, 137 N.C. App. 418 (2000). Should the child's injuries be the proximate cause of death, the person responsible for abusing the child could be convicted of criminal child abuse, neglect, manslaughter, and even murder. *State v. Evans*, 74 N.C. App. 31 (1985) (defendant convicted of involuntary manslaughter). Generally, medical expert testimony on "battered child syndrome" is allowable when helpful to advance the understanding of an issue in the case and when based on the experience, expertise, and knowledge of the medical professional. *See State v. Stokes*, 150 N.C. App. 211 (2002), *rev'd on other grounds*, 357 N.C. 220 (2003); *State v. Hitchcock*, 75 N.C. App. 65 (1985); *State v. Harper*, 72 N.C. App. 471 (1985); N.CG.S. 8C-1, Rule 703.

Battered child syndrome resulting in death: As a general rule, the prosecution in a battered child homicide case need not prove exactly which injury of the many inflicted upon the child proximately caused death. A prosecutor need only establish "(1) a pattern of violent behavior towards the child, or exclusive control, (2) a pattern of non-accidental injuries, and (3) probability of death from such injuries." *State v. Evans*, 74 N.C. App. 31, 36 (1985); *State v. Vega*, 40 N.C. App. 326, *disc. rev. denied* and *appeal dismissed*, 297 N.C. 457, *cert. denied*, 444 U.S. 968 (1979). Note also that a "preexisting condition, but for which the allegedly criminal conduct would not have been fatal does not excuse criminal responsibility." *State v. Evans*, 74 N.C. App. at 34.

What the expert can testify to: The leading case in North Carolina on

[9] Note: Much of the content of this subsection on battered child syndrome was originally drawn from "Children and the Law," Chapter V., by Ilene Nelson.

"battered child syndrome" is *State v. Wilkerson*, 295 N.C. 559 (1978), in which the Supreme Court held that medical testimony was properly admitted to explain the term "battered child syndrome" and to offer an opinion that the particular child was a victim of the syndrome, but not as to a certain event that had in fact caused the injuries. The admission of expert medical testimony regarding the likely cause of injury only under the following circumstances:

> (1) the witness because of his or her expertise is in a better position to have an opinion on the subject than the trier of fact,
>
> (2) the witness testifies only that an event could or might have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, unless his or her expertise leads to an unmistakable conclusion, and
>
> (3) the witness does not express an opinion as to the defendant's guilt or innocence. *State v. Moss*, 139 N.C. App. 106, *rev. denied*, 353 N.C. 275 (2000).

The expert thus renders an opinion as to probable or possible cause of the injury. An expert could therefore offer an opinion on "battered child syndrome," or the probable cause of injuries to a child, apparently even if not based on reasonable medical certainties.

In *State v. Phillips*, 328 N.C. 1, *cert. denied*, 501 U.S. 1208 (1991), the defendant argued that testimony as to "battered child syndrome" made an improper inference that the victim's injuries were caused by the victim's caretaker, relieving the prosecutor of the burden of proof and unfairly shifted the burden to the defendant to prove his innocence. The court stated that while testimony as to "battered child syndrome" does lead to a permissible inference that the child's caretaker inflicted the victim's injuries, but the burden remains on the State.

ii. Rape trauma syndrome or post-traumatic stress disorder (PTSD)

In *State v. Hall*, 330 N.C. 808 (l992), the expert witness testified as to a conversion reaction, which he characterized as PTSD. The supreme court held that it was error when used to confirm that a rape had occurred. The testimony could be used for corroboration and the jury must be instructed that it is for this purpose only. It is permissible to use symptoms and characteristics of sexual abuse to help a jury understand the symptoms consistent with sex abuse but only to aid in assessing credibility. *See also State v. Andre Jones*, 105 N.C. App. 576 (1992)(holding that expert testimony that victim exhibited symptoms of PTSD is admissible for corroborative purposes only

The trial court should always balance the probative value of such evidence against its prejudicial impact under Rule 403 of the Rules of Evidence. *State v. Hall*, 330 N.C. 808 (l992). In *State v. Huang*, 99 N.C. App. 658, *disc. rev. den.*, 327 N.C. 639 (1990), the probative value of the expert's testimony was

outweighed by the danger of unfair prejudice. *See also State v. Hensley*, 120 N.C. App. 313 (1995).

Testimony about PTSD may be admitted for purposes of corroboration and a limiting instruction must be given. With such limitation, the admission of expert testimony regarding PTSD can be helpful to the jury to explain the victim's delay in reporting the offenses and is therefore admissible. *State v. Hughes*, 114 N.C. App. 742, *rev. denied*, 337 N.C. 697 (1994).

In *State v. Marine*, 135 N.C. App. 279 (1999), the court of appeals found it permissible to admit testimony by an expert that the victim suffered from post traumatic stress syndrome, including how that conclusion was reached and evidence concerning the victim's mental and emotional state. The expert had testified that one of the indicators of PTSD is that the victim "has experienced actual or threatened serious injury or threat to her physical integrity." This testimony went to the reliability of the diagnosis and not to the victim's credibility.

iii. Child Sexual Abuse Accommodation Syndrome

In *State v. Stallings*, 107 N.C. App. 241 (1992), the Court of Appeals discussed this syndrome, stating that it consists of "five categories of behavior exemplified by children who are victims of sexual abuse: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and, (5) retraction." *Id.* at 248 citing John E. B. Myers, et al., Expert Testimony in Child Sexual Abuse Litigation, 68 Nebraska Law Review 1, 6667 (1989). The court goes on to emphasize that the syndrome is founded on the premise that abuse has occurred and identifies behavior typical of sexually abused children, but is not a diagnostic tool for determining that abuse has occurred. *Id.* at 248-49.
Testimony of Accommodation Syndrome is not admissible as substantive evidence and may only be admitted for corroborative purposes if the trial court determines (1) it should not be excluded under N.C.R. Evid. 404 and (2) this evidence would be helpful to the jury pursuant to N.C.R. Evid. 702. *State v. Stallings*, 107 N.C. App. 241 (1992); *State v. Black*, 111 N.C. App. 284 (1993).

In *Stallings*, evidence of this syndrome was improperly admitted for several reasons. To begin with, there was no evidence in the record whether the syndrome had been generally accepted in the medical field; CSAAS is not designed to determine whether a child has been abused but rather assumes abuse has occurred, and the potential for prejudice looms large because of the danger that the jury will give too much weight to the expert opinions. In addition, there was no limiting instruction and the testimony was permitted to be considered for both substantive and corroborative purposes. (However, no prejudicial error was found.) *Stallings*, at 251.

e. Testing Devices (Plethysmograph)

In *State v. Spencer*, 119 N.C. App. 662, *disc. rev. denied*, 341 N.C. 655 (1995), the state presented evidence tending to show that the defendant had engaged in sexual activity

with his five-year-old stepdaughter on several occasions from September 1992 until February 1993, while her mother was at work. The defendant denied any sexual activity with the child, saying she had an overactive imagination. The defendant was convicted by the jury of first degree sexual offense and taking indecent liberties with a minor. The defendant argued that the trial court should not have excluded expert opinion testimony. The Court of Appeals said that the trial court did not abuse its discretion in excluding the opinion testimony offered by the defendant of a clinical psychologist who specialized in sexual dysfunction. The part of the testimony that was excluded concerned the likelihood that the defendant committed the offenses charged and was based on the result of a penile plethysmograph. The court based its decision on the lack of general acceptance of the test's validity and utility and therefore its unreliability for forensic purposes in the scientific community. Nonacceptance of this test was also confirmed in *Spencer*.

§ 7.6 Certain Evidence Involving the Alleged Perpetrator

A. Character Evidence

1. Rule of Evidence 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:

> (1) Character of accused -- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same. . .

2. During adjudication, evidence of the alleged perpetrator's character may not be offered by the GAL or DSS if it is offered for the purpose of proving that he or she acted in conformity with that trait on a particular occasion. However, *the perpetrator's attorney* may offer evidence of a pertinent trait of character of the perpetrator, in which case DSS or the GAL may offer character evidence in rebuttal. **[404(a)]** In addition, evidence relating to the perpetrator may be offered pursuant to 404(b) (see subsection B below).

3. In *State v. Wagoner*, 131 N.C. App. 285 (1998), *disc. rev. denied*, 350 N.C. 105 (1999), the Court of Appeals stated that "evidence of the defendant's general 'psychological make-up' is not 'pertinent' to the commission of a sexual assault. . . While evidence of a sexual pathology would have been relevant to show motive, evidence of the lack of several mental problems does not qualify as a 'pertinent' character trait." *Id.* at 743(quoting *State v. Mustafa*, 113 N.C. App. 240, 245-246, *cert. denied*, 336 N.C. 613 (1994)).

B. Other Crimes, Wrongs or Acts

Rule of Evidence 404(b): Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. "Recent cases decided by [the North Carolina Supreme Court] under Rule 404 (b) state a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278 (1990)

(emphasis by the court). *But see State v. Al-Bayyinah*, 356 N.C. 150 (2002)("…the rule of inclusion described in *Coffey* is constrained by the requirements of similarity an temporal proximity.")

1. Evidence of similar sex crimes

a. *State v. Owens*, 135 N.C. App. 456 (1999), is a case which discusses admissibility of similar sex crimes and the fact that North Carolina appellate courts have been very liberal in admitting evidence of similar sex crimes as an exception to Rule 404(b). *Id*.; *See also State v. Greene*, 294 N.C. 418 (1978). *See State v. White*, 135 N.C. App. 349 (1999), a case in which the court found that the prejudicial effect outweighed the probative value of evidence of other acts where the acts were too dissimilar.

b. In *State v. DeLeonardo*, 315 N.C. 762 (1986), evidence of similar sex crimes committed by the defendant was admissible to establish plan or scheme. In this case, it was permissible to admit evidence of sex with daughter to show sex with son. *See also State v. Beckham*, 148 N.C. App. 282 (2002)(incidents occurring many years prior were admissible); and *State v. Johnson* 145 N.C. App. 51 (2001)(holding sexual acts committed against the witness were sufficiently similar to those at issue in the case and the acts occurred during the same time period as those forming the basis of the indictment, the acts were admissible under Rule 404(b).); *State v. Thompson*, 139 N.C. App. 299 (2000)(holding evidence of alleged sexual acts committed on the victim when she was 5 years old and when she was 10 years old – acts that occurred seven years and two years, respectively, before the first charged offense – did not violate Rule 404(b)); *State v. Blackwell*, 133 N.C. App. 31 (1999)(holding prior sexual acts ten and seven years earlier were not too dissimilar or remote in time to be admitted).

c. In *State v. Frazier*, 121 N.C. App. 1 (1995), *aff'd*, 344 N.C. 611 (1996), it was permissible to admit testimony by other female members of the defendant's family who testified as to how the defendant had sexually abused them when they were young. The abuse had occurred between seven and twenty-six years before the current incident, and this was not too remote to be admissible under Rule 404(b) to establish common plan or scheme. The Supreme Court found that the lapse of time only strengthened the argument that the defendant had a common plan to molest all of the female members of his family. The striking similarities of the abuse also showed evidence of a plan.

d. In a trial for rape of a daughter, the trial court admitted evidence that the defendant had repeatedly beaten his two children and wife. The Fourth Circuit Court of Appeals concluded that the evidence of the defendant's violence against his daughter and family members was admissible under 404(b) to explain the daughter's submission to the acts and her delay in reporting the sexual abuse. The court also held that in comparing the general character of physical violence in this case, the beatings were sufficiently related to the nature of the rape charged. Rape, like a beating, is an act of violence. *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. N.C. 1995), *cert. denied*, 516 U.S. 1077 (1996).

e. *State v. Burr*, 341 N.C. 263 (1995), involved the prosecution of a defendant for murder of an infant. In this case, the court found as admissible testimony concerning the defendant's misconduct toward the mother involving certain types of assaults and injuries that were similar

to what the child suffered. Such evidence was admissible under Rule 404(b) to show identity as perpetrator of the crime.

f. In *State v. Crockett*, 138 N.C. App. 109 (2000), the defendant argued that evidence concerning sexual activity with someone other than the victim was irrelevant and unfairly prejudicial. The Court of Appeals, however, found that the evidence, even if it tended to show other crimes or bad acts committed by the defendant, was admissible under Rule 404(b) because it was relevant for some purpose other than to show that the defendant had the propensity for the type of conduct for which he was being tried. Here the evidence was admissible because it showed intent, knowledge and plan.

2. Evidence of abuse or neglect of other children

a. Following a termination of parental rights proceeding, the mother appealed the court order that allowed the petitioner to introduce evidence of prior adjudications about the mother's four older children. The Court of Appeals held that this was not prejudicial since the situation with regard to the current child was similar to the situation with regard to the older children. The prior orders were relevant to the question of probability of repetition of neglect. *In the Matter of Christian Diane Allred*, 122 N.C. App. 561 (l996).

b. Note that under recent changes to the N.C. Juvenile Code, evidence of abuse or neglect of other children is relevant to a determination of neglect (7B-101) and may also provide grounds for termination of parental rights (7B-1111). The Code therefore makes such evidence *highly* relevant.

§ 7.7 Exhibits

A. Introduction

In adjudications of abuse, neglect, or dependency, attorneys may seek to utilize in evidence medical records, mental health records, DSS records, police reports or records, and other such forms of documentary evidence. There are several Rules of Evidence relating to the admissibility of records, notes, documents or other such evidence. Rules of Evidence 1001 - 1008 relate to the admissibility of Writings, Recordings and Photographs. Rules 901 and 902 relate to authentication of evidence. Rule 803 sets out certain types of written evidence that are not considered hearsay. **The verbatim language of all of the above rules will not be set out in this subsection, even though it will be referred to, so attorneys should consult the rules themselves.**

B. Written Exhibits May or May Not Be Hearsay

Unless the person who actually produced the written exhibit is in court to testify about the exhibit, such exhibit would be considered hearsay unless it falls under one of the following exceptions set out in Rule of Evidence 803.

Rule 803: Hearsay exceptions; availability of declarant immaterial

(5) Recorded Recollection
(6) Records of Regularly Conducted Activity
(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph 6
(8) Public Records and Reports
(9) Records of Vital Statistics
(10) Absence of Public Record or Entry
(11) Records of Religious Organizations
(12) Marriage, Baptismal, and Similar Certificates
(13) Family Records
(14) Records of Documents Affecting an Interest in Property
(15) Statements in Documents Affecting an Interest in Property
(17) Market Reports, Commercial Publications
(18) Learned Treatises

C. Authentication of Written Exhibits

Rule 901 requires that for evidence to be admissible, it must be authenticated. In other words, there must be a finding that the matter in question is what its proponent claims. Rule 901 gives examples of authentication of certain types of evidence by certain means (see Rule 901).

Rule 902 sets out certain types of evidence that do not require extrinsic evidence of authenticity, as they are "self -authenticating," describing the circumstances for each.

(1) Domestic Public Documents Under Seal
(2) Domestic Public Documents Not Under Seal
(3) Foreign Public Documents
(4) Certified Copies of Public Records
(5) Official Publications
(6) Newspapers and Periodicals
(7) Trade Inscriptions and the Like
(8) Acknowledged Documents
(9) Commercial Paper and Related Documents
(10) Presumptions Created by Law

D. Admissibility of Writings, Recordings, and Photographs under Rules 1001 - 1008

The following is a *summary* of each Rule of Evidence; the Rule itself should be consulted for detail.

1. Rule 1001 sets out **definitions** of terms used in these rules.

2. Rule 1002 requires that the evidence sought to be admitted be an **original.**

3. Rule 1003 discusses the fact that **duplicates** can be admitted as originals with exceptions.

4. Rule 1004 discusses the **circumstances under which an original is not required**.

5. Rule 1005 discusses the issues unique to the admissibility of **public records.**

6. Rule 1006 allows the admission of **summaries** of voluminous writings.

7. Rule 1007 allows the contents of a writing to be proved by the **testimony or deposition** of a party against whom it is offered without accounting for the lack of an original.

8. Rule 1008 discusses the **functions of the court and jury** with respect to such evidence.

E. Laying the Foundation for Introduction[10]

This subsection contains advice on laying the foundation for certain types of evidence commonly used in abuse, neglect, and dependency adjudications. These foundation elements are guidelines and some judges may not require strict adherence to each element as it appears below, depending, in part, on whether the element is a statutory requirement. For foundation on specific categories of evidence not discussed below, consult the Rule of Evidence that is directly applicable.

1. Photographs

Elements for foundation:

a. Relevancy.
b. Witness is familiar with the scene portrayed in the picture.
c. Witness is familiar with the scene at the relevant date (and time if important).
d. Picture fairly and accurately shows the scene as it appeared on the relevant date.
e. Probative value outweighs prejudicial effect.

2. Sound and video recordings

Elements for foundation:

a. Relevant.
b. Recording machine was tested before being used and was in normal operating condition.
c. Recording machine that was used is accurate.
d. Operator was experienced and qualified to operate the machine.
e. Witness heard/saw what was being recorded.
f. After the recording was made, the operator replayed it and checked that it was accurate.
g. Tape was labeled and sealed, placed somewhere to guard against tampering, later removed for trial in sealed condition.
h. Recording machine in court is in normal operating condition and can accurately reproduce sound/images.
i. Witness recognizes and can identify voices/persons on tape.

3. Letters

Elements for foundation:

a. Relevant.
b. Witness received letter.
c. Witness recognizes the signature as the other party's.
d. Letter is in the same condition now as when first received.

[10] Some elements for foundation were obtained from Thomas A. Mauet, *Fundamentals of Trial Techniques*, Chapter 5, 1988.

4. Records of Regularly Conducted Activity [Rule 803(6)]

Much of the written evidence sought to be introduced in abuse, neglect or dependency proceedings would fall under this category and typically would include DSS records, medical records, mental health records, etc.
Elements for foundation:

a. Relevant.
b. Record is a "memorandum, report, record or data compilation in any form."
c. Witness is the "custodian or other qualified witness."
d. Record was made by a "person with knowledge of the facts" or was made from "information transmitted by a person with knowledge" of the facts unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness.
e. It was the regular practice of the organization to make such a record.
f. Record was kept in the course of a regularly conducted business activity.

§ 7.8 Miscellaneous Evidentiary Issues

A. Privileges

Section 7B-310 states that there are no privileges in child abuse, neglect, and dependency cases except attorney-client privilege. There is no doctor-patient (§ 7B-310 and 8-53.1), husband-wife (§§ 7B-310 and 8-57.1), or psychologist-client privilege (§ 8-53.3). Section 7B-601 addresses privileges related to the GAL's ability to obtain information and states that neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the GAL and the court from obtaining such information.

B. Party to the Proceedings (Parent) Called to Testify Without Subpoena

The Department of Social Services called the respondent mother to the stand over the objection of her attorney who argued that the respondent had to be subpoenaed before she could be called. The Court of Appeals held that a party to the proceedings need not be subpoenaed but may be called to testify as an adverse witness upon appearance at the proceedings. *In re Davis*, 116 N.C. App. 409 (1994).

C. Searches and Seizures

In re Beck, 109 N.C. App. 539 (1993), was a TPR action. A child was brought to the hospital with burns that were intentionally caused. Police went to the home to measure the temperature of the water heater and found over 1000 explicitly sexual videotapes. DSS was given the tapes, which were introduced into evidence. The Court of Appeals said it was not error to give DSS the tapes and not error to admit them.

D. Specifying Purpose for Which Evidence Is Offered Is Unnecessary

While it is better for the party offering evidence to specify the purpose for which it is offered, unless challenged, there is no requirement that such purpose be specified. There is no requirement that a trial judge disclose the grounds on which he excludes or admits evidence; on review it is presumed that the trial court had a valid reason. If the offering party does not designate the purpose for which properly admitted evidence is offered, the evidence is admissible as either corroborative or substantive evidence. *See e.g.*, *State v. Goodson*, 273 N.C. 128 (1968); *State v. McGraw*, 137 N.C. App. 726 (2000); *State v. Ford*, 136 N.C. App. 634 (2000).

E. Judicial Notice

Where the trial court did not indicate, in the record of termination proceedings, that it agreed to take judicial notice of the entire juvenile file, it was error to admit a letter by a psychiatrist who testified at the hearing but was not tendered as an expert. *In re Brim*, 139 N.C. App. 733 (2000).

CHAPTER 8
GUARDIAN AD LITEM ADVOCACY: THE PROGRAM, ROLES, AND RESPONSIBILITIES

Table of Contents

STATUTES

North Carolina Guardian ad Litem Program Mission
The mission of the Guardian ad Litem Program is to provide trained independent advocates to represent and promote the best interests of abused, neglected, and dependent children in the state court system and to work toward a plan that ensures that these children are in a safe, permanent home.

§ 8.1 Introduction: A Team Effort [1]

A Guardian ad Litem Attorney Advocate (AA) works as a partner with a Guardian ad Litem volunteer, and both are supported by the Guardian ad Litem staff. The attorney, volunteer, and staff are therefore cooperating as a team to represent and promote the best interests of the child in abuse, neglect, or dependency cases. Each member of this advocacy "team" brings different skills and a different perspective, which helps to ensure quality representation of the child.

Guardian ad Litem representation is a unique and fulfilling type of legal representation. One of its unique aspects is that of working as part of a team. Another unique aspect is that the attorney advocate represents what is in the best interest of the child instead of strictly representing the child's wishes. The attorney advocate and the GAL volunteer factor any wishes expressed by the child into a determination of best interest. The GAL makes recommendations to the court based on best interest but also conveys any wishes expressed by the child to the court.

§ 8.2 What Is a "Guardian ad Litem"?

A. Definition

The phrase *ad Litem* means "for the lawsuit."[2] The word *guardian* refers to an officer or agent of the court who is appointed to protect the interests of minors.[3] The phrase *Guardian ad Litem* as a whole therefore refers to one who protects and represents the child for the purpose of the court action, which, in this case, includes all matters surrounding a petition for abuse, neglect, or dependency.

B. Origin: The Child Abuse Prevention and Treatment Act of 1974

This federal act required states receiving federal funds for the prevention of child abuse and neglect to provide a Guardian ad Litem for each child involved in such proceedings. Each state handles this requirement differently because the federal act did not define the role or responsibilities of GALs. 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 to represent children.

C. North Carolina Program Establishment and Program Structure

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[1] Some of the material for this section was originally drawn from Children and the Law, by Ilene Nelson, 1992, and from the North Carolina Guardian ad Litem Training Curriculum, edited by Cindy Bizzell, 1998, both published by the Administrative Office of the Courts.

[2] Barron's Law Dictionary, page 11 (1984).

[3] Id. at 208.

In the North Carolina General Statutes, G.S. 7B-1200 and 7B-1201 establish the existence of the Guardian ad Litem Program, stating that local programs shall consist of (at a minimum) volunteer guardians ad litem ("GALs"), a program attorney, a program coordinator and necessary clerical staff. This program exists within the Administrative Office of the Courts (AOC) as the Guardian ad Litem Services Division, that promulgates policies and procedures necessary and appropriate for the administration of the program.

There is at least one GAL office in every judicial district in the state, and some districts have more than one office. Each district has a district administrator responsible for overseeing the program in that district. GAL offices also typically have, in addition to the district administrator, one or more program supervisors and a program assistant. The size of the staff varies depending on the size of the district. Each district contracts with one or more attorneys to provide legal services for the program clients and those attorneys are independent contractors who are appointed by the court and paid out of program funds. Guardian ad Litem Staff who are in positions which serve the entire state, as opposed to a district or satellite field office, are collectively referred to as the "state office staff." Most members of the state office are located in one office in Raleigh, but other members of the state office staff have offices in other locations.

D. North Carolina's Model of Dual Representation: Volunteer and Attorney Advocate

In North Carolina, volunteers serve in the role of guardian ad litem, but the statute requires that whenever a nonattorney volunteer is appointed, an attorney be appointed as well. **[7B-601]** The GAL and attorney advocate have standing to represent the juvenile in all actions under Subchapter I of the Juvenile Code where they have been appointed. The appointment is to terminate when the permanent plan has been achieved for the juvenile and approved by the court, but the court may reappoint the GAL upon a showing of good cause upon motion of any party, including the GAL, or of the court. **[7B-601]** According to statute, the attorney is to assure protection of the child's legal rights throughout the proceeding.[4] **[7B-601]**

§ 8.3 An Explanation of the Role of the Guardian ad Litem [5]

To be an effective member of the advocacy team, it is essential that a GAL attorney understand his or her role and how that role relates to staff members and volunteers. An excerpt from *Children and the Law*, a casebook written by Ilene Nelson, former Administrator of the Guardian ad Litem Program, best summarizes the general role of the Guardian ad Litem along with the role of attorney advocate:

> *The notion of the child as a separate party entitled to legal counsel and advocacy has concurrently underscored the vital role of the Guardian ad Litem in protecting the child's best interests in a legal proceeding.*
>
> *. . . The appointment of a Guardian ad Litem is mandatory in North Carolina whenever a juvenile petition is filed alleging abuse or neglect. It is permissive if dependency is the only allegation. NCGS 7A-586 [Now 7B-601]. In an effort to improve the representation of the child both in and out of court, North Carolina provides a volunteer/attorney statewide program of Guardian ad Litem service for children.*

[4] From 1995 until 1999, the attorney advocate's representation was limited to "through disposition and after disposition when necessary to further the best interests of the child."

[5] Refer to Chapter 12 of this manual on Ethics for more discussion on the role of the GAL.

As soon as the social services department files the petition alleging abuse or neglect, the Guardian ad Litem is appointed for the child. The GAL represents neither the social services department nor the family but rather focuses on the child alone. Virginia Weisz, Advocating For Children: North Carolina's Guardian Ad Litem Program, Popular Gov't. 16, 18 (Institute of Government, 1985).

A trained lay volunteer chosen to act as Guardian ad Litem must be assisted by an attorney "in order to assure protection of the child's legal rights within the proceeding". NCGS 7A-586 [Now 7B-601]. These attorneys are called "attorney advocates." The GAL represents the best interest of the child and not necessarily what the child wishes. However, because the child does not have an attorney to represent those wishes, it is essential that the GAL make those wishes known to the court even when advocating against them.

The aim of the legislation is clear: (1) to provide quality representation for children in abuse and neglect matters, and (2) to do so in a cost-effective manner by using volunteers, with professional services from attorneys in every court proceeding.

Attorney advocates in North Carolina serve as partners with trained lay volunteer Guardians ad Litem to represent the best interest of the child. The attorney relies on the volunteer to bring to court sufficient evidence to support recommendations that are in the best interest of the child. The Guardian ad Litem relies on the attorney to present the evidence in a convincing manner and preserve a strong court record. A strong working relationship between attorney and volunteer gives the child the quality representation the court demands.

The basic duties of the Guardian ad Litem [volunteer] encompass the continued involvement with the child from the time the petition is filed through return of the child's custody to the parents or through termination of parental rights and adoption, or "until formally relieved of the responsibility by the judge." NCGS 7A-586.[6] [Now 7B-601]

§ 8.4 Responsibilities of the Guardian ad Litem Team
(volunteer, attorney advocate, and staff)

A. Statutory Duties

The statute sets out specific duties of the GAL, which are carried out as a team effort by volunteer, attorney advocate, and staff. The expanded responsibilities stemming from these duties and the division of responsibility among staff, volunteer, and attorney advocate are shown in the chart in § 8.7 in this chapter titled "Division of Responsibilities of the Guardian ad Litem Volunteer, Attorney Advocate and Guardian ad Litem Staff." Contractual responsibilities of the attorney advocate are further outlined in § 8.4.C. of this chapter.

The Statutory Duties of the GAL under 7B-601 include the following:

- Representing the child in all actions in Juvenile Court where they have been appointed
- Making an investigation to determine the following:
  - the facts,
  - the needs of the juvenile, and
  - the available resources within the family and community to meet those needs
- Facilitating, when appropriate, the settlement of disputed issues
- Offering evidence and examining witnesses at adjudication
- Exploring options with the judge at the dispositional hearing

[6] Children and the Law, by Ilene Nelson, published by the Administrative Office of the Courts, 1992.

- Protecting and promoting the best interests of the juvenile until formally relieved of the responsibility by the judge
- Conducting follow-up investigations to insure that the orders of the court are being properly executed
- Reporting to the court when the needs of the juvenile are not being met
- When authorized by the court, to accompany the child to court in any criminal action where the child is called to testify in a matter relating to abuse.

B. The Team Model: Volunteer, Staff, and Attorney Advocates

These statutory duties provide a framework for the GAL volunteer, who receives at least twenty-five hours of intensive, detailed training from GAL program staff members on how to apply and expand these responsibilities. Volunteers are closely supervised and supported by local Guardian ad Litem staff throughout the course of a case. GAL attorneys work with both volunteer and staff to provide the legal representation for child clients. The GAL program, both locally and at the state level, provides training and guidelines for attorneys, staff, and volunteers to help define the work done by all.

C. Specific Responsibilities of Attorney Advocate[7]

1. Contractual Obligations

The GAL attorney advocate has certain contractual obligations pertaining to the services that he or she performs in providing legal representation to GAL child clients. Those contractual obligations relevant to a discussion of AA responsibilities include the following:[8]

> The AA agrees to provide, in a manner satisfactory to the agency and consistent with the North Carolina Revised rules of Professional Conduct, the following legal services reasonably necessary to effectively advocate in the proceedings brought pursuant to Chapter 7B of the North Carolina General Statutes for each child client of the Guardian ad Litem Services Division for whom the attorney has been appointed to represent, including but not limited to: representing the best interests of the child in non-secure custody hearings, adjudicatory proceedings, dispositional proceedings, and proceedings to terminate parental rights; participation in any court ordered pre-trial conferences; and all other reasonable professional services necessary after disposition until the court relieves the attorney of this duty. The attorney shall be present and represent each child client at every review hearing; provided, however, that if the attorney is unable to attend a review hearing the attorney will be deemed to have fulfilled this obligation if the child is represented at the review hearing by an attorney approved by the GAL Services division.

[7] There are two sources from which an AA can draw to define his or her responsibilities. The contract that each AA signs with the AOC sets out a number of performance expectations that are binding on the AA. In addition, the GAL Guidelines for Best Practice set out expectations for the AA, some of which are not incorporated in the contract but are designed to serve as guidelines attorneys should attempt to meet to make their representation as effective as possible. Because the contract language was revised more recently than the Guidelines, the contract would supercede the Guidelines where there is any contradiction or ambiguity between similar provisions in both.

[8] Other contractual obligations will not be discussed here, e.g. those relating to payment, qualifications, termination, etc. These obligations have been paraphrased and do not necessarily duplicate the language in the contracts. These obligations are set out here to provide information on the AA's responsibilities and the reader should assume that the language in the actual contracts with AAs will differ.

The AA further agrees to advocate for and further the best interests of the child and assure protection of the child's legal rights by taking all action necessary to zealously represent the child; such advocacy includes but is not limited to:

- ensuring that all relevant evidence and witnesses to be introduced in court are identified and secured;
- interviewing witnesses when appropriate, including the child, and preparing witnesses for court;
- ensuring that subpoenas are issued in a timely manner;
- examining and cross-examining witnesses and introducing relevant evidence in court;
- making relevant arguments to the court;
- reviewing court orders for accuracy and taking appropriate action when corrections are required;
- ensuring that all hearings are timely scheduled and held, including the filing of motions for such hearings if necessary;
- ensuring that termination of parental rights petitions are filed in a timely manner when needed to further the interests of the child, including the filing of such petitions initiated by the GAL;
- discussing case issues with the Volunteer GAL and other parties to ensure complete familiarity with facts and issues in the case and to determine areas of agreement and disagreement and the legal limits within which a settlement can be reached. The attorney agrees not to enter into a settlement with other parties without agreement from the Volunteer GAL;
- advocating for interventions designed to expedite the cessation of court involvement;
- in effort with the Volunteer GAL, facilitating agreements among the parties;
- requesting release of the GAL and AA pursuant to 7B-601 and ensuring court orders reflect that release.

The AA shall ensure that the child, by and through the GAL, participates in all appeals arising out of the proceedings to which the AA is appointed. A separate brief for the child is not necessary if the attorney deems it appropriate to join in the brief of another party so long as the child becomes a party to the appeal and the brief sufficiently addresses the child's appellate issues.

The attorney has no obligation and shall not be paid for participating in tangential legal or administrative proceedings that may benefit the child but fall outside the scope of Chapter 7B. The attorney is not required to pursue these actions on behalf of the child but rather must advocate for proper representation for the child so that the child is able to proceed with these actions.

2. Work Standards from the GAL Guidelines for Best Practice

Responsibilities and expectations of the GAL attorney advocate (AA) are outlined below in the Work Standards, contained in the Guardian ad Litem Guidelines for Best

Practice, which take into account both program expectations and statutory obligations.

WORK STANDARDS
FOR GUARDIAN AD LITEM ATTORNEYS

[From *Guardian ad Litem Guidelines for Best Practice, 2007*]

E. Work Standards

I. Advocacy

A Guardian ad Litem Attorney Advocate:

a. Demonstrates knowledge and expertise in the area of juvenile law, including familiarity with the North Carolina Juvenile Code and relevant case law.

b. Performs legal research on disputed legal questions and prepares in advance for courtroom presentation of the case.

c. Collaborates with Volunteers to a sufficient degree to facilitate effective paired representation of the child-client.

d. Advocates for the best interests of the child-client in courtroom proceedings in conjunction with the Guardian ad Litem Volunteer. Expressed wishes of the child-client are communicated to the court if the child-client is able to articulate his or her wishes.

e. Express wishes of the child-client to the court if the child is unable to articulate his/her wishes.

f. Attends all hearings to further the best interests of the child-client.

g. Advocates and furthers the best interests and protects the legal rights of the child-client by:

(1) Identifying and securing evidence and witnesses to be introduced in court.

(2) Interviewing witnesses, including the child-client, when appropriate and preparing witnesses for court.

(3) Ensuring that subpoenas are issued in a timely manner.

(4) Examining and cross-examining witnesses and introducing relevant evidence in court.

(5) Making appropriate arguments to the Court.

(6) Reviewing court orders for accuracy and taking appropriate action when corrections are required. Ensures that court orders are timely entered

according to statute.

(7) Requesting the release of the Volunteer and Attorney Advocate at the close of a case and ensuring court orders reflect that release.

(8) Assuring protection of the child-client's legal rights in other related legal matters through other legal representation or other professionals as appropriate.

h. Files motions for review or any other necessary motion in the child's best interest and schedules hearings as needed after consulting with the GAL staff and Volunteer on particulars of the matter.

i. Files Termination of Parental Rights (TPR) petitions or motions in a timely manner that GAL staff and the Volunteer agree are in the best interests of the child-client.

j. Discusses case issues with the Volunteer and other parties to determine areas of agreement and disagreement and the legal limits within which a settlement can be reached. The Attorney Advocate will not enter into a settlement with other parties without agreement from the Volunteer.

k. Advocates for interventions designed to expedite the cessation of court involvement.

l. With the Volunteer, facilitates agreements among parties when possible and serves as mediator when appropriate. Notifies the District Administrator or designee immediately when a case is appealed.

m. Ensures that the child-client is represented on appeal by either:

a. Representing the child-client on appeal by filing a separate brief or collaborating with DSS on a brief.

b. Referring the case to the GAL State Office for representation by a pro bono attorney. *(Cross reference appeals re: volunteer involvement)*

c. Referring the case to another attorney who has the same position on the brief, if appropriate, so long as the child-client, by and through the GAL, is a party to the appeal and the brief sufficiently addresses the child-client's appellate issues.

n. In order to be paid for appellate work, attorneys representing the child-client on appeal must request and receive approval from the State Office to participate in the appeal prior to the docketing of the case in the Court of Appeals.

II. Division and Staff Relations

a. Promotes the Guardian ad Litem Program mission.

b. Understands the role of the Attorney Advocate in relation to Volunteers and GAL staff and appropriately functions in that role.

c. Consistently cooperates within the spirit of the Program and uses a shared-team approach of case involvement.

d. Offers creative ideas and solutions to system obstacles and program operation.

e. Consults with the GAL District Administrator or designee on contested issues.

f. Participates in Volunteer Guardian ad Litem Training as requested by the GAL District Administrator or designee.

g. Attends meetings as requested by the District Administrator that relate to the advocacy of the child-client as his/her schedule permits.

III. Volunteer Relations

a. Provides consultation and support to Volunteers when appropriate.

b. Responds in a timely manner to Volunteers' phone calls, requests for information, and legal direction.

c. Reviews Volunteers' recommendations to ensure they are legally appropriate and child-focused, and offers appropriate feedback.

d. Attends Guardian ad Litem Program case staffings with Volunteers or staff as requested and consults on case investigation and preparation when necessary.

e. Brings any concerns regarding Volunteer performance to the attention of the District Administrator or his/her designee.

IV. Professional Responsibility

a. Maintains professional standards and ethics.

(1) The vulnerability of the population of children served by the Program, as well as the Program's credibility and integrity in the legal and child advocacy communities, requires a high standard of ethics. The Attorney Advocate is expected to bring ethical conflicts and questions to the Guardian ad Litem Services Division Program Administrator and/or Associate Counsel for assistance with resolution.

(2) Attorney Advocates are not appointed to cases in which their representation would violate the North Carolina Rules of Professional Conduct (RPC). (Rules 1.7; 1.9; and 1.10 of the Revised Rules of Professional Conduct of the North

Carolina State Bar.)

(3) Attorney Advocates follow all RPCs and withdraw from any case in which they would violate the RPCs by continuing representation.

(4) Attorney Advocates zealously represent the best interests and protect the legal rights of their child-clients throughout the proceedings.

(5) Attorney Advocates may withdraw from a case only if they can do so without violating the RPCs after consulting with the GAL District Administrator.

(6) Attorney Advocates who interact on a regular basis, consult with each other, or are in any sense of the word colleagues, are considered part of a "law firm" for the purpose of applying the RPCs to conflicts.

b. Works and interacts appropriately for the situation with system players such as Department of Social Services, Mental Health, Office of Juvenile Justice, Clerks' Offices, and others to enhance Guardian ad Litem facilitation and cooperation.

c. Appears for scheduled court hearings throughout the proceedings. If unable to attend, ensures that the child-client will be represented by securing separate counsel and being responsible for compensation of that representation if necessary.

d. Offers and accepts constructive criticism regarding program operation and job duties.

e. Completes training related to Juvenile Law and the Guardian ad Litem Program as required by the Attorney Advocate contract.

f. Notifies the GAL District Administrator or designee if unable to fulfill contract obligations in regard to any hearing, and works with the District Administrator or designee to secure counsel for that hearing including offering compensation for coverage if necessary.

g. Provides complete, timely and accurate requests for payment by the Program as requested and attaches any documentation to payment requests as policy dictates.

h. In accordance with provisions of the North Carolina State Bar, retain client files for a minimum of six (6) years after the case is closed, unless arrangements have been made with GAL staff for the Program to retain the files.

§ 8.5 The Attorney Advocate's Role and Relationship with the Volunteer [9]

A. Resolving Conflicts in Opinion

[9] Please see Chapter 12 in this manual on Ethics for more discussion on the Attorney Advocate's Role and Relationship with the Volunteer.

GAL volunteers and attorneys all approach their cases in different ways. Volunteers make a significant investment of time and thought throughout their investigation and evaluation of the case. They have been in the child's home, have observed her and talked to her, have spoken with her parents, teachers, relatives, and friends. In fact, monthly contact with the child is typically required, according to the GAL Guidelines for Best Practice.[10] The evidence they bring to the attorney advocate has been gathered with their own eyes and ears, and, as such, their evaluation of the facts of the case deserves respect and deference.

Consequently, it is reasonable to say that when there is a factual issue or conflict, the volunteer is entitled to deference from the attorney. When there is a legal issue or conflict, however, the attorney is entitled to deference from the volunteer. This is not to say that volunteers and attorneys should never question, challenge, or disagree with each other – they should and must if they are to carry out the very essence of the teamwork approach to advocacy. But both must realize that the case is not theirs alone and allow the other to carry out his or her portion of the work without interference.

In the rare circumstance that a volunteer and attorney advocate simply can't agree, the conflict should be handed over to GAL staff for resolution. The volunteer and attorney advocate should then abide by the decision of staff concerning the case. The only exception is if the attorney advocate feels that he or she could not zealously represent the child under the circumstances or has an ethical dilemma, in which case the attorney should withdraw from that particular case.

B. The Attorney Advocate's Role as Consultant

The role of the AA during the investigative stages of the case is to be available to the volunteer and staff for advice and support as needed. Some AAs have specific times when they meet with volunteers or when they are in the GAL office for staff meetings. An AA's availability will depend on his or her practice and on logistics, but the important thing is that the AA communicate availability to staff and volunteers, give them information on how to be reached, and exhibit a willingness to consult with them when possible. Volunteers and staff appreciate an attorney who is accessible.

[10] See GAL Guidelines for Best Practice, III-8.

C. Talking to the Volunteer: The Importance of Communication

> There are times when there simply is no substitute for an actual conversation between attorney and volunteer. When that conversation does not take place, information may come to light too late in the process or, worse, may never come to light at all.

The AA must be willing to make time to speak with the volunteer. It is entirely possible in some cases for an attorney advocate, especially an experienced one, to go into court with a volunteer's report in hand without ever having spoken to the volunteer and still give *adequate* representation to the child. However, representation is unlikely to be at its best when the volunteer and attorney advocate have never spoken about the case prior to court. Both attorneys and volunteers have many time limitations and other logistical issues that could make a face-to-face meeting difficult, in which case a phone conversation would suffice. Many things that cannot be learned simply by reading a report can be learned through conversation with the volunteer.

Beyond the information contained in the court report, it is important that the attorney understand what facts and issues the volunteer wants to be emphasized in court. It is also important for the attorney to determine whether it would be useful to tender the volunteer to the court for questions or call the volunteer as a witness. The attorney needs to determine the volunteer's feelings about talking to the court and may need to prepare the volunteer as a witness. If the volunteer is new, the attorney should explain what his or her expectations are of the volunteer when they are in court.

The attorney must remember that as nonlawyers, most volunteers are not familiar enough with the judicial process to understand which piece, among all the evidence they have gathered, is most important and admissible. As a result, their report may not emphasize or even include some information that the volunteer is aware of that the attorney believes to be important for the case. Such information might only come to the attorney's attention in the course of conversation with and questioning of the volunteer.

The attorney also needs to talk to the volunteer to assess the credibility and admissibility of potential testimony and evidence. The volunteer, for example, may know facts about a potential witness that might prevent him or her from being a credible witness but may not have mentioned such facts in a report.

D. Filling Gaps in Investigation

If an attorney advocate is proceeding with a case and feels as though there are gaps in the investigation or that additional information is needed, he or she should ask the GAL volunteer to obtain the information or inform staff of the problem so that they can assist the GAL in obtaining the information.

E. Division of Time Between GAL Work and Other Areas of Practice

Some attorneys struggle with dividing their time between GAL work and work in their other areas of practice. The important thing to remember is that once an attorney agrees to represent a child-client all of his or her clients deserve quality representation regardless of ability to pay. However, GAL staff members are typically sensitive to and understanding of the time demands on program attorneys from other areas of practice. The best way to avoid conflicts is to discuss with the district administrator realistic and reasonable expectations concerning the amount of time the attorney advocate typically will need to contribute to the GAL program and then abide by those expectations with a mutual

understanding that there must be a bit of flexibility on both sides.

F. Role of the Attorney Advocate When There Is No Volunteer Assigned to a Case

A case without a volunteer is often referred to as a "program case." Program cases have been handled in various ways in different districts, but now the GAL Guidelines for Best Practice state that "If no volunteer is available, the District Administrator assigns an Attorney Advocate or staff person as the Guardian ad Litem."[11] A GAL staff member or the attorney advocate, whoever is assigned, must take over tasks normally carried out by the volunteer. Because of the sheer volume of cases, however, the staff member or AA is typically unable to handle the case in the same fashion as a volunteer. However, the duty to represent the best interests of the child remains whether or not a volunteer is assigned to the case. It is important to remember that the attorney advocate (or staff member) should never advocate for a position unless it is based on adequate knowledge acquired through independent investigation. It is better not to take any position when information is inadequate and/or not acquired by the AA or GAL staff member.

G. Role of the Attorney Advocate When a Volunteer Is Not Present in Court

Sometimes a volunteer simply is not present in court, due to a conflict, oversight, or other reason. In this case the attorney may or may not have a report. If the volunteer has a conflict, the AA should be sure to obtain the volunteer's report and talk to the volunteer prior to court. At the hearing, it is a good idea for the AA to explain to the court the reason for the volunteer's absence (assuming it is a good one) and to tell the court whether he or she has spoken to the volunteer about the volunteer's views in the case. If an AA has no report *and* no volunteer and no good excuse for an absence, the AA simply needs to do the best he or she can with information from the file, GAL staff, DSS, and any other sources. *If it becomes apparent that the child would suffer more from inadequate representation due to a lack of information than from a postponement of the matter, only then would a request for a continuance be appropriate.*

§ 8.6 Attorney Dilemma: Who Is the Client?

Defining the client is a dilemma that arises at times for Attorney Advocates in GAL representation. The GAL AA is in a unique position because he or she represents the "best interests of the child" and not necessarily the child's wishes even though any wishes expressed by the child are factored into best interest and conveyed to the court. Because the GAL volunteer makes recommendations regarding best interest and the attorney advocate is, in essence, the volunteer's voice, is the volunteer the client? Since, however, the attorney is appointed for the child, to be a partner with the volunteer, is the child the client? The definition of the GAL Attorney Advocate's client has not been resolved by the North Carolina State Bar or in North Carolina cases. The best guidance in resolving this dilemma is to examine the language of 7B-601, which states that ". . . an attorney shall be appointed in the case in order to assure protection of the child's legal rights . . ." This language specifically refers to protecting the child's rights and not to representation of the GAL volunteer or the program. As such, it is reasonable to infer that the attorney advocate represents the child, not the volunteer. However, the representation is unconventional because it is done as a team, in cooperation with the volunteer, and because the representation is of the child's best interests. Please see Chapter 12 for a more detailed discussion of this issue.

[11] GAL Guidelines for Best Practice, V-4.

§ 8.7 Division of Responsibilities of the Guardian ad Litem Volunteer, Attorney Advocate, and Guardian ad Litem Staff [12]

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.

Staff	*Receives and reviews petition and any background information DSS shares about the case. Determines which available volunteer should be assigned to case.*
Staff	*Assigns volunteer to case, sending copy of petition and GAL appointment order to volunteer. Shares any background information available with volunteer.*
Attorney Advocate / *Staff/ Volunteer*	**Reviews petition**
Staff	*Notifies volunteer of dates for non-secure, adjudication, disposition hearings.*
Staff	*As needed, assists volunteer in planning the steps and priorities of her/his investigation*
Volunteer	Visits the child at least monthly, having direct and sufficient contact with the child-client to carry out an independent and valid investigation of the child's circumstance and what the child wants so as to be able to make sound, thorough and objective recommendations in the child's best interest.
Volunteer	Interviews parents and family members. The parents' counsel is informed of the Guardian ad Litem Volunteer's intent to visit or communicate with the parents.
Volunteer	Gathers and reviews data from various records, including DSS, Mental Health, education, and other community service providers to ascertain the needs of the child
Volunteer	Verifies accuracy of information gained during investigation
Staff	*Assists the volunteer as necessary to gather and review data from various records, including DSS, Mental Health, education, and other community service providers*
Staff	*Consults with volunteer to ensure all needs are identified*
Volunteer	Determines what services are necessary to meet the child's needs, determines whether the child can live in his/her own home or needs to remain in foster care or other group setting
Staff	*Notifies volunteer of foster care reviews and court hearings*
Volunteer	Identifies which resources are available to meet the child's needs
Staff	*Provides a community resource manual and assists the volunteer in identifying which resources are available to meet the child's needs*
Volunteer	Formulates recommendations for services to meet the child's needs
Staff	*Helps volunteer identify additional resources to meet the child's needs*
Staff	*Consults with volunteer prior to hearings to review court report and recommendations*
Staff	*Coordinates the sharing of information between the volunteer and attorney advocate prior to the hearing as needed*
Attorney Advocate	**Reviews volunteer recommendations with volunteer and/or staff and determines need for witnesses**
Volunteer	Identifies and clarifies issues in the case which are known to be in dispute and agreement

[12] Source: This Chart was adapted from the N.C. Guardian ad Litem Training Curriculum, edited by Cindy Bizzell, 1998, revised by Ruth Kravitz, 2002.

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To facilitate, when appropriate, the settlement of disputed issues.

Attorney Advocate / *Staff* / Volunteer	**Identifies and clarifies issues in the case which are known to be in dispute and agreement**
Attorney Advocate / *Staff* / Volunteer	**Determines the limits within which a settlement can be reached with other parties**
Attorney Advocate / Volunteer	**Discusses case issues with other parties to determine areas of agreement**
Attorney Advocate	**Communicates with volunteer and/or staff about possible settlements**
Attorney Advocate / *Staff* / Volunteer	**Facilitates agreement among parties when possible**

To offer evidence and examine witnesses at adjudication.

Attorney Advocate	**Consults with volunteer to determine what evidence is needed for the court hearing**
Attorney Advocate	**Reviews cases and clarifies disputed issues**
Attorney Advocate	**Identifies what evidence is needed, ensures that subpoenas are issued and documents secured that need to be introduced**
Attorney Advocate	**Interviews witnesses to prepare them for court, including child when appropriate**
Attorney Advocate	**Performs legal research on disputed legal questions and prepares court presentation of case**

To explore options with the judge at the dispositional hearing.

Volunteer	Writes court report, including the child's wishes, the child's needs and the resources available to meet those needs, and recommendations for achieving the goal of a permanent safe home for the child
Staff	*Reviews court report to ensure that it includes the child's wishes, the child's needs and the resources available to meet those needs, and recommendations for achieving the goal of a permanent safe home for the child*
Attorney Advocate	**Reviews volunteer court report**
Attorney Advocate	**Advocates for the needs of the child, including the volunteer's recommendations as to how those needs might be met**
Attorney Advocate	**Brings the child's wishes to the attention of the court and lets the court know if the child's wishes and the child's best interests are not the same**

To conduct follow-up investigations to insure that the orders of the court are being properly executed.

Volunteer / Attorney Advocate	**Reviews the court order**
Volunteer	Visits the child at least monthly, and maintains sufficient contact with parents, relatives, foster parents and agency personnel to determine if the orders of the court are being properly executed
Staff	*Notifies volunteer of foster care reviews, court hearings, and of any relevant information that they receive regarding the case*
Staff	*Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate*
Volunteer	Verifies accuracy of information gained during follow-up investigation
Volunteer	Notifies staff and attorney advocate if the orders of the court are not being properly executed
Attorney Advocate / *Staff*	**Contacts those who are responsible for carrying out the orders of the court to**

/ Volunteer	**address issues surrounding non-compliance**
Staff	*Identifies facts and changes in situation that may necessitate the case's return to court*
Attorney Advocate	**Files necessary motions and schedules hearings as needed**

To report to the court when the needs of the juvenile are not being met.

Volunteer / Attorney	**Reviews the court order**
Volunteer	Visits the child at least monthly, and maintains sufficient contact with parents, relatives, foster parents and agency personnel to determine if the needs of the juvenile are not being met
Staff	*Notifies volunteer of foster care reviews, court hearings, and of any relevant information that they receive regarding the case*
Staff	*Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate*
Volunteer	Verifies accuracy of information gained during follow-up investigation
Volunteer	Notifies staff and attorney advocate if the needs of the juvenile are not being met
Attorney Advocate / *Staff* / Volunteer	**Contacts those who are responsible for carrying out the orders of the court to address issues surrounding non-compliance**
Staff */ Volunteer*	Identifies facts and changes in situation that may necessitate the case's return to court
Attorney Advocate	**Files necessary motions and schedules hearings as needed**

To protect and promote the best interest of the juvenile until formally relieved of the responsibility by the court.

Volunteer	Regularly monitors the child in his/her home setting, evaluating appropriateness of placement and whether the child is receiving court ordered services, identifying any unmet needs
Staff	*Consults with volunteer throughout the life of the case to ensure adequate investigation and monitoring of the case*
Volunteer	Ensures that the child's wishes are known to the court at every review hearing and that the child-client is appropriately informed about relevant case issues (impending court hearings, the issues to be presented, and the resolution of those issues) in an age appropriate manner
Volunteer	If the Volunteer's recommendations for the best interest of the child are in conflict with the wishes of the child, the Volunteer informs the child-client of the reasons for the Volunteer's recommendations
Attorney Advocate	**Ensures that the child's wishes are known to the court at every review hearing**
Volunteer	Determines if additional services are needed for the child
Attorney Advocate / Volunteer	**Advocates for interventions and services that are designed to ensure that as soon as possible, the child is in a permanent safe home and GAL involvement will no longer be necessary**
Staff	*Provides support to the volunteer who advocates for interventions and services that are designed to ensure that as soon as possible, the child is in a permanent safe home and GAL involvement will no longer be necessary*

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Staff / Volunteer	Identifies facts and changes in situation that may necessitate the case's return to court
Attorney Advocate	**Files necessary motions and schedules hearings as needed**
Attorney Advocate	**Files appeals as approved by the State GAL office**
Staff	*Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate*

§ 8.8 Events, Activities and Roles in Abuse, Neglect, and Dependency Cases

EVENT	TIMING	ACTIVITY	GAL ROLE	DSS ROLE
Report of abuse/neglect to DSS. **Prepare Reports**	Initiate investigation in 24 hours if abuse is alleged, 72 hours if neglect is alleged.			1. Investigates report to determine if child abused or neglected. 2. Substantiates all allegations. 3. Removes child if necessary–DSS has placement authority. 4. Provides services to substantiated cases.
Child may or may not be taken into temporary custody. **Petition filed by DSS.** **May pursue Non-Secure Custody Order**	When taken into temporary custody with no order, must obtain Non-Secure Custody Order within 12 hours or 24 hours if any part of the 12 hours falls on a Saturday, Sunday or holiday.	1. Child may be removed 2. Petition filed 3. Removal may be pursuant to temporary or nonsecure custody 4. Non-Secure Custody Order signed by judge if appropriate 5. Summons sent to both parents with Non-Secure Custody Order and Petition. 6. GAL appt. order signed.	1. GAL and Attorney Advocate appointed on abuse/neglect cases. 2. Receives Petition, Summons, Non-Secure Custody Order and Appointment Order. 3. Begins investigation immediately. 4. Visits child, witnesses and parents if possible. 5. Interviews DSS social worker. 6. Collects records.	1. Files petition/subpoenas and calls witnesses. 2. Places child in temporary legal custody. 3. Develops protective service plan, which includes resources.
Non-Secure Custody Hearing	1-7 days after removal; may be continued for up to 10 business days with the consent of the juvenile's parent or guardian, and GAL, if one has been appointed	1. Establish need for continued custody (whether child has been exposed to physical or sexual abuse or risk of either or needs medical treatment). 2. Determine whether DSS has made reasonable efforts to prevent removal, or whether such efforts are not required. 3. Determine where child will reside until next hearing. 4. May address visitation, support or other such issues. 5. If parents are present, they will be given an opportunity to request court appt'd counsel.	1. GAL consults with Attorney Advocate prior to hearing. 2. Attorney Advocate presents evidence on need for continued custody and on reasonable efforts, based on preliminary investigation by volunteer GAL, if any. 3. Inquires about legal representation for parents. 4. Conducts preliminary assessment of family problems and remedies. 5. Begins to identify child's needs. 6. Identifies parties' common interests. 7. Evaluates risks to child if remains in home or separated from home. 8. Asks for attention to child's needs	1. Presents petition and puts on evidence. 2. May ask for continued non-secure custody if appropriate. 3. Has placement authority for children if granted nonsecure custody. 4. Informs the court of placement of the child and arrangement for visitation, evaluations and other services for family. Shows court what reasonable efforts were made to prevent removal, if not an emergency, or why reasonable efforts are not required.

Source: Adapted from the N.C. Guardian ad Litem Training Curriculum, edited by Cindy Bizzell, 1998, revised Ruth Kravitz, 2002.

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EVENT	TIMING	ACTIVITY	GAL ROLE	DSS ROLE
Ongoing Non-Secure Custody hearings	Within 7 days after first Non-Secure Custody hearing and every 30 days thereafter until adjudication unless waived.	Determine need for continued non-secure custody.	1. Attends with attorney advocate. 2. Attorney advocate presents evidence or cross examines, if needed. 3. Continues independent investigation. 4. Advocates for appropriate placement and services needed by child.	1. Presents evidence regarding why non-secure custody is needed. 2. Provides services for family of child. 3. Finances placement/ services/care for child.
Pre-Hearing Conference ***(In a number of judicial districts, local court rules require these conferences. They are not mandated by law.)***	Prior to adjudication hearing.	1. Clarify issues to be addressed. 2. Establish proper parties. 3. Review placement of children. 4. Motions of Attorneys presented. 5. List of witnesses presented by each party. 6. Discussion to settle or not to settle.	1. Attends with attorney advocate. 2. Has formed opinion (based on facts) on child's needs for inclusion in any consent order. 3. Is ready to discuss settlement issues. 4. Makes sure any consent order clearly states parent and DSS responsibilities to child whether or not child is returning home. 5. Reviews DSS plan to ensure child's best interest served or considered, presents other alternatives and requests to serve child's best interest. 6. Advocates for permanency for child.	1. Works with family to remedy issues in petition–may include housing, day care, job skills, substance abuse/mental health counseling. 2. Assesses conditions to determine if children can return home. 3. Arranges medical and psychological evaluations particularly in abuse cases. 4. Finances child's placement and care while in DSS custody.
Adjudication Hearing	Within 60 days from the filing of the petition unless the judge schedules it later for good cause.	1. All parties present evidence and examine witnesses. 2. DSS must prove allegations in Petition are true. 3. Judge determines if allegations are proven. 4. Judge determines whether DSS made reasonable efforts to reunify or whether such efforts are not required.	1. Attends with attorney advocate. 2. Attorney advocate presents evidence when needed, question witnesses, and argues the case. 3. Gives testimony. 4. Ensures that the court has sufficient information and professional advice about child, family, and services available. 5. Advocates for prompt adjudication by court.	1. Presents case/evidence. 2. Attempts to prove allegations/ carries burden of proof.

EVENT	TIMING	ACTIVITY	GAL ROLE	DSS ROLE
Disposition Hearing	Usually immediately following adjudication. Sometimes delayed to receive more information on child's needs.	1. To design a case plan that sets forth actions to be taken by the family, DSS, and other professionals to strengthen the home situation and/or place the child outside the home. 2. DSS presents plan. 3. GAL presents Court Report which includes recommendations. 4. Parents present evidence. 5. Judge determines what is in best interest of child and issues order.	1. Assesses DSS case plan to insure that it is specific, meets the needs of the child and family, and advocates for necessary changes. 2. Consults GAL staff and Attorney Advocate prior to hearing. 3. Attends with attorney advocate. 4. Advocates recommendations through court report and/or testimony based on child's best interest. 5. Seeks to settle differences in plan, to avoid adversarial confrontations. 6. Offers alternative witness/ evidence to support differences in plan for judge's consideration. 7. Recommends next review date.	1. Presents case plan. 2. Offers services to remedy conditions that led to the child's removal; and/or advocates for out-of-home placement. 3. Sets visitation schedule. 4. Schedules evaluations and services. 5. Designate other services. 6. Manages provision of services needed by family and child. 7. Financially supports needed services by child and family. 8. Recommends next review date.
Ongoing and Out-of-Court Involvement	Between all court hearings	1. Parents involved in DSS service plan. 2. DSS and GAL attend meetings, review reports, monitor situations, etc.	1. Monitors case to ensure court orders are executed. 2. Attends conferences to facilitate services to the child/family. 3. Gathers reports/information for court. 4. Motions to the court if orders not followed or if circumstances change for the child. 5. Identifies possible remedies. 6. Problem solver/facilitator. 7. Serves as liaison between service providers, DSS, family and foster parents–to empower systems to act on behalf of child. 8. Offers consistent representation and involvement for the child. 9. Informs GAL staff of ongoing progress or problems.	1. Monitors family's progress, provides social work services, reviews plans for family and child; supervises visits between family and child; manages all facets of case; has primary placement authority for children. 2. Contracts for services for family and child. 3. Motions the court for changes. 4. Monitors child's out-of-home placement.

GUARDIAN AD LITEM ADVOCACY

EVENT	TIMING	ACTIVITY	GAL ROLE	DSS ROLE
First Review Hearing	Within 90 days of the date of the dispositional hearing.	1. In-court review of placement and service plans and court order. 2. Determine any need to modify, renew or terminate previous orders. 3. Examination of the status of child and family, of placement of child and needs of child. This includes examination of services offered, whether reunification efforts are futile or inconsistent with child's needs, examination of efforts and goals concerning placement, and of visitation and any independent living assessment for children 16 or 17.	1. Investigates and continues to monitor prior to court. 2. Consults with attorney advocate and GAL staff prior to hearing. 3. Attends with attorney advocate. 4. Attorney advocate presents evidence on parent's, DSS, and other efforts to reunify family; reports on compliance with previous orders. 5. Attorney advocate presents evidence on child's current needs and advocates for permanent placement. 6. Identifies other assessments or evaluations needed to remedy situation. 7. Informs court of progress made toward alleviating the conditions which caused the petition to be filed. 8. Submits Court Report.	1. Presents court report. 2. Reports progress of parents complying with court order. 3. Identifies need for continuing services from DSS or other agencies. 4. Justifies need for continued DSS involvement. 5. Presents case plan for next 6 months. 6. Identifies permanent plan for child.
Second and Subsequent Review Hearings	Within 6 month intervals after the first hearing. Further review hearings may be waived under certain circumstances pursuant to 7B-906(b).	1. Same activities as in first review hearing, above. 2. If child not returned to parents, termination of parental rights considered.	Same as above.	Same as above.

EVENT	TIMING	ACTIVITY	GAL ROLE	DSS ROLE
Permanency Planning Hearing	In cases of removal, required within 12 months after initial order removing child, and subsequent hearings are at least every 6 months thereafter. Also required within 30 days of a judge's decision that reasonable efforts to reunify are not required or shall cease.	1. Parties present information ot the court to enable the court to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time. 2. If the child has been outside the home for 12 of the most recent 22 months or meets any other criteria set out in 7B-907(d) DSS shall initiate TPR proceedings unless the exceptions in 7B-907(d) are met. Such TPR petition shall be filed within 60 days of the permanency planning hearing.	1. Presents information to the court to enable the court to determine the same factors (1-5) listed in the column to the right concerning DSS role • 2. Advocates for a specific plan to achieve a safe, permanent home within a reasonable period of time.	Needs to provide information to the court to enable the court to determine the following: 1. Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home; 2. Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents; 3. Where the juvenile's return home is unlikely within six months, whether adoption should be pursued, and if so, any barriers to the juvenile's adoption; 4. Where the juvenile's return home is unlikely within six months, whether the juvenile should remian in the current placement or be placed in another permanent living arrangement and why; 5. Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile.

GUARDIAN AD LITEM ADVOCACY

EVENT	TIMING	ACTIVITY	GAL ROLE	DSS ROLE
Termination of Parental Rights (TPR) Petition Filed **TPR petition can be initiated as a motion in the cause in an abuse, neglect and dependency proceeding.**	DSS ordered or required to initiate termination proceedings in cases involving circumstances set out in 7B-907(d) or upon the initiative of DSS at any time when warranted, or the GAL when warranted.	1. DSS files petition or GAL may file. 2. Both parents summoned or noticed.	1. Attorney advocate expediently files TPR petition, when it is determined that such a proceeding is in the child's best interest. 2. Consults attorney advocate to draft the Petition. Where DSS petitions for TPR and GAL is in favor of TPR, GAL and attorney advocate prepare to present evidence, question witnesses and argue case to the court to supplement the case presented by DSS.	1. Files TPR petition after reasonable attempts to reunite the family have failed, or the situation is so egregious that no efforts are reasonable. 2. Adoption unit looks for adoptive family, prepares child for adoption, determines if adoption subsidies are available/ appropriate.
Termination of Parental Rights Hearing	Responding parties have 30 days to file an answer. Hearing shall be held no later than 90 days from filing of petition or motion	1. Parents admit or deny allegations. 2. DSS presents evidence. 3. GAL presents evidence. 4. Parents present evidence. 5. Judge determines if grounds exist and if in best interest of child to terminate rights of parents.	1. Prepares for hearing with attorney advocate. 2. Attends with attorney advocate. 3. GAL testifies if necessary. 4. Attorney advocate presents evidence on grounds for termination as well as best interest of child and argues case, whether or not petitioner. 5. Submits Court Report in dispositional phase of the case.	1. Presents evidence and argues the case.
Post TPR Court Review	No later than six months from date of termination and every 6 months thereafter.	1. DSS presents evidence of efforts to place child for adoption. 2. GAL, foster parents, agencies present evidence.	1. Investigates and requests information from DSS. 2. Presents information and submits Court Report. 3. Advocates for permanency/ stable home/services for child. 4. Attends with attorney advocate. 5. Presents any information. 6. Collaborates with DSS adoption unit to ensure child's interest is paramount. 7. GAL advocates for additional adoption listing, if appropriate. 8. GAL requests additional moneys for subsidies for special needs children.	1. Works with adoptive family. 2. Provides services to child. 3. Finances child's placement/services while in DSS custody.

EVENT	TIMING	ACTIVITY	GAL ROLE	DSS ROLE
Adoption Petition filed	After parental rights terminated.	DSS notifies District Court and GAL in writing.	1. GAL raises any issues of abuse of discretion by DSS within 10 days following written notification of adoption petition filing, but cannot demand to have a role in adoption selection. 2. Requests information on adoption selection from DSS. 3. Submits Court Report.	Must provide GAL with adoption selection information within 5 days upon request of GAL. Monitors adoption for 1 year or until adoption is finalized.
Adoption Disruption	Adoptive parents relinquish rights back to the agency, or other situation which places child back in DSS custody.	1. DSS monitors the case for continued reviews. 2. GAL reappointed. 3. Notice of disruption given to GAL within 30 days of disruption.	1. GAL investigates and determines child's needs. 2. Prepares for review through investigation. 3. Submits Court Report. 4. Advocates for permanency/ stable home/services for child. 5. Attends with attorney advocate. 6. Presents any information. 7. Collaborates with DSS adoption unit to ensure child's interest is paramount. 8. GAL advocates for additional adoption listings, if appropriate. 9. GAL requests additional moneys for subsidies for special needs children.	DSS attempts to locate another home or determines alternate permanent home.

STATUTES

§ 7B-600. Appointment of guardian

(a) In any case when no parent appears in a hearing with the juvenile or when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile. The guardian shall operate under the supervision of the court with or without bond and shall file only such reports as the court shall require. The guardian shall have the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court. The guardian may consent to certain actions on the part of the juvenile in place of the parent including (i) marriage, (ii) enlisting in the armed forces, and (iii) enrollment in school . The guardian may also consent to any necessary remedial, psychological, medical, or surgical treatment for the juvenile. The authority of the guardian shall continue until the guardianship is terminated by court order, until the juvenile is emancipated pursuant to Article 35 of Subchapter IV of this Chapter, or until the juvenile reaches the age of majority.

(b) In any case where the court has determined that the appointment of a relative or other suitable person as guardian of the person for a juvenile is in the best interest of the juvenile and has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court may not terminate the guardianship or order that the juvenile be reintegrated into a parent's home unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, that the guardian has neglected a guardian's duties, or that the guardian is unwilling or unable to continue assuming a guardian's duties. If a party files a motion or petition under G.S. 7B-906 or G.S. 7B-1000, the court may, prior to conducting a review hearing, do one or more of the following:

(1) Order the county department of social services to conduct an investigation and file a written report of the investigation regarding the performance of the guardian of the person of the juvenile and give testimony concerning its investigation.

(2) Utilize the community resources in behavioral sciences and other professions in the investigation and study of the guardian.

(3) Ensure that a guardian ad litem has been appointed for the juvenile in accordance with G.S. 7B-601 and has been notified of the pending motion or petition.

(4) Take any other action necessary in order to make a determination in a particular case.

(c) If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-124, § 1, eff. October 1, 2000; S.L. 2003-140, § 9(a), eff. June 4, 2003.

§ 7B-601. Appointment and duties of guardian ad litem

(a) When in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian ad litem to represent the juvenile. When a juvenile is alleged to be dependent, the court may appoint a guardian ad litem to represent the juvenile. The juvenile is a party in all actions under this Subchapter. The guardian ad litem and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have

been appointed. The appointment shall be made pursuant to the program established by Article 12 of this Chapter unless representation is otherwise provided pursuant to G.S. 7B-1202 or G.S. 7B-1203. The appointment shall terminate when the permanent plan has been achieved for the juvenile and approved by the court. The court may reappoint the guardian ad litem pursuant to a showing of good cause upon motion of any party, including the guardian ad litem, or of the court. In every case where a nonattorney is appointed as a guardian ad litem, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding. The duties of the guardian ad litem program shall be 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; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

(b) The court may authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein the juvenile may be called on to testify in a matter relating to abuse.

(c) 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. 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.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 432, § 1, eff. Aug. 10, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999.

§ 7B-603. Payment of court-appointed attorney or guardian ad litem

(a) An attorney or guardian ad litem appointed pursuant to G.S. 7B-601 shall be paid a reasonable fee fixed by the court or by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts.

(a1) The court may require payment of the fee for an attorney or guardian ad litem appointed pursuant to G.S. 7B-601 from a person other than the juvenile as provided in G.S. 7A-450.1, 7A-450.2, and 7A-450.3. In no event shall the parent or guardian be required to pay the fees for a court-appointed attorney or guardian ad litem in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent or, in a proceeding to terminate parental rights, unless the parent's rights have been terminated. If the party is ordered to reimburse the State for attorney or guardian ad litem fees and fails to comply with the order at the time of disposition, the court shall file a judgment against the party for the amount due the State.

(b) An attorney appointed pursuant to G.S. 7B-602 or pursuant to any other provision of the Juvenile Code for which the Office of Indigent Defense Services is responsible for providing counsel shall be paid a reasonable fee in accordance with rules adopted by the Office of Indigent Defense Services.

(b1) The court may require payment of the fee for an attorney appointed pursuant to G.S. 7B-602 or G.S. 7B-1101 from the respondent. In no event shall the respondent be required to pay the fees for a court-appointed attorney in an abuse, neglect, or dependency proceeding unless the juvenile has been adjudicated to be abused, neglected, or dependent or, in a proceeding to terminate parental rights, unless the respondent's rights have been terminated. At the dispositional hearing or other appropriate hearing, the court shall make a determination whether the respondent should be held responsible for reimbursing the State for the respondent's attorneys' fees. This determination shall include the respondent's financial ability to pay.

If the court determines that the respondent is responsible for reimbursing the State for the respondent's attorneys' fees, the court shall so order. If the respondent does not comply with the order at the time of disposition, the court shall file a judgment against the respondent for the amount due the State.

(c) Repealed by S.L. 2005-254, § 2, eff. Oct. 1, 2005.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2000-144, § 17, eff. July 1, 2001; S.L. 2005-254, § 2, eff. Oct. 1, 2005.

§ 7B-1200. Office of Guardian ad Litem Services established

There is established within the Administrative Office of the Courts an Office of Guardian ad Litem Services to provide services in accordance with G.S. 7B-601 to abused, neglected, or dependent juveniles involved in judicial proceedings and to assure that all participants in these proceedings are adequately trained to carry out their responsibilities. Each local program shall consist of volunteer guardians ad litem, at least one program attorney, a program coordinator who is a paid State employee, and any clerical staff as the Administrative Office of the Courts in consultation with the local program deems necessary. The Administrative Office of the Courts shall adopt rules and regulations necessary and appropriate for the administration of the program.

Added by S.L. 1998-202, § 6, eff. July 1, 1999.

§ 7B-1201. Implementation and administration

(a) Local Programs. --The Administrative Office of the Courts shall, in cooperation with each chief district court judge and other personnel in the district, implement and administer the program mandated by this Article. Where a local program has not yet been established in accordance with this Article, the district court district shall operate a guardian ad litem program approved by the Administrative Office of the Courts.

(b) Advisory Committee Established. --The Director of the Administrative Office of the Courts shall appoint a Guardian ad Litem Advisory Committee consisting of at least five members to advise the Office of Guardian ad Litem Services in matters related to this program. The members of the Advisory Committee shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions generally.

Added by S.L. 1998-202, § 6, eff. July 1, 1999.

§ 7B-1202. Conflict of interest or impracticality of implementation

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. If the Administrative Office of the Courts determines that within a particular district court district the implementation of a local program is impractical, or that an alternative plan meets the conditions of G.S. 7B-1203, the Administrative Office of the Courts shall waive the establishment of the program within the district.

Added by S.L. 1998-202, § 6, eff. July 1, 1999.

§ 7B-1203. Alternative plans

A district court district shall be granted a waiver from the implementation of a local program if the Administrative Office of the Courts determines that the following conditions are met:

(1) An alternative plan has been developed to provide adequate guardian ad litem services for every juvenile consistent with the duties stated in G.S. 7B-601; and

(2) The proposed alternative plan will require no greater proportion of State funds than the district court district's abuse and neglect caseload represents to the State's abuse and neglect caseload. Computation of abuse and neglect caseloads shall include such factors as the juvenile population, number of substantiated abuse and neglect reports, number of abuse and neglect petitions, number of abused and neglected juveniles in care to be reviewed pursuant to G.S. 7B-906, nature of the district's district court caseload, and number of petitions to terminate parental rights.

When an alternative plan is approved pursuant to this section, the Administrative Office of the Courts shall retain authority to monitor implementation of the said plan in order to assure compliance with the requirements of this Article and G.S. 7B-601. In any district court district where the Administrative Office of the Courts determines that implementation of an alternative plan is not in compliance with the requirements of this section, the Administrative Office of the Courts may implement and administer a program authorized by this Article.

Added by S.L. 1998-202, § 6, eff. July 1, 1999.

§ 7B-1204. Civil liability of volunteers

Any volunteer participating in a judicial proceeding pursuant to the program authorized by this Article shall not be civilly liable for acts or omissions committed in connection with the proceeding if the volunteer acted in good faith and was not guilty of gross negligence.

Added by S.L. 1998-202, § 6, eff. July 1, 1999.

CHAPTER 9
OVERVIEW OF THE COURT PROCESS

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Sec.

STATUTES

§ 9.1 The Juvenile Code

A. Legislative Changes

The Juvenile Code is in the North Carolina General Statutes Chapter 7B and contains the law relating to criminal delinquency matters, undisciplined matters, and civil abuse, neglect, and dependency matters all involving juveniles. Prior to legislative changes in 1998, the Juvenile Code was contained in Chapter 7A and had numerous provisions that mixed criminal and civil juvenile proceedings. But in the fall of 1998, the General Assembly completely revamped the Juvenile Code as it relates to delinquency matters and in fact separated delinquency from abuse, neglect, and dependency, putting their respective provisions in different places in the Juvenile Code. At the same time, the legislature also made significant changes to abuse, neglect, and dependency matters, mostly to accommodate the Federal Adoption and Safe Families Act of 1997 ("ASFA").[1] Since 1998, amendments to the Juvenile Code continue to be enacted, some in an effort to further accommodate ASFA and others in an effort to clarify statutory language or strengthen the protection afforded to abused, neglected, and dependent children.

B. Understanding the Purpose and Definitions Contained in the Code

The purpose of the Juvenile Code and definitions to many of the terms used in the Code are stated in G.S. 7B-100 and 7B-101, which can be found at the end of this chapter of the manual. A clear understanding of the purpose of the Code and the definitions is crucial to an attorney advocate (AA) being able to accurately apply the law contained in the Code.

§ 9.2 Juvenile Court [2]

A. Courtroom Division between Criminal Delinquency Matters and Abuse, Neglect, and Dependency Matters

Regular Juvenile Court is typically divided into two settings: (1) criminal delinquency and undisciplined matters petitioned by a juvenile court counselor and prosecuted by a district attorney and (2) civil abuse, neglect, and dependency matters petitioned by the Department of Social Services. There are other special juvenile sessions devoted to related juvenile matters, and termination of parental rights proceedings are also held in Juvenile Court.

In some locations, criminal and DSS matters are calendared on the same day, and court is not divided specifically between the two. In others, court calendars are devoted either to delinquency or to DSS matters, and they are entirely separate. Some districts have local court rules governing the procedures followed in juvenile matters; others simply go by unwritten local protocol. Obviously, one of the greatest variables in courtroom procedure is the way a particular judge is inclined to run court.

[1] Please see Chapter 11 in this manual for more information on the Adoption and Safe Families Act.

[2] This section is designed to be an introduction to juvenile court for those readers who have not had exposure to juvenile court.

B. Narrative Outline of the Process: Petition, Nonsecure Custody, Adjudication, Disposition, and Review

When DSS substantiates a complaint of abuse, neglect, or dependency and decides to initiate a petition, they often identify an immediate need to remove a child. If so, they will obtain a nonsecure custody order and have a nonsecure custody hearing so the court can determine where the child should live pending adjudication on a petition. Juvenile matters are then divided into two primary stages: (1) an adjudicatory stage devoted to fact-finding and ruling on the allegations, and (2) a dispositional stage devoted to identifying the needs of the child and the parent, ways to address those needs, and settling on an outcome that is in the best interests of the child. Disposition can immediately follow adjudication or it can be delayed. Hearings conducted after disposition are called *review* hearings.

After disposition, the judge will conduct review hearings to determine if dispositional orders are being followed, whether the orders are appropriate, whether the parents are improving, and to examine placement plans for the child as well as the child's needs and whether they are being met. A special review hearing, called a *permanency planning hearing*, must be held at a specific point to ensure that a permanent plan is in place for the child and that the case is moving toward that plan. In some cases, once dispositional orders are carried out and the court finds the parents fit to care for their child, the child can be returned home. Sometimes, the judge may find that reunification efforts are futile or not in the best interests of the child and may order such efforts to cease. If returning the children home is not appropriate now or in the future, a termination of parental rights (TPR) petition can be filed if there are statutory grounds for termination, and a hearing will follow. Once a TPR is ordered, post-termination review hearings are held as the court and all of its players work toward a permanent placement for the child. The court retains jurisdiction over the juvenile until terminated by the court's order, the juvenile turns eighteen, or is emancipated, whichever occurs first.

C. Governed by the Rules of Civil Procedure

Procedural issues in abuse, neglect, and dependency matters are governed by the Rules of Civil Procedure unless specifically addressed by the Juvenile Code.

D. Overlap between Civil and Criminal

A much more detailed discussion of the attorney advocate's role in such proceedings is included in Chapter 13 of this manual titled, "The Attorney Advocate's Role in Other Proceedings."

1. When juvenile is involved in both delinquency and abuse or neglect proceedings

Sometimes a juvenile involved in a delinquency case is also involved in an abuse, neglect, or dependency case. Occasionally a child will be taken into DSS custody as a result of what took place in court on a delinquency matter. A child already in DSS custody might also become involved in criminal activity that results in a delinquency petition. It is important to remember, however, that unless there is an abuse, neglect, or dependency petition, the statute does not give the court the authority to appoint a guardian ad litem pursuant to 7B-601.

2. When parent with criminal charges brings everyone into adult criminal court

Another overlap between the juvenile case and criminal proceedings occurs when the events that led to the petition for abuse or neglect result in criminal charges of the parent or caretaker. When criminal charges are pending against a parent or caretaker, the AA, the GAL staff, the

volunteer, and the child probably will all end up being involved with law enforcement personnel and the district attorney's office. Many complex issues arise in such a situation, including whether and how to share information, under what circumstances the child should be interviewed or testify, and what kind of relationship the GAL should have with law enforcement officers and prosecutors. However, it is important to realize that the criminal process moves independently of the civil process, although each proceeding can influence the other in terms of timing and content, they don't always affect each other; therefore, decisions relating to the relationship between the two must be made on a case-by-case basis. [For information on agency sharing of information, see § 1.9.E.2; on the child witness, see § 7.2; on the role of the attorney advocate, see, Chapter 13.]

E. Continuances and a Child's Sense of Time

Continuances may be requested frequently, but *unless they are beneficial to the child's interest, the attorney advocate should oppose continuances*. A child's sense of time is very different from ours. If an infant or toddler waits months for a hearing, that wait is a significant portion of his or her life and may truly seem like a lifetime to the child. A school-age child who is uprooted from school and friends does not view a month (or three or four) as a short time at all.

Consider this excerpt from the insightful resource materials prepared for the National Council of Juvenile and Family Court Judges.

> . . .When litigation proceeds at what attorneys and judges regard as a normal pace, children often perceive the proceedings as extending for vast and infinite periods.
>
> The passage of time is magnified for children in both anxiety levels and direct effect. Three years is not a terribly long period of time for an adult. For a six-year-old, it can mean the difference between finding an adoptive family and failing to gain permanence because of age. If too much time is spent in foster care during these formative years, lifetime problems can be created.
>
> Court delays caused by prolonged litigation can be especially stressful to abused and neglected children. The uncertainty of not knowing whether they will be removed from home, whether and when they will go home, when they might be moved to another foster home, or whether and when they may be placed in a new permanent home are frightening.[3]

Children should not be separated from their parents any longer than necessary, nor should they have to wait for permanent, out-of-home placement any longer than necessary. The faster a child's case is moved through the system, the less the child has to suffer. Attorney advocates should always push the judge to set the next court date for as soon as is practical, according to what needs to be accomplished prior to that date -- not according to the convenience of the parties involved. Legislative changes made to the statutes in 1998 put tighter time limitations on various stages of the proceedings to address the child's need for a faster, more efficient process.

F. Permanency Planning Is Always the Focus

[3] National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases. Written by the Publication Development Committee Victims of Child Abuse Project, 1995, Hon. David E. Grossmann, chairman, p. 14.

Throughout the juvenile court process, a safe *and* permanent home must be the focus and goal behind decisions and recommendations. The GAL volunteer and attorney cannot make getting the child into a safe place their only goal. Especially when termination seems possible or likely, potential adoptive placements are preferable to temporary foster care. The GAL attorney and volunteer cannot rest simply because a child has been placed in a safe, positive situation. If the placement situation is not permanent, there is still work to be done. A permanent placement refers not only to a placement that has the potential for adoption but also to one that is legally secure and cannot easily be "undone." Steps must be taken to speed the process along to either return the child to the parents or terminate parental rights so that the child can be adopted, or another permanent placement option can be found. [For more information on options for permanency, see "Permanency Options" in the appendix of this manual.]

§ 9.3 Juvenile Court Players

A. The DSS Attorney

The DSS attorney represents the Department of Social Services through his or her representation of the social worker assigned to a given case. The DSS attorney acts similarly to a prosecutor in many courtrooms, as he or she may call cases for hearing and inform the court as to the status of each case. The DSS attorney, in the capacity of petitioner, is responsible for the initial presentation of evidence in each stage of the proceedings (excluding hearings on motions initiated by the GAL or parent's attorney). The DSS attorney is also responsible for protecting the agency from liability. *See Chapter 10 of this manual for additional explanation of the role and responsibilities of DSS.*

B. The Parent's Attorney

Every parent has the right to counsel and to court-appointed counsel in cases of indigency unless the parent waives that right. **[G.S. 7B-602]** If the parents' interests could be in conflict, each must have a different attorney. The parent's attorney has an obligation to represent the needs and desires of the parent, to protect the legal rights of the parent, and to advise the parent on legal matters. From a practical standpoint, it is preferable to have separate attorneys for each parent because even when parents feel their interests do not conflict, such interests may change throughout the course of a case.

C. The Department of Social Services Worker(s)

The social worker (often referred to as a caseworker) investigates the case, initiates a petition, usually removes the child from the home, and proceeds with further investigation to determine the needs of the family. The social worker (often more than one, each assigned to a different stage of the case) is responsible for determining and coordinating services for the family, for gathering evidence to present in court, for making recommendations to the court, and for monitoring and managing the case until DSS services are no longer needed. He or she also assists parents in identifying ways to carry out conditions imposed upon them by the court concerning evaluation, treatment, classes, programs, and other methods of improving their circumstances. The role and responsibilities of the social worker are explained in greater detail in Chapter 10 of this manual.

D. The Juvenile Court Clerk or Case Manager

The Juvenile Court Clerk maintains the schedule and calendar for juvenile cases, maintains confidential

juvenile court files, records juvenile proceedings, and assists with clerical matters during court hearings. Some family court districts also have a Juvenile Court Case Manager that may schedule cases and otherwise assist with managing cases (*i.e*. monitoring timelines; prioritizing hearings; etc.). It is necessary to be familiar with your local district.

E. The Juvenile Court Judge

The judge hears and rules on all matters in juvenile court, including whether to adjudicate and where to place a child. Juvenile matters do not come before a jury. The judge orders appropriate services, orders reviews, and sometimes takes part in prehearing conferences. The judge is responsible for overseeing the courtroom proceedings and for determining the child's best interests. Some judges take an active role in case management and juvenile court improvement.

F. Guardian ad Litem Volunteer, Attorney Advocate, and Staff

Ideally, the Attorney Advocate and volunteer are both in the courtroom to represent the child. Sometimes staff is needed as well. Depending on the type of hearing, however, the presence of one or more of the three may not be required.

G. The Parent

The parent is served with a summons and required to be present at all hearings involving the child, though a hearing can proceed without a parent if the parent is properly served and noticed. The parent is responsible for meeting conditions or orders imposed by the court to improve his or her situation in order to get the child back. The parent may be involved in criminal proceedings involving the same circumstances alleged in the petition.

H. The Child

If possible, the child will explain any allegations to DSS or law enforcement, but every effort should be made to avoid having the child repeat his or her story unless absolutely necessary (the GAL should not be inquiring about the allegations). If possible, the child will convey information to the GAL regarding his or her life that will assist the GAL in determining the child's needs and best interests. Any wishes expressed by the child will be communicated to the court via the child, the GAL, or the AA. The child may or may not be present in court and may or may not testify. The GAL volunteer and attorney should monitor both matters. [See, § 2.7.H and § 7.2 regarding children in court and the child witness.] There are certain places in the Juvenile Code, however, that require notice to a child twelve and over and an opportunity for the child to convey information to the court. In any event, the child should be informed of all issues and resolutions related to the case in a manner that is appropriate to the child's level of maturity.

§ 9.4 Rights of the Child, Rights of the Parent

A. Rights of the Child

There is an ongoing debate at the national level about the legal rights of children in the context of child protection proceedings. One specific component of that debate is whether children's voices should be expressed in terms of their wishes, in terms of their best interests, or both, and whether the vehicle for the child's voice should be the child himself, a volunteer CASA or GAL, an attorney, or any combination of all three.

In North Carolina, the framework for abuse, neglect, and dependency cases itself sets up certain rights for children. Within this framework once a petition is filed, children have the right to have their best interests represented by a GAL (who must focus only on the child) throughout the course of a case. While the statute does not specifically set up a framework for representation of the child's expressed wishes, the GAL program Guidelines for Best Practice set the expectation that any wishes expressed by the child will be taken into account in determining best interest and conveyed to the court.[4] The process for child protection cases generally centers on the best interest of the child, determined by way of a hearing with an opportunity for all parties to be heard.

In addition, some sections in the Juvenile Code require that children 12 years old or older get notice of certain proceedings and some require the judge to receive information from the child in certain proceedings and/or give the child an opportunity to be heard. (*See, e.g.*, 7B-901, -906, - 907, -908.) In all proceedings, the GAL, who represents the child, has the right to notice and an opportunity to fully participate in anything related to the case since the juvenile is a party (pursuant to 7B-601) and acts through his or her GAL.[5]

The United States Constitution does not address the rights of children, and the U.S. Supreme Court has never held specifically that the child has a right to be heard in abuse or neglect proceedings. Of course, various United States Supreme Court cases have dealt with children's rights issues but those cases do not involve the rights of children in civil abuse and neglect proceedings but usually delinquency matters. (*But see Lassiter v. Department of Social Services*, 452 U.S. 18 (1981)(addressing the due process rights of a parent involving termination of parental rights proceedings and of liberty interests for choices made in matters of family life and held that a parent does not have a constitutional right to counsel in a TPR case.)

B. Rights of the Parent [6]

1. Equal Protection

An individual's status as a parent and his expectancy of exercising and enjoying the functioning of parenthood do fall within those "fundamental rights of family life" protected by the Fourteenth Amendment.[7] Where fundamental rights are involved, statutes are typically subject

[4] GAL Guidelines for Best Practice, IV-2, 2000 (Attorney Work Standards which are also set out in this manual in § 8.4).
[5] See § 12.5 in this manual for more discussion on children in court.
[6] For a more detailed discussion of the rights of parents, see Ilene Nelson, Children and the Law: A Casebook for Practice, Administrative Office of the Courts, 1992, pp. 15 - 21.
[7] *See Meyer v Nebraska*, 262 U.S. 390 (1923), *Pierce v Society of Sisters*, 268 U.S. 510 (1925); *Moore v East Cleveland*, 431 U.S. 494 (1977); *Cleveland Bd. of Educ. v LaFleur*, 414 U.S. 632 (1974); *Wisconsin v Yoder*, 406 U.S. 205 (1972); *Griswold v Connecticut*, 381 U.S. 479 (1965), *Stanley v Illinois*, 405 U.S. 645 (1972); *Zablocki v Redhail*, 434 U.S. 374

> to a "strict scrutiny" test, placing the burden on the state to show a "compelling state interest."[8] Some cases relating to the fundamental rights of family examine whether there is a "substantial relation to [an] important state interest" or whether the means selected are "appropriate or necessary" or "needlessly, arbitrarily, or capriciously impinge upon . . . [a] vital area of . . . constitutional liberty." [9]

North Carolina courts have been asked to consider the constitutionality of certain termination of parental rights grounds on the basis of equal protection in the past. In the case of *In re Biggers*, 50 N.C. App. 332 (1981), the North Carolina Court of Appeals found that the grounds for termination based on failure to support and on neglect did not violate equal protection. In so doing, the court performed an analysis of the interests and stated the following:

> *All parents have the duty to support their children within their means, and the State, as the parens patriae of all children, may enforce that duty to prevent children from becoming public charges.* 3 Lee, N.C. Family Law *§ 229 (3d ed. 1963). In G.S. 7A-289.32(4), the legislature has concluded that a child's best interest is served by a termination of parental rights when his parents cannot provide reasonable support. This statute meets the standard of strict judicial scrutiny, where fundamental rights are involved, under the equal protection clause. The State undoubtedly demonstrates a compelling interest for the health, welfare and safety of minor children, and this interest is directly related to the purpose of the statute.* See also N.C. Ass'n for Retarded Children v. State of N.C., *420 F. Supp. 451 (M.D.N.C. 1976);* In re Johnson, *45 N.C. App. 649, 263 S.E. 2d 805 (1980). "It certainly is not an unreasonable or arbitrary exercise of the police power for the State to intervene between parent and child where that child is helpless and defenseless and is endangered by parental neglect, inattention, or abuse." In re Lassiter, 43 N.C. App. 525, 527, 259 S.E. 2d 336, 337 (1979), review denied, 299 N.C. 120, 262 S.E. 2d 6 (1980). In sum, we conclude that G.S. 7A-289.32(4) does not violate the equal protection clause by discriminating among persons similarly situated since it applies to all parents equally and allows due consideration of their specific individual financial circumstances.*

Id. at 339.

2. Due Process

The following is an excerpt from Children and the Law: A Casebook for Practice, by Ilene Nelson:

> Only when a parent fails in fulfilling the responsibilities owed to a child should the state intervene in a parent-child relationship. Parents have an important interest in the protection and preservation of their right to the custody and care of a child. *Lassiter v. Durham County Department to Social Services,* 452 U.S. 18, 27, *reh'g denied*, 453 U.S. 927 (1981); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). The state's interference with a parent-child

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(1978); and *Caban v Mohammed, 441 U.S. 380 (1979).*

[8] *Moore v East Cleveland , supra*; *Shapiro v Thompson*, 394 U.S. 618 (1969).

[9] *In re Jonathan E.G.*, 436 N.Y.S.2d 546, 552 (1980)(citing *Caban v Mohammed supra, Moore v East Cleveland, supra, Cleveland Bd. Of Educ. v. LaFleur, supra*).

relationship treads upon the fundamental rights of a parent, thereby threatening destruction of a family unit. The U.S. Supreme Court has emphasized that "parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745 (1982).

When the state becomes involved in overseeing a parent-child relationship, the parent is entitled to the rights of due process: the right to notice and the opportunity to be heard. Procedural safeguards for parents interested in a child are especially warranted in adoption and termination of parental rights cases. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (due process requires the state to prove the need to terminate parental rights by the presentation of clear and convincing evidence); *Lehr v. Robertson*, 463 U.S. 248 (1983) (putative father entitled to notice of adoption proceedings); *In re Clark*, 76 N.C. App. 83, 332 S.E.2d 196 *appeal dismissed*, 314 N.C. 665, 335 S.E.2d 322 (1985).

Generally, all of the procedural safeguards that apply in any civil case apply in juvenile court matters. However, there is one glaring exception. The United States Supreme Court has stated that:

> [a] mother who is the custodian of her child pursuant to a court order may not invoke the Fifth Amendment privilege against self-incrimination to resist a subsequent court order to produce the child. . . . Even assuming that the act of production would amount to a communication regarding Bouknight's control over, and possession, of [her child] that is sufficiently incriminating and testimonial in character, she may not invoke the privilege to resist the production order in the present circumstances. The ability to invoke the privilege is greatly diminished when invocation would interfere with the effective operation of a generally applicable regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws. *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549, 550 (1990).

3. Custody rights

a. Parent v. grandparent: Courts have been known to award custody to a grandparent in a custody action against a parent. The United States Supreme Court addressed the issue of grandparent's visitation in *Troxel v. Granville*, 530 U.S. 57 (2000). Chapter 50 of the NC General Statutes specifically addresses grandparent issues in several provisions. *Penland v. Harris*, 135 N.C. App. 359 (1999), is a North Carolina case that discuses a grandparent's right to seek custody and/or visitation of a grandchild and discusses the Chapter 50 provisions. Other recent cases include *Montgomery v. Montgomery*, 136 N.C. App. 435 (2000); *Price v. Breedlove*, 138 N.C. App. 149 (2000); *Shaut v. Cannon*, 136 N.C. App. 834 (2000). *See also In re Ore*, 160 N.C. App. 586 (2003)(holding that grandmother who had physical custody of a juvenile for two years could file TPR petition); *In re Badzinski*, 79 N.C. App. 250, *disc. rev. denied*, 317 N.C. 703 (1986); *Best v. Best*, 81 N.C. App. 337 (1986); *Moore v. Moore*, 89 N.C. App. 351 (1988).

b. Foster parent v. parent and/or grandparent and/or DSS:[10]

[10] Information on Rights of Foster Parents obtained from Children and the Law, p. 173 -74. For more detailed

i. The N.C. General Statutes require notice to foster parents and require courts to consider information from the foster parents in various places in the Juvenile Code but never raise the foster parent to the status of a party from the petitioning phase of the case through disposition and review.[11] However, a foster parent can petition for termination of parental rights under certain circumstances [see 7B-1103(5)].

ii. *Oxendine v. Catawba County DSS*, 303 N.C. 699 (1981), discusses the rights of foster parents to seek custody of a child in the legal custody of DSS. Here the foster parents had filed a complaint seeking permanent custody of their foster child where the natural parents had voluntarily released their parental rights and surrendered the child to DSS. The court found the foster parents to be without standing.

iii. In a custody dispute involving foster parents, DSS, and an eighteen-year-old father, the court concluded that the best interests of the child warranted giving custody to the foster parents, because neither the father nor grandparents would be fit and proper parents. The court in this case found that permitting the foster parents to intervene in this action was appropriate pursuant to Rule 24(b) of the Rules of Civil Procedure. The court distinguished this case from *Oxendine* (see above). In *Oxendine*, the case was controlled by G.S. 48-9 et seq. and standing to bring an action, but this case is not, because both parents have not released the child for adoption and the case involves permissive intervention, not standing to bring an action. *In re Scearce*, 81 N.C. App. 531, *cert. denied*, 318 N.C. 415 (1986).

iv. The U.S. Supreme Court discussed the rights of foster parents and the unit of a foster family with respect to constitutionally protected interests in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977).

information on the rights of foster parents, see Children and the Law, pp. 171 - 77.

[11] Note that Session Law 2007-276 effective October 1, 2007 gives foster parents the "right to be heard" as opposed to simply an "opportunity."

§ 9.5 Court Hearings in Abuse, Neglect and Dependency 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-500, 7B-502** **7B-503, 7B-504** **7B-505**	Upon motion for nonsecure custody brought by DSS or GAL. The initial nonsecure custody order may be granted as the result of a hearing or may be an ex parte order.	Criteria that must be met: • reasonable factual basis to believe matters alleged in petition are true, • no other reasonable means available to protect the juvenile, • must first consider release of juvenile to parent, relative, guardian, custodian, or other responsible adult, • must consider whether it is in the juvenile's best interest to remain in his or her community of residence, • must find that the juvenile meets one of the following criteria: 1. has been abandoned 2. has suffered physical injury or sexual abuse 3. is exposed to substantial risk of physical injury or sexual abuse . . . 4. 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	Statute does not set forth a burden of proof but merely states the criteria for a nonsecure custody order.	The judge must determine whether the child should be removed from the custody of the parent or caretaker. If so, where the child should be placed pending adjudication. The judge cannot dismiss the petition at the nonsecure stage, but DSS can. [Note that temporary custody under 7B-500 and 7B-501 is possible without a nonsecure custody order under certain circumstances and where the child might be injured or could not be taken into custody if it were first necessary to obtain a court order. A hearing must be held within 12 hours or 24 if on a weekend.]
Non-Secure Custody Hearings **7B-500, 7B-502** **7B-503, 7B-504** **7B-505, 7B-506,** **7B-507**	Nonsecure custody hearing must be within 7 days after removal. After initial hearing, 2nd hearing within 7 days, then within 30 day intervals.	The judge applies the same criteria set out above from 7B-503 to determine the need for an initial order of nonsecure custody and orders continuing nonsecure custody. Reasonable efforts findings pursuant to 7B-507 must be made when an order placing or continuing the placement of the child in the custody or placement responsibility of DSS is made.	Burden of proof is on DSS, and the standard of proof is by clear and convincing evidence. Nonsecure custody hearings are informal and the formal rules of evidence need not apply.	The judge must decide whether the child should be in nonsecure custody or remain in nonsecure custody and where the child should be placed. Whether reasonable efforts have been made or whether the court may order such efforts to be unnecessary or to cease due to the presence of certain circumstances set out in 7B-507

Statute/Event	Timing	Criteria or Factors Considered	Procedural Requirements	Decisions to Be Made
Adjudicatory Hearing 7B-801, 7B-802, 7B-805, 7B-807, 7B-902	Must be heard within 60 days of the date of the filing of the petition unless the judge finds good cause for continuance.	Whether the allegations in the petition are proven by clear and convincing evidence. (Whether the child is in fact abused, neglected, or dependent as defined by 7B-101.)	The allegations in the petition must be proven by clear and convincing evidence. The formal rules of evidence in civil cases are applicable. The burden of proof is on DSS.	The judge must decide whether the allegations in the petition have been proved by clear and convincing evidence. If so, the juvenile is adjudicated abused, neglected, or dependent. If not, the judge must dismiss the petition. If there is an adjudication, the judge must decide whether to proceed immediately to disposition or set a date for a dispositional hearing.
Dispositional Hearing 7B-900, 7B-901, 7B-903	Should be heard immediately following adjudication but can be postponed pending necessary collection of information.	What must happen in order to accommodate the best interests of the child or children and to achieve a safe, permanent home within a reasonable period of time? Whether reasonable efforts have been made or whether the court may order such efforts to be unnecessary or to cease due to the presence of certain circumstances set out in 7B-507.	Hearing may be informal (with respect to Rules of Evidence) and the court can consider hearsay evidence that is relevant and reliable. The statute does not place the burden of proof on any party but states that sufficient evidence must be presented to enable the court to make a determination regarding best interest.	The judge must decide whether the child should be returned home or placed outside the home according to the best interests of the child. The judge must also determine: • where the child should be placed • what services the child should receive • what services the parent(s) should receive • what kind of visitation is appropriate • what directives to make to the parent concerning expected changes or accomplishments on the part of the parent that would place him or her in a better position to care for a child (but cannot **order** parent to do things unless statute permits) • any other details pertaining to the above or to the needs of the child or parents.

OVERVIEW OF THE COURT PROCESS

Statute/Event	Timing	Criteria or Factors Considered	Procedural Requirements	Decisions to Be Made
Review Hearings 7B-903, 7B-906	Must be held within 90 days from date of the dispositional hearing if child is removed; every 6 months thereafter.	Same considerations as for dispositional hearings, plus the court will consider the following: • Whether certain services have been provided, what the response has been to such services, and whether additional services are needed. • Whether the parent has complied with court directives.	Same procedural requirements as for dispositional hearings.	Same decisions as in dispositional hearings.
Permanency Planning Hearing 7B-907	In cases of removal, required within 12 months after initial order removing child, and subsequent hearings are at least every 6 months thereafter. Also required within 30 days of a judge's decision in any hearing that reasonable efforts are not required or shall cease.	(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home; (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents; (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued, and if so, any barriers to the juvenile's adoption; (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why; (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile; (6) Any other criteria the court deems necessary.	Same as for dispositional and review hearings. May be combined with regular review hearing, but must meet requirements of 7B-907.	The judge must make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. The judge may make any disposition authorized by 7B-903. Whether reasonable efforts have been made or whether the court may order such efforts to be unnecessary or to cease due to the presence of certain circumstances set out in 7B-507. If the child is not returned home, the judge shall enter an order directing DSS to carry out the plan and document the steps in the plan. If the child has been outside the home for 12 of most recent 22 months or meets any other criteria set out in 7B-907(d), the judge shall order DSS to initiate TPR proceedings unless the exceptions in 7B-907(d) are met. Such TPR petition shall be filed within 60 days of the permanency planning hearing.

Statute/Event	Timing	Criteria or Factors Considered	Procedural Requirements	Decisions to Be Made
Termination of Parental Rights Hearing 7B-1100 through 7B-1112	DSS ordered or required to initiate termination proceedings in cases involving certain circumstances set out in 7B-907(d) or upon the initiative of DSS or the GAL when circumstances warrant termination. Must be held within 90 days of filing petition or motion for termination (effective for actions pending or filed on or after 1/1/02)	Are facts sufficient to show that grounds for terminating the parental rights of the parent exist as set out in 7B-1111? Whether or not grounds exist, is it in the best interests of the child to terminate parental rights?	The termination hearing is a bifurcated process. First, there is an adjudicatory hearing to determine whether grounds for termination exist. At the adjudicatory hearing the formal rules of evidence apply, the burden is on DSS, and the standard is by clear, cogent and convincing evidence. Following adjudication is the dispositional phase of the case where the court makes a determination as to best interest. The petitioner does not carry a burden, the court makes a discretionary determination, and the formal rules of evidence may not apply.	The judge must determine whether grounds for termination exist and whether it is in the best interest of the child to terminate. If a determination is made that grounds do not exist or that it is not in the best interest of the child to terminate, the judge must dismiss the case. The judge must decide where the child should be placed.
Post-termination of parental rights placement court review 7B-908	Within 6 months of the date of termination and every 6 months thereafter until child is adopted.	1. The adequacy of the plan developed by DSS or a child-placing agency for a permanent placement relative to the child's best interest and the efforts of the department or agency to implement such plan; 2. Whether the child has been listed for adoptive placement with the North Carolina Adoption Resource Exchange, the North Carolina Photo Adoption Listing Service (PALS), or any other specialized adoption agency; and 3. The efforts previously made by DSS or other agency to find a permanent home for the child.	Procedural requirements are the same as in dispositional and review hearings. Hearing may be informal (with respect to Rules of Evidence) and the court can consider hearsay evidence that is relevant and reliable.	The court, after making findings of fact, shall affirm the plans for the child or require specific additional steps which are necessary to accomplish a permanent placement which is in the best interests of the child. The court has the authority to make any dispositional option provided in 7B-903.

STATUTES

§ 7B-100. Purpose

This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:

(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; and

(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.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1999- 456, § 60, eff. Aug. 13, 1999; S.L. 2003-140, § 5, eff. June 4, 2003.

§ 7B-101. Definitions

As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused juveniles.--Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; crime against nature, as provided in G.S. 14- 177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and

G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14- 190.17; promoting the prostitution of the juvenile as provided in G.S. 14- 190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1;

e. 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 or others; or

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

(2) Aggravated circumstances.--Any circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

(3) Caretaker.--Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility, or any employee or volunteer of a division, institution, or school operated by the Department of Health and Human Services. "Caretaker" also means any person who has the responsibility for the care of a juvenile in a child care facility as defined in Article 7 of Chapter 110 of the General Statutes and includes any person who has the approval of the care provider to assume responsibility for the juveniles under the care of the care provider. Nothing in this subdivision shall be construed to impose a legal duty of support under Chapter 50 or Chapter 110 of the General Statutes. The duty imposed upon a caretaker as defined in this subdivision shall be for the purpose of this Subchapter only.

(4) Clerk.--Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(5) Community-based program.--A program providing nonresidential or residential treatment to a juvenile in the community where the juvenile's family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(6) Court.--The district court division of the General Court of Justice.

(7) Court of competent jurisdiction.--A court having the power and authority of law to act at the time of acting over the subject matter of the cause.

(7a) Criminal history. -- A local, State, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or a felony, involving violence against a person.

(8) Custodian.--The person or agency that has been awarded legal custody of a juvenile by a court or a person, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.

(9) Dependent juvenile.--A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

(10) Director.--The director of the county department of social services in the county in which the juvenile resides or is found, or the director's representative as authorized in G.S. 108A-14.

(11) District.--Any district court district as established by G.S. 7A-133.

(11a) Family assessment response. -- A response to selected reports of child neglect and dependency as determined by the Director using 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.

(11b) Investigative assessment response. -- A response to reports of child abuse and selected reports of child neglect and dependency as determined by the Director using a formal information gathering process to determine whether a juvenile is abused, neglected, or dependent.

(12) Judge.--Any district court judge.

(13) Judicial district.--Any district court district as established by G.S. 7A-133.

(14) Juvenile.--A person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States.

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

(16) Petitioner.--The individual who initiates court action, whether by the filing of a petition or of a motion for review alleging the matter for adjudication.

(17) Prosecutor.--The district attorney or assistant district attorney assigned by the district attorney to juvenile proceedings.

(18) Reasonable efforts.--The diligent use of preventive or reunification services by a department of social 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. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile.

(18a) Responsible individual. -- An individual identified by the director as the person who is responsible for rendering a juvenile abused or seriously neglected.

(19) Safe home.--A home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect.

(20) Shelter care.--The temporary care of a juvenile in a physically unrestricting facility pending court disposition.

(21) Substantial evidence. -- Relevant evidence a reasonable mind would accept as adequate to support a conclusion.

(22) Working day. -- Any day other than a Saturday, Sunday, or a legal holiday when the courthouse is closed

for transactions.

The singular includes the plural, the masculine singular includes the feminine singular and masculine and feminine plural unless otherwise specified.

Added by S.L. 1998-202, § 6, eff. July 1, 1999. Amended by S.L. 1998- 229, §§ 1, 18, eff. July 1, 1999; S.L. 1999-190, § 1, eff. June 18, 1999; S.L. 1999-318, § 1, eff. Oct. 1, 1999; S.L. 1999-456, § 60, eff. Aug. 13, 1999; S.L. 2005-55, § 1, eff. Oct. 1, 2005; S.L. 2005-399, § 1, eff. Oct. 1, 2005.

CHAPTER 10
THE PRE-PETITION STAGE AND THE ROLE OF DSS

Table of Contents

STATUTES

§ 10.1 How a Case Enters the Court System[1]

A. STAGE 1: Reporting Suspected Abuse, Neglect, or Dependency

Someone in the community reports to the Department of Social Services (DSS) that he or she suspects a child is being abused or neglected or is dependent.

1. "Any person or institution who has 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, shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing . . .." **[N.C.G.S. 7B-301- see statute at the end of this chapter for further detail]** No privilege can be grounds for failing to report except when knowledge is gained by an attorney during representation in the abuse, neglect or dependency case. **[7B-310]**

2. People making such reports are immune from liability if they cooperate with inquiry and investigation and act in good faith. **[7B-309]** Regarding immunity, *see Davis v. Durham City Schools*, 91 N.C. App. 520 (1988)(where principal was granted immunity after reporting suspected abuse); *Dobson v. Harris*, 352 N.C. 77 (2000)(issue of immunity was discussed when store clerk reported customer to DSS).

B. STAGE 2: Screening Reports of Suspected Abuse, Neglect, or Dependency

1. DSS investigates and then moves forward with the case whenever the allegations, if proved to be true, would fit the legal definition of abuse, neglect, or dependency and the alleged perpetrator is a caretaker, as defined by law. DSS must inform the reporter as to the action being taken. **[7B-302]**

2. In circumstances in which the allegations would not fit the legal definition of abuse, neglect, or dependency, the reporter is notified within five days that there will be no DSS investigation. DSS will refer the reporter to outreach services or other agencies as appropriate. **[7B-302]**

C. STAGE 3: Investigating Reports of Suspected Abuse, Neglect, or Dependency [7B-302]

1. DSS does an "investigative assessment" (investigation) of the report to determine the facts, the extent of the abuse or neglect, and the risk of harm to the child. If the DSS investigative assessment does not substantiate abuse or neglect, the case is closed.

2. The person making the initial report of abuse or neglect has the right to pursue a review by the prosecutor if DSS decides not to petition the court. **[7B-302, 7B-305, 7B-306]**

D. STAGE 4: Intervening in Confirmed Cases of Abuse, Neglect, or Dependency [7B-302]

1. If the DSS investigative assessment confirms abuse or neglect, which occurs in about 32 out of 100 cases, DSS then determines whether protective services should be provided or if a petition must be filed. Petitions are filed when DSS needs the court to intervene on the child's behalf to eliminate the risk that child maltreatment will recur, or when the child should be removed from her or his home to ensure the child's safety.

[1] The following section is short summary of the pre-petition process adapted from the GAL Volunteer Training Manual. Please see 7B-300 through 7B-311 for much greater detail on this process.

2. If DSS finds evidence of abuse or any kind of physical harm by a parent or anyone else, such findings must be reported to appropriate law enforcement and the district attorney. **[7B-307]**

E. STAGE 5: GAL Appointment and Court Involvement Commence

Once a petition is filed, a GAL *must* be appointed when the petition alleges abuse or neglect and *may* be appointed where the petition alleges dependency. **[7B-601]** The matter is now a juvenile court case.

§ 10.2 The Role and Responsibilities of DSS

A. The DSS Family Support and Child Welfare Manual

The State Division of Social Services has a **Family Support and Child Welfare Manual,** providing information and guidance to social services agencies and social workers dealing with families and children. The hard-copy version of the manual is enormous and includes detailed explanations of all of the children's services standards in addition to a wealth of valuable information**.** There is also an online manual called the Family Support and Child Welfare Manual and although it is not as comprehensive, *many of the questions an AA or GAL is likely to have concerning DSS, DSS policy, or the foster care system can be answered by going to the online manual at:* http://zeus.dhhs.state.nc.us/olm/manuals/manuals.aspx?dc=dss. (Note: At times, websites are updated or change; however, the manual should be located by searching NC DHHS Manuals Division of Social Services). This online manual is an excellent resource in comparing the policies of the North Carolina Department of Health and Human Services with local DSS district practice, and being knowledgeable of policies allows the GAL to ask appropriate questions regarding services.

The information in this chapter is a mere overview of some aspects of DSS role and responsibilities. For more detail, the Family Support and Child Welfare Manual should be consulted.

See § 10.3 below, in this chapter, for information on the relationship between DSS and the GAL as well as information on understanding and ascertaining DSS policy.

B. How DSS Fits into the Child Welfare System

The Department of Social Services, or, more specifically, the director of social services and the staff that he or she delegates, is charged, under G.S. 108A-14(a)(11), with the duty of investigating reports of child abuse and neglect and of taking appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B. In North Carolina, DSS agencies are administered at the county level and supervised by the state Department of Health and Human Services (Division of Social Services). [G.S. 108A-1] There is a principal-agent relationship between the Department of Health and Human Services pursuant to G.S. 108A-14. *In reJ.L.H.*, --- N.C. App. ---, 645 S.E.2d 833 (2007)(dismissing appeals by county departments of social services of court order that transferred custody of juveniles to them due to principal-agent relationship between DHHS and the local agencies that rendered the appeal a nullity). *See also* accompanying sibling case, *In re Z.D.H.*, --- N.C. App. ---, 646 S.E.2d 374 (2007).

C. Organizational Structure of DSS

The structure below reflects the general flow of supervision, but it is important to keep in mind that individual county departments of social services set their own policies and procedures and run their own agencies. In other words, those who run county DSS agencies are employees of the county, not of the state, though the agencies operate as agents of the state.

Department of Health and Human Services
⇓
Human Services
⇓
Division of Social Services
⇓
Family Support & Child Welfare Division
⇓
Children's Program Representatives
⇓
County Departments of Social Services
[All over the state, each with a director and some with an assistant director]
⇓
Divisions within Each County Department
[Most County Departments have divisions such as Intake, Investigation, Child Protective Services and Foster Care with Program Managers for each division]
⇓
Social Work Supervisors
⇓
Social Workers

The state Division of Social Services and the Family Support and Child Welfare Division provide supervision to county agencies through the issuance and interpretation of policies, standards, and methods designed to carry out the purposes of federal and state laws and rules adopted by the Social Services Commission. Supervision also includes consultation and technical assistance and reviewing, training, monitoring, and establishing corrective action as necessary to ensure that policies, standards, and methods are in operation to achieve equity and quality of service to clients. Direct operation of each county program is carried out by the individual agency, however, and each agency has its own policies and procedures.

D. The Focus of DSS: Stabilizing Family Life

The role of DSS is different from that of the Guardian ad Litem Program. By statute, DSS is charged with the responsibility of providing services to improve the quality of child care, to help the parents be more adequate parents or caretakers, and to preserve and stabilize family life. **[G.S. 7B-300]** DSS is therefore focused on stabilizing family life. In other words, although theoretically it is primarily

concerned with the welfare of the child, DSS cannot focus solely on the child and must work with the needs of all family members. The Guardian ad Litem Program, however, focuses specifically on the needs and best interests of the child (or children), and, consequently, will not always agree with the plan and recommendations of DSS.

E. DSS Responsibilities and Children's Services Standards

A social worker's numerous responsibilities in a given case are detailed primarily in Articles 3 and 4 of the Juvenile Code, some of which are set out at the end of this chapter. For more information on DSS standards and responsibilities, *see "Standards for Children's Services Delivery,"* also at the end of this chapter. County agencies are expected to follow these guidelines set forth by the state Division of Social Services and the Children's Services Section, to help ensure that they carry out the law and utilize best practice methods. Detailed explanations of these standards can be found in the DSS *Family Support and Child Welfare Manual* referenced above.

F. Failure of DSS to Provide Child Welfare Services in Accordance with the Law

G.S. 108A-74 outlines the remedy for and procedure to address a failure on the part of DSS to provide protective services, foster care services, or adoption services in accordance with the law, or for failing to demonstrate reasonable efforts to do so. Such failures are first addressed with monitoring, special assistance, corrective planning, and advising by the Department of Health and Human Services (DHHS). If this does not bring about improvements in sixty days, state and federal funding can be withheld or DHHS can contract with other public or private agencies to provide such services.

G. DSS Operational Issues of Common Interest to GAL Attorney Advocates

1. Voluntary placement

a. Occasionally, DSS does not file a petition but places a child outside the home pursuant to a voluntary placement agreement with the parent(s). Since no petition is filed, a GAL is not involved with the case and the parents are not represented. The only involvement the court has in such placements is pursuant to **G.S. 7B-910**, which directs the court to determine

- the voluntariness of the placement,
- the appropriateness of the placement,
- whether the placement is in the child's best interest, and
- the types of services that have been or should have been provided the child's parents or caretaker.

b. At times the voluntary placement breaks down and the case ends up in court anyway. When this happens, the case before the court is often more difficult because the original problems have become more remote in time, and in the absence of judicial or GAL involvement, there is probably less concrete evidence to bring before the court.
For more information on voluntary placements, see § 1.6.D.

2. Average caseloads

According to the Children's Services Program Management Standards, average caseload standards shall be no greater than the following:

- Investigative Assessment: 1:12 families
- Child Protective Services Case Planning and Management: 1:12 families

- Foster care and adoption caseloads: 1:15 children; and licensure: 1:32 families, foster or adoptive

The supervisor/worker ratio shall not exceed 1:5.

3. Division of responsibility between DSS and mental health agencies [2]

There is no clear-cut line drawn between mental health and DSS agencies to divide certain responsibilities that relate to issues of mental health for children and families. In general, when DSS believes that certain needs can best be addressed by the local mental health agency, DSS will seek services from that agency (many of the children in DSS custody are on Medicaid, and mental health is usually the only agency that can serve them). However, DSS may choose to contract with private providers rather than to use mental health agencies. Problems may arise, however, if the mental health agency is unavailable during certain hours, or if the agency cannot see the individual on a sufficiently frequent basis to meet the individual's needs. In addition, DSS and mental health may disagree as to the needs and required services for an individual. While agencies try to come to agreement on disputed issues, if there are differences that can't be resolved between the two agencies, each would make its recommendations to the court to let the judge make the final decision.

4. Placement Resources [3]

When a child must be placed out of the home, placement resources include:

- a foster family home or group home licensed by the N.C. Department of Health and Human Services;
- a private, non profit child caring institution that is licensed or approved by the N.C. Department of Health and Human Services and is in compliance with Title VI of the Civil Rights Act;
- a foster care facility which is under the auspices of a licensed or approved private child care or child placing agency. Such foster care services programs must have been licensed by the N.C. Department of Health and Human Services and be in compliance with Title VI of the Civil Rights Act;
- a foster care facility that is licensed by the N.C. Department of Health and Human Services as a public or private group home and is in compliance with Title VI of the Civil Rights Act;
- a licensed or approved foster care facility located in another state when the placement is made in compliance with the Interstate Compact on the Placement of Children. The other state must agree to supervise the child and the facility must be in compliance with Title VI of the Civil Rights Act; or
- an unlicensed home that is approved by the court and designated in the court order.

[2] Note: this section was written before the dissolution of local mental health agencies resulting in the privatization of mental health service providers. Services vary from community to community and often depend on Local Mental Health Entities (LME's) that act as gatekeepers to services. The general message of this section is the same in that DSS agencies may defer individuals to local, but private, mental health facilities that take Medicaid.

[3] From the North Carolina Department of Social Services Online Family Support and Child WelfareManual, Chapter IV, Section 1201, accessed August 2005.

5. Child Placement Services [4]

Child placement services shall be provided to any child in the custody or placement responsibility of a County Department of Social Services. The agency shall provide regular community awareness and public education programs on: recognizing an reporting abuse, neglect, and dependency, an community coordination and cooperation in service provision. (Refer to Section 1201 of the Children's Services Manual, the Yellow Pages, page vii for more information about cultural competence.)

Child placement services include but are not limited to:

- Services to protect children in their own homes, strengthen families, and prevent out-of-home placement;
- Careful planning and decision making with the family about placement, when necessary;
- Assessing children's needs to ensure appropriate placement and services;
- Arranging and monitoring a placement appropriate to the child's needs;
- Involving the kinship network to provide planning, placement and other support for the child and family;
- Developing and arranging community-based services to support the child and family;
- Collaborating with other community service providers working with the family to ensure continuity of services and to prevent duplication of services;
- Referring the child and family to needed services, including clinical treatment;
- Providing treatment services, as appropriate;
- Preparing the child, the child's family, and the foster family for separation and placement, including negotiating and preparing visitation agreements;
- Assessing family strengths and needs to determine the appropriate plan for service;
- Providing ongoing risk assessment to determine risk to the child and to guide the case planning process;
- Working with the family to develop and implement the Out of Home Family Services Agreement;
- Monitoring and updating the Out of Home Family Services Agreement with the family;
- Providing case planning and management;
- Concurrent permanency planning with the family to develop alternative options to provide a permanent home for a child should reunification fail;
- Helping the family meet Out of Home Family Services Agreement objectives by providing information, instruction, guidance and mentoring on parenting skills;
- Providing counseling to the child and family to help the child and family cope with the grief resulting from the separation and placement;
- Arranging medical examinations and other services for the child;
- Supervising foster care facility to ensure that the child receives proper care during placement;
- Maintaining contact with the family and others significant to the case;
- Preparing for and participating in court proceedings;
- Maintaining a close working relationship with the agency attorney for guidance in the legal process;
- Periodically reviewing the Out of Home Family Services Agreement;
- Preparing for and facilitating Permanency Planning Action Team meetings;

[4] From the North Carolina Department of Social Services Online Family Support and Child WelfareManual, Chapter IV, Section 1201, accessed August 2005.

- Providing transportation for children in foster care when needed and not otherwise available, including visits with parents, siblings, and relatives;
- Providing LINKS to assist older youth in learning life skills necessary to make a successful transition from foster care to living on his or her own;
- Ensuring that foster care placements across state lines are in compliance with the Interstate Compact on the Placement of Children;
- Recruiting, developing and supervising foster care families and child care facilities;
- Recruiting and assessing relatives and other kin as potential caregivers;
- Assessing and periodically reassessing foster care homes and facilities to determine if the home or facility meets the needs of the children it serves;
- Providing consultation, technical assistance, and training to assist foster families and foster care facilities to expand and improve the quality of care provided;
- Involving foster parents in the planning and decision making for children in foster care;
- Facilitating foster/adopt options for children and preparing foster/adoptive parents;
- Preparing children for adoptive placements and maintaining life books; and
- Maintaining the foster care case record and thorough documentation of case activities.

6. The relationship between services and placement

Services available to meet the needs of the child are not dependent on the child's type of placement. Whether the child is placed in a foster family, group home, with a relative, or in any other type of placement, the child should have the same opportunity for needed services. However, in any kind of placement, it is incumbent on the caregiver to bear a certain amount of responsibility to connect the child with necessary services. For example, group homes or foster parents who have physical custody of the child may agree to provide the child with therapy or transport the child to a service provider. The quality of that therapy and the consistency in getting the child to the service provider, however, will vary from placement to placement. As such, some disparity is inevitable in the quality and frequency of services received. It should be noted, however, that funding sources and amounts can vary depending on the type of placement (foster care vs. custody vs. guardianship, etc. . .) or certain eligibility factors of the child. For more information on this topic, see Subsection H below in this chapter, as well as "Permanency Options" in the appendix to this manual.

7. Frequency of contact by caseworkers [5]

a. Immediately following substantiation: A social worker is expected to see a family within one week after substantiation of abuse, neglect, or dependency. A social worker is expected, at a minimum, to have face-to-face contact with both the child and the family at least twice a month and to have contact with a person or persons significant to the case twice a month as appropriate.

b. Once a child is placed out of the home: A social worker is expected to have face-to-face contact with the child and the caregiver at least once within the first week of initial and subsequent placement, then face-to-face contact with the child at least monthly. (See Children's Services Standards for exceptions.) When reunification is the permanent plan, a social worker is expected to have at least one face-to-face contact per month with the parent or persons from whom the child was removed, unless more frequent contact is needed. (Less frequent contact must be approved.) The social worker is expected to have contact at least twice per month with

[5] Information obtained from Children's Services Program Management Standards.

a person or persons significant to the case, unless more frequent contact is needed. Less frequent contact must be documented and approved.

H. Financial Support of Child

1. Introduction and practical considerations

While local departments of social services usually handle financial support for GAL child-clients in their custody, it is the GAL's job to advocate for expenditures that meet the child's needs when the GAL observes a need that is not being met. A child is entitled to child support from a parent who is able to pay it, but DSS and the court deal with such support obligations when the child is in DSS custody, and the money is used to offset DSS expenditures for the child.

DSS should be able to finance services and goods that are necessary to meet the child's basic needs. No checklist or chart outlines all of the possible "basic needs" of an individual childwhich is why disagreement sometimes arises about whether certain services or goods should be obtained by and paid for by DSS. DSS agencies are primarily funded by the same sources. Some agencies get additional funding from other sources. This puts agencies in varying positions when it comes to their ability to pay for certain services and goods for their clients. It is effective advocacy to ask questions regarding local funding and how it compares to state policies.

Sometimes the GAL and DSS disagree about which services or goods the agency should provide. The GAL may be confused about whether DSS is unable or unwilling to provide them. When disagreement occurs, every attempt should be made to work with the caseworker and DSS supervisor to discuss in detail the child's needs and the reasons behind DSS's position to make sure everyone has the same information. If agreement cannot be reached, the issue may be brought before the court for a decision by the judge. [For a discussion of how a GAL or AA should handle policy inquiries, see § 10.3, below, in this chapter.]

2. Foster Care Funding [6]

a. Introduction: All eligibility determinations, whether for Title IV-E of the Social Security Act or State Foster Home Funds, must begin with the inclusion or exclusion of the child's eligibility for IV-E foster care assistance. Such eligibility will affect foster care funding. Eligibility for IV-E assistance is a somewhat complicated matter and will not be discussed here. Please consult the online DSS Family Support and Child WelfareManual referred to in this chapter for specific information.

b. Standard board rate: The main sources of financial support for children placed out of the home and put into the foster care system are federal, state, and county funds. North Carolina has a state standard board rate (SBR) of reimbursement that is based upon the age of the child:

0 – 5 years of age = $390/month
6 – 12 years of age = $440/month
13-18 years of age = $490/month

Of this allotment, $15 per child is considered a personal needs monthly allowance. For costs up

[6] Most of the information in this section was compiled from the North Carolina DHHS On-Line Manual, Family Support and Child Welfare Manual, Chapter 8, Part V, Foster Care Funding (visited 7/29/2007).

to the SBR, the counties are partially reimbursed by Federal Financial Participation (recalculated every October), and the state and counties split the remaining nonfederal share of costs.

c. Foster care costs: Foster care costs, defined by federal regulations, include the following as essentials of daily living: shelter, meals, clothing, personal incidentals, school supplies, recreation, and individual supervision, as well as some specific day care and transportation costs under certain circumstances.

Any costs that exceed the SBR are assumed by the counties or by service providers. A Social Services Block Grant, one source of funding for special services, provides monies for services for children with special needs when costs for their care exceed the SBR. Another source for additional funding is the Division of Medical Assistance, which reimburses counties for some of the costs of case management services for children at risk of abuse, neglect, or exploitation. The State Maternity Home Fund is another possible source of financial support for any North Carolina resident experiencing a problem pregnancy and unable to remain in her own home and whose financial resources are inadequate to obtain an approved living arrangement.

Title IV-E eligible children placed out of home are automatically eligible for medical assistance through Medicaid, and non-IV-E eligible children may also receive Medicaid depending on certain income factors. A child's resources can also be a source of financial support, depending on the child's IV-E eligibility. A child's resources can include SSI, SSS, trust funds, endowment, or child support paid directly to the county DSS agency.

For a discussion of funding available for various alternative placement options such as custody or guardianship, please see "Permanency Options" in the appendix to this manual.

§ 10.3 The Relationship Between DSS and GAL; DSS Policy and Inquiries

A. Introduction

The Guardian ad Litem Program as a whole and the individuals within the program work closely with departments of social services generally and with individual caseworkers and supervisors. It is to everyone's advantage to foster a positive, professional relationship between GAL and DSS, without forgetting the necessity of advocating a certain position for a child even when GAL and DSS disagree. The key to a positive relationship often lies in communication. If the GAL and the DSS caseworker are well informed about each other's perspectives on the case and the reasons behind those perspectives, they are more likely to either reach an agreement or deal positively with their differences of opinion. In other words, the GAL should not just read DSS reports, as there is no substitute for talking to the caseworker!

B. Distinguishing Policy, Law, and Personal Perspective in Social Services Agencies

1. Ascertaining the reasons behind a DSS decision

There are times when a GAL believes that a social worker should do something that the social worker is unwilling to do. The social worker's reasons for unwillingness could be rooted in DSS policy, in state or federal law, or in individual philosophy and perspective. When the GAL

considers the issue very important, it is critical that the GAL ascertain the reason behind the social worker's unwillingness. Once the GAL ascertains the reason, he or she can determine, with the help of the attorney advocate, whether it is possible and within the law for the social worker to take the action the GAL is requesting, whether and how hard to push, or whether granting the request is in fact impossible.

2. Understanding DSS policy [7]

State laws govern the way abuse, neglect, and dependency cases are handled, and federal law dictates much of the language in these state laws. There are also Administrative Rules handed down by the Social Services Commission that govern abuse, neglect, and dependency cases. Federal and state law and Administrative Rules are binding on those who deal with such cases. DSS agencies also deal with policies and standards handed down by state and local authorities that they are expected to adhere to, although these policies are not considered binding as law.

The Family Support and Child Welfare Section of the state Division of Social Services sets forth policies, standards, and practice guidance for local social services agencies. Such policies and standards are based on both law and concepts of best practice. Each individual DSS agency also has its own set of policies to accommodate local practice. Local DSS agencies are subject to a biennial review by the Family Support and Child Welfare Section, which scores the agency on compliance with the Standards for Children's Services Delivery. Agencies are scored in six different areas, and if the agency scores below 80 in any given area, it is required to craft a program improvement plan. The state must approve the plan and will then follow up on it to ensure compliance. Noncompliance results in measures taken pursuant to G.S. 108A-74, discussed above in § 10.2.E.

To better understand DSS policy on a certain issue or to ask a question about what the policy is, social workers and social work supervisors should be able to explain local DSS policy. Questions about policy handed down from the state Division of Social Services via Family Support and Child Welfare can also be addressed to the Children's Program Representative (CPR) for that location. The CPR's are distributed in four field offices, so the GAL may call the applicable field office and ask for the CPA for the appropriate county.

C. Children's Program Representatives [8]

Joy Gossett **(828) 225-1028**
Counties: Catawba, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, Polk, Swain, Transylvania, Watauga.

Donna Beck **(828) 645-3794**
Counties: Anson, Cabarrus, Gaston, Iredell, Lincoln, Mecklenburg, Montgomery, Richmond, Rowan, Stanly, Union

[7] Standards for Children's Services Delivery are set forth by the state Division of Social Services through the Children's Services Section, and can be accessed at this website: http://info.dhhs.state.nc.us/olm/manuals/dss/csm-10/man/CSs1201c1-09.htm#P279_28658 (visited 7/31/07). These standards are guidelines that county agencies are expected to follow to help ensure that they carry out the law and utilize best practice methods.

[8] These CPR County Assignments are effective January 16, 2007. Note that changes do occur. The CPR Supervisor is currently Keith Davis, 919-733-7831 ext. 279 or keith.davis@ncmail.net.

Roslyn Thompson (828) 766-9510
Counties: Alexander, Alleghany, Ashe, Avery, Buncombe, Burke, Caldwell, Cleveland, McDowell, Mitchell, Rutherford, Wilkes, Yancey

Joyce White (336) 315-1073
Counties: Alamance, Caswell, Davidson, Davie, Forsyth, Orange, Person, Randolph, Rockingham, Stokes, Surry, Yadkin, Guilford

Gale Trevathan (252) 937-5705
Counties: Chatham, Durham, Franklin, Granville, Halifax, Harnett, Johnston, Lee, Nash, Vance, Wake, Warren, Wilson

Susan Moss (910) 485-1439
Counties: Bladen, Brunswick, Columbus, Cumberland, Duplin, Hoke, Moore, New Hanover, Pender, Robeson, Sampson, Scotland

Jeffrey Olson (910) 397-1501
Counties: Beaufort, Carteret, Craven, Edgecombe, Greene, Hyde, Jones, Lenoir, Onslow, Pamlico, Pitt, Wayne

Janet Thursby (252) 446-2166
Counties: Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Martin, Northhampton, Pasquotank, Perquimanns, Tyrell, Washington

§ 10.4 Multiple Response System

A. Introduction

Multiple Response System (MRS) refers to a family-centered approach to child welfare that reflects a belief that the family is its own primary source of intervention and look to family members for support in a larger social and environmental contact. MRS interventions focus on assessing the family's immediate an extended community through needs assessment, resource identification, and service delivery. This family centered practice attempts to respect a family's right of self-determination and capabilities on the assumption that families have the ability to grow and change with proper supportive interventions.[9] Note that although the family assessment response is used in any family situations where neglect is substantiated, social workers can still use the investigative assessment response for reports of child abuse and selected neglect cases.[10]

B. Effect of MRS on the GAL

This change in investigative philosophy that tries to strengthen families is appropriate in many situations to prevent the necessity of filing a juvenile petition, and some districts have seen a decline in filings of petitions. However, as a result of MRS in some cases, DSS has worked with the family for months exhausting community resources. A juvenile petition may then be filed because parents are not complying with their family services agreement, and it is necessary to invoke juvenile court jurisdiction to order parents to comply. Because the families have been working intensely with DSS and other community resources pre-petition without appropriate progress, the GAL must question whether reunification can in fact be successful when these supports have been exhausted. Perhaps with court-intervention, the parents can succeed in reunification; however, the GAL must explore other permanency options for the child-client as early as disposition.

[9] Most of the information in this section was compiled from the North Carolina DHHS On-Line Manual, Family Support and Child Welfare Manual, Chapter 8, Part III, Multiple Response System (visited 7/30/2007).

[10] "Family assessment response" is defined as a response to selected reports of child neglect and dependency as determined by DSS using 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. 7B-101(11a)

§ 10.5 The Responsible Individuals List

A. Introduction

In addition to the requirement that the Department of Health and Human Services (DHHS) maintain a confidential central registry of abuse, neglect, an dependency cases and child fatalities resulting from alleged maltreatment **[7B-311(a)]**, DHHS must also maintain a list of responsible individuals identified by county DSS agencies as the result of investigative assessment responses.[11] DHHS may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children. **[7B-311(b)]** Because the responsible individuals list is not confidential, as in the case of the central registry, there is an expunction process to protect due process that individuals placed on this list can invoke.

B. Notice to Individual Responsible for Abuse or Substantial Neglect [7B-320]

An individual found responsible for a determination of abuse or serious neglect must be notified in writing within five (5) working days of the completion of the investigative assessment response. The notice must include the following:

- A statement informing the individual of the nature of the investigative assessment response and whether the director determined abuse or serious neglect or both.
- A statement summarizing the substantial evidence supporting the director's determination without identifying the reporter or collateral contacts.
- A statement informing the individual that the individual's name has been placed on the responsible individuals list as provided in *G.S. 7B-311*, and that DHHS may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services.
- A clear description of the actions the individual must take to have his or her name removed from the responsible individuals list, including information regarding how to request an expunction by the director of the individual's name from the responsible individuals list and procedures for seeking review by the district attorney and for seeking judicial review of the director's decision not to remove the individual's name from the list.

C. Request for Expunction

1. Review by director. Within thirty (30) days after notice, the responsible individual may request that the DSS director reviews the decision. *See* 7B-321 for details.

2. Review by district attorney. Within thirty (30) days of the director's refusal to expunge an individual's name, the responsible individual may request that the district attorney review the decision. *See* 7B-322 for details.

3. Petition for expunction in district court. As a final action, the responsible individual may file a petition for expunction that is heard in district court. *See* 7B-232 for details.

[11] "Investigative assessment response" is defined as a response to reports of child abuse and selected reports of child neglect an dependency as determined by the DSS director using a formal information gathering process to determine whether a juvenile is abused, neglected or dependent. 7B-101(11b).

§ 10.6 Glossary: Common Terms Used by DSS [12]

Activities - The steps that the social worker and the family members take to achieve the objectives. Activities should not be confused with objectives.

Allowable costs[13] - Foster care costs, defined by federal regulations, to provide the essentials of daily living, which include shelter, meals, clothing, personal incidentals, school supplies, recreation and individual supervision. Also, some specific day care and transportation costs are allowable costs under certain circumstances.

Caretaker - "Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent, foster parent, an adult member of the juvenile's household, an adult relative entrusted with the juvenile's care, or any person such as a house parent or cottage parent who has primary responsibility for supervising a juvenile's health and welfare in a residential child care facility or residential educational facility...." (G.S. 7B-101(3))

Child Program – A single center or home, or a group of centers or homes, both which are operated by one owner or supervised by a common entity. (10 N.C.A.C. 9.0102)

Concurrent permanency planning[14] ensures that alternative plans are developed in the event that placement prevention efforts fail. In cases of removal, alternative permanency options are developed while reunification efforts are being made. If reunification fails, an alternative permanency plan has been developed and can be implemented swiftly. It is not inconsistent to work toward reunification while building a case which will support alternative planning and alternative resolutions.

DHHS Facilities - Schools, institutions, or divisions operated by the Department of Health and Human Services.

Eligible Child Care Agency[15] **-** An agency which has applied and qualified for a state established Facility Rate.

Facility Rate[16] - State established (allowable) cost of care for eligible child care agencies.

Family Centered Practice[17] **-** Family centered practice is a social work approach to services that departs significantly from traditional individualized practice approach. Traditional social work services typically focus on the individual and are provided in an office setting. Practitioners tend to be specialists who assess needs and develop strategies to help the individual cope more effectively with his/her environment. Services tend to be intangible services such as counseling, guidance, treatment, assessment, and referral. In contrast, family centered practice focuses on the family with full knowledge and appreciation for its dynamics. The social worker goes to the family's home and/or community to provide or arrange for services. The practitioner is flexible in weaving together a comprehensive service delivery system that involves the family's resources,

[12] Some of the definitions in this glossary are drawn from the DSS Family Support and Child Welfare Manual accessed online August 2005.
[13] From the North Carolina Department of Social Services Family Support and Child Welfare Manual, Chapter IV, Section 1203, accessed August 2005.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*

community resources, and public resources. Services reflect the needs of the family, from the tangible to the intangible. The family-centered services practitioner values family resources, respects diversity among families, supports parental efforts to care for their children, and approaches crises as opportunities for change.

Family Risk Assessment - The formal assessment completed after a CPS report is substantiated and at other points in the case. The term *Family Risk Assessment*, when capitalized, refers to the worksheet itself. When the term *risk assessment* is not capitalized, it refers to the concept of assessing risk to the child any time. [See the Risk Assessment Worksheet at the end of this chapter]

Family Services Case Plan, Part A (formerly known as an intervention plan) - The plan of action developed by the treatment social worker and the family that addresses the issues identified in the initial, and subsequently developed, risk assessments. [See the Family Services Case Plan, Forms, at the end of this chapter.]

Family Services Case Plan, Part AA - The plan of action and underlying reasons for pursuing permanence other than reunification. See this case plan at the end of this chapter.

Family Services Case Plan, Part B - This part of the case plan deals with placement. It is a tool for documenting the appropriateness of the permanent plan as well as the present placement, and provides the opportunity to document the partnership with the placement provider. See this case plan at the end of this chapter.

Family Services Case Plan, Part C - A form to involve the team (parents, relatives, social workers, placement providers, and community members) in examining, assessing, and reviewing the placement of the child(ren) and the various aspects of that placement.

Family Services Case Plan, Part D - Case plan for independent living.

Federal Financial Participation (FFP)[18] **-** The percentage of foster care reimbursement that is available from Title IV-E for Title IV-E eligible children who are in licensed foster care placements.

Foster care placement[19] is *temporary substitute care* provided to a child who must be separated from his or her own parents or caretakers when the parents or caretakers are unable or unwilling to provide adequate protection and care. A child in foster care is a child for whom a licensed public or private child placing agency has legal custody and/or placement responsibility, whether or not he/she has been removed from his/her home.
Child placement services are designed to:

- strengthen, preserve and/or reunite families after children have come into agency custody or placement responsibility by helping families improve the conditions in the home that caused agency intervention;
- ensure a single, stable, safe, nurturing, and appropriate temporary living arrangement for children removed from their homes;
- achieve an alternative safe, permanent home for all children in agency custody or placement responsibility who cannot return home.

Every child needs and deserves a stable, permanent home that is safe and that provides love, care, and nurture. Most children are best served by remaining in the custody of their own families. Therefore, foster care placement shall not be considered until reasonable efforts have been made to preserve a child's safety, health, and well-being in his or her own home.

Foster Child - An individual less than eighteen years of age who has not been emancipated under the

[18] *Id.* at Chapter IV, Section 1203.
[19] *Id.* at Chapter IV, Section 1201.

provisions of Chapter 7B of the General Statutes . . . who is dependent, neglected, abandoned, destitute, orphaned, delinquent, or otherwise in need of care away from home and not held in detention. Individuals who have reached their eighteenth birthday and sign a voluntary boarding home agreement in order to remain in foster care do not meet the definition of foster child for the purposes of child protective services.

Goal - The comprehensive, overall, long-term outcome toward which all Family Services Case Plan, Part A (Intervention Plan) objectives and activities are directed. It is a broad, descriptive statement. There will be only one goal identified in each Family Services Case Plan, Part A (Intervention Plan).

Group Home - "A residential child-care facility operated either under public or private auspices which receives twenty-four hour care for no more than nine children. This number includes the care givers' own relatives under the age of 18. The composition of the group shall include no more than two children under the age of two, four children under the age of six, and six children under the age of twelve. A group home shall not provide day care, nor shall it be available to adults in the community who wish to rent rooms." (10 NCAC 41S .0201)

Intervention Plan - Former term for what is now known as the Family Services Case Plan (see definitions above).

Legal Risk Placement or Legal Risk Home - Placement in a pre-adoptive situation prior to clearance for adoption. The term *legal risk* refers to the risk in the permanence of a placement because the child has not been legally cleared for adoption by termination of parental rights or other legal prerequisites.

Objective - A statement that describes a specific, desired outcome. It is more specific than a goal and specifies exactly what change is wanted. Theoretically, there can be an unlimited number of objectives in Family Services Case Plan, Part A.

Permanence[20] is defined as a life-long family relationship with at least one adult that promotes a sense of mutual belonging and is legally secure. A legally secure placement is defined as a placement in which the direct caregiver has the legal authority to make parental decisions on behalf of the child; e.g. return to the birth parents, assignment of legal custody or legal guardianship of the person of the child, or adoption of the child.

Protection Plan - A temporary plan of care for the child that will usually be completed by the investigation social worker before the transfer of the case to the treatment social worker. It is not the Family Services Case Plan. CPS Intake and Investigation Standard #12 - As appropriate, a protection plan shall

- be developed jointly with the family;
- be in writing;
- specifically address the removal of the condition, situation, or persons that threaten the safety or well-being of the child.

Residential Child-Care Facility - Staffed premises with paid or volunteer staff where children receive continuing full-time foster care. Residential child-care facility includes child-caring institutions, group homes, and children's camps that provide foster care.

Residential Therapeutic Camp - A residential treatment facility in a camping environment which is designed to help individuals develop behavior control, coping skills, self-esteem, and interpersonal skills. Services may include supervised peer interaction, provision of healthy adult role models, and supervised recreational, educational and therapeutic experiences. The facilities typically serve children and adolescents who are emotionally disturbed or who have mental retardation or other developmental disabilities.

[20] *Id.*

Residential Treatment Facility - A facility which provides a structured living environment for children and adolescents who are primarily mentally ill and who may also be multi-handicapped and for whom removal from home is essential to facilitate treatment. Services are designed to address the functioning level of the child or adolescent and include training in language or communication skills, social relationships, and recreational skills.

Safe Home:[21] **-** North Carolina law defines a safe home as one in which a child is not at substantial risk of physical or emotional abuse or neglect.

Standard Board Rate (SBR) - The amount of foster care funding that is established by the General Assembly, which determines the amount of state funds that will be included in the amounts established. (For example: The standard board payment for a non-IV-E eligible child, who is 15 years old, is $415.00 per month, 50% of which is reimbursed by the state. For the same age child, who is IV-E eligible, the state match is 18.5%.)

State Foster Home Funds - A source of state funds that is appropriated to reimburse county Department of Social Services for non-IV-E eligible children in licensed foster care placements.

State Funds - A source of state funds that is appropriated to reimburse private non-profit child care agencies which are members of the Sate Funds Program.

Therapeutic Home - A residential facility primarily located in a private residence which provides professionally trained parent-substitutes who work intensively with individuals in providing for their living, socialization, therapeutic and skill-learning needs. The parent-substitutes have skills and training above those of alternative family living service providers and receive close supervision and support from program staff.

Title IV-E Funds[22] **-** A source of federal funds that is available to reimburse county departments of social services and eligible child care agencies for Title IV-E eligible children in licensed foster care placements.

§ 10.7 Common Forms Used by DSS

Being familiar with the forms used by departments of social services can be helpful when reviewing DSS files. The forms can be accessed online at: http://info.dhhs.state.nc.us/olm/forms/forms.aspx?dc=dss (last visited 7/31/07). The following is a list of the form numbers that are commonly used in family assessments and child protective:

- dss-1402 CPS Intake Report
- dss-1789 Voluntary Placement Agreement
- dss-5106 MRS Case Tracking Form
- dss-5203 Kinship Care Initial Assessment
- dss-5201ia North Carolina Family Assessment Needs/Strengths
- dss-5231 North Carolina Safety Assessment
- dss-5239 In Home Family Services Agreement
- dss-5242ia Visitation/Contact Plan

[21] From the North Carolina Department of Social Services DSS Family Support and Child Welfare Manual, Chapter IV, Section 1201

[22] *Id*. at Chapter IV, Section 1203.

STATUTES

§ 7B–300. Protective services

The director of the department of social services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.

Protective services shall include the investigation and screening of complaints, casework, or other counseling services to parents, guardians, or other caretakers as provided by the director to help the parents, guardians, or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents, guardians, or caretakers, and to preserve and stabilize family life.

The provisions of this Article shall also apply to child care facilities as defined in G.S. 110–86.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–301. Duty to report abuse, neglect, dependency, or death due to maltreatment

Any person or institution who has 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, shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the names and ages of other juveniles in the home; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse, neglect, or dependency; and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give the person's name, address, and telephone number. Refusal of the person making the report to give a name shall not preclude the department's investigation of the alleged abuse, neglect, dependency, or death as a result of maltreatment.

Upon receipt of any report of sexual abuse of the juvenile in a child care facility, the director shall notify the State Bureau of Investigation within 24 hours or on the next workday. If sexual abuse in a child care facility is not alleged in the initial report, but during the course of the investigation there is reason to suspect that sexual abuse has occurred, the director shall immediately notify the State Bureau of Investigation. Upon notification that sexual abuse may have occurred in a child care facility, the State Bureau of Investigation may form a task force to investigate the report.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–302. Investigation by director; access to confidential information; notification of person making the report

(a) When a report of abuse, neglect, or dependency is received, the director of the department of social services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. When the report alleges abuse, the director shall immediately, but no later than 24 hours after receipt of the report, initiate the investigation. When the report alleges neglect or dependency, the director shall initiate the investigation within 72 hours following receipt of

the report. When the report alleges abandonment, the director shall immediately initiate an investigation, take appropriate steps to assume temporary custody of the juvenile, and take appropriate steps to secure an order for nonsecure custody of the juvenile. The investigation and evaluation shall include a visit to the place where the juvenile resides. When the report alleges abandonment, the investigation shall include a request from the director to law enforcement officials to investigate through the North Carolina Center for Missing Persons and other national and State resources whether the juvenile is a missing child. All information received by the department of social services, including the identity of the reporter, shall be held in strictest confidence by the department.

(b) When a report of a juvenile's death as a result of suspected maltreatment or a report of suspected abuse, neglect, or dependency of a juvenile in a noninstitutional setting is received, the director of the department of social services shall immediately ascertain if other juveniles live in the home, and, if so, initiate an investigation in order to determine whether they require protective services or whether immediate removal of the juveniles from the home is necessary for their protection. When a report of a juvenile's death as a result of maltreatment or a report of suspected abuse, neglect, or dependency of a juvenile in an institutional setting such as a residential child care facility or residential educational facility is received, the director of the department of social services shall immediately ascertain if other juveniles remain in the facility subject to the alleged perpetrator's care or supervision, and, if so, assess the circumstances of those juveniles in order to determine whether they require protective services or whether immediate removal of those juveniles from the facility is necessary for their protection.

(c) If the investigation indicates that abuse, neglect, or dependency has occurred, the director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the director shall immediately provide or arrange for protective services. If the parent, guardian, custodian, or caretaker refuses to accept the protective services provided or arranged by the director, the director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

(d) If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 5 of this Chapter.

(d1) Whenever a juvenile is removed from the home of a parent, guardian, custodian, stepparent, or adult relative entrusted with the juvenile's care due to physical abuse, the director shall conduct a thorough review of the background of the alleged abuser or abusers. This review shall include a criminal history check and a review of any available mental health records. If the review reveals that the alleged abuser or abusers have a history of violent behavior against people, the director shall petition the court to order the alleged abuser or abusers to submit to a complete mental health evaluation by a licensed psychologist or psychiatrist.

(e) In performing any duties related to the investigation of the complaint or the provision or arrangement for protective services, the director may consult with any public or private agencies or individuals, including the available State or local law enforcement officers who shall assist in the investigation and evaluation of the seriousness of any report of abuse, neglect, or dependency when requested by the director. The director or the director's representative may make a written demand for any information or reports, whether or not confidential, that may in the director's opinion be relevant to the investigation of or the provision for protective services. Upon the director's or the director's representative's request and unless protected by the attorney-client privilege, any public or private agency or individual shall provide access to and copies of this confidential information and these records to the extent permitted by federal law and regulations. If a custodian of criminal investigative information or records believes that release of the information will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future

investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such an action, the custodian of the records shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this paragraph shall be set down for immediate hearing, and subsequent proceedings in the actions shall be accorded priority by the trial and appellate courts.

(f) Within five working days after receipt of the report of abuse, neglect, or dependency, the director shall give written notice to the person making the report, unless requested by that person not to give notice, as to whether the report was accepted for investigation and whether the report was referred to the appropriate State or local law enforcement agency.

(g) Within five working days after completion of the protective services investigation, the director shall give subsequent written notice to the person making the report, unless requested by that person not to give notice, as to whether there is a finding of abuse, neglect, or dependency, whether the county department of social services is taking action to protect the juvenile, and what action it is taking, including whether or not a petition was filed. The person making the report shall be informed of procedures necessary to request a review by the prosecutor of the director's decision not to file a petition. A request for review by the prosecutor shall be made within five working days of receipt of the second notification. The second notification shall include notice that, if the person making the report is not satisfied with the director's decision, the person may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive the person's right to this notification, and no notification is required if the person making the report does not identify himself to the director.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1998–229, §§ 2, 19, eff. July 1, 1999; S.L. 1999–190, § 2, eff. June 18, 1999; S.L. 1999–318, § 2, eff. Oct. 1, 1999; S.L. 1999–456, § 60, eff. Aug. 13, 1999; S.L. 2001–291, § 1, eff. July 19, 2001.

§ 7B–303. Interference with investigation

(a) If any person obstructs or interferes with an investigation required by G.S. 7B–302, the director may file a petition naming said person as respondent and requesting an order directing the respondent to cease such obstruction or interference. The petition shall contain the name and date of birth and address of the juvenile who is the subject of the investigation, shall specifically describe the conduct alleged to constitute obstruction of or interference with the investigation, and shall be verified.

(b) For purposes of this section, obstruction of or interference with an investigation means refusing to disclose the whereabouts of the juvenile, refusing to allow the director to have personal access to the juvenile, refusing to allow the director to observe or interview the juvenile in private, refusing to allow the director access to confidential information and records upon request pursuant to G.S. 7B–302, refusing to allow the director to arrange for an evaluation of the juvenile by a physician or other expert, or other conduct that makes it impossible for the director to carry out the duty to investigate.

(c) Upon filing of the petition, the court shall schedule a hearing to be held not less than five days after service of the petition and summons on the respondent. Service of the petition and summons and notice of hearing shall be made as provided by the Rules of Civil Procedure on the respondent; the juvenile's parent, guardian, custodian, or caretaker; and any other person determined by the court to be a necessary party. If at the hearing on the petition the court finds by clear, cogent, and convincing evidence that the respondent, without lawful excuse, has obstructed or interfered with an investigation required by G.S. 7B–302, the court may order the respondent to cease such obstruction or interference. The burden of proof shall be on the petitioner.

(d) If the director has reason to believe that the juvenile is in need of immediate protection or assistance, the director shall so allege in the petition and may seek an ex parte order from the court. If the court, from the verified petition and any inquiry the court makes of the director, finds probable cause to believe both that the juvenile is at risk of immediate harm and that the respondent is obstructing or interfering with the director's ability to investigate to determine the juvenile's condition, the court may enter an ex parte order directing the respondent to cease such obstruction or interference. The order shall be limited to provisions necessary to enable the director to conduct an investigation sufficient to determine whether the juvenile is in need of immediate protection or assistance. Within 10 days after the entry of an ex parte order under this subsection, a hearing shall be held to determine whether there is good cause for the continuation of the order or the entry of a different order. An order entered under this subsection shall be served on the respondent along with a copy of the petition, summons, and notice of hearing.

(e) The director may be required at a hearing under this section to reveal the identity of any person who made a report of suspected abuse, neglect, or dependency as required by G.S. 7B–301.

(f) An order entered pursuant to this section is enforceable by civil or criminal contempt as provided in Chapter 5A of the General Statutes.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–304. Evaluation for court

In all cases in which a petition is filed, the director of the department of social services shall prepare a report for the court containing the results of any mental health evaluation under G.S. 7B–503, a home placement plan, and a treatment plan deemed by the director to be appropriate to the needs of the juvenile. The report shall be available to the court immediately following the adjudicatory hearing.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–318, § 3, eff. Oct. 1, 1999; S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–305. Request for review by prosecutor

The person making the report shall have five working days, from receipt of the decision of the director of the department of social services not to petition the court, to notify the prosecutor that the person is requesting a review. The prosecutor shall notify the person making the report and the director of the time and place for the review, and the director shall immediately transmit to the prosecutor a copy of the investigation report.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–306. Review by prosecutor

The prosecutor shall review the director's determination that a petition should not be filed within 20 days after the person making the report is notified. The review shall include conferences with the person making the report, the protective services worker, the juvenile, if practicable, and other persons known to have pertinent information about the juvenile or the juvenile's family. At the conclusion of the conferences, the prosecutor may affirm the decision made by the director, may request the appropriate local law enforcement agency to investigate the allegations, or may direct the director to file a petition.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–307. Duty of director to report evidence of abuse, neglect; investigation by local law enforcement; notification of Department of Health and Human Services and State Bureau of Investigation

(a) If the director finds evidence that a juvenile may have been abused as defined by G.S. 7B–101, the director shall make an immediate oral and subsequent written report of the findings to the district attorney or the district attorney's designee and the appropriate local law enforcement agency within 48 hours after receipt of the report. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate and coordinate a criminal investigation with the protective services investigation being conducted by the county department of social services. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate and may request the director or the director's designee to appear before a magistrate.

If the director receives information that a juvenile may have been physically harmed in violation of any criminal statute by any person other than the juvenile's parent, guardian, custodian, or caretaker, the director shall make an immediate oral and subsequent written report of that information to the district attorney or the district attorney's designee and to the appropriate local law enforcement agency within 48 hours after receipt of the information. The local law enforcement agency shall immediately, but no later than 48 hours after receipt of the information, initiate a criminal investigation. Upon completion of the investigation, the district attorney shall determine whether criminal prosecution is appropriate.

If the report received pursuant to G.S. 7B–301 involves abuse or neglect of a juvenile in child care, the director shall notify the Department of Health and Human Services within 24 hours or on the next working day of receipt of the report.

(b) If the director finds evidence that a juvenile has been abused or neglected as defined by G.S. 7B–101 in a child care facility, the director shall immediately so notify the Department of Health and Human Services and, in the case of sexual abuse, the State Bureau of Investigation, in such a way as does not violate the law guaranteeing the confidentiality of the records of the department of social services.

(c) Upon completion of the investigation, the director shall give the Department written notification of the results of the investigation required by G.S. 7B–302. Upon completion of an investigation of sexual abuse in a child care facility, the director shall also make written notification of the results of the investigation to the State Bureau of Investigation.

The director of the department of social services shall submit a report of alleged abuse, neglect, or dependency cases or child fatalities that are the result of alleged maltreatment to the central registry under the policies adopted by the Social Services Commission.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–308. Authority of medical professionals in abuse cases

(a) Any physician or administrator of a hospital, clinic, or other medical facility to which a suspected abused juvenile is brought for medical diagnosis or treatment shall have the right, when authorized by the chief district court judge of the district or the judge's designee, to retain physical custody of the juvenile in the facility when the physician who examines the juvenile certifies in writing that the juvenile who is suspected of being abused should remain for medical treatment or that, according to the juvenile's medical evaluation, it is unsafe for the juvenile to return to the juvenile's parent, guardian, custodian, or caretaker. This written certification must be signed by the certifying physician and must include the time and date that the judicial authority to retain custody is given. Copies of the written certification must be appended to the juvenile's medical and judicial records and another copy must be given to the juvenile's parent, guardian, custodian, or caretaker. The right to

retain custody in the facility shall exist for up to 12 hours from the time and date contained in the written certification.

(b) Immediately upon receipt of judicial authority to retain custody, the physician, the administrator, or that person's designee shall so notify the director of social services for the county in which the facility is located. The director shall treat this notification as a report of suspected abuse and shall immediately begin an investigation of the case.

(1) If the investigation reveals (i) that it is the opinion of the certifying physician that the juvenile is in need of medical treatment to cure or alleviate physical distress or to prevent the juvenile from suffering serious physical injury, and (ii) that it is the opinion of the physician that the juvenile should for these reasons remain in the custody of the facility for 12 hours, but (iii) that the juvenile's parent, guardian, custodian, or caretaker cannot be reached or, upon request, will not consent to the treatment within the facility, the director shall within the initial 12–hour period file a juvenile petition alleging abuse and setting forth supporting allegations and shall seek a nonsecure custody order. A petition filed and a nonsecure custody order obtained in accordance with this subdivision shall come on for hearing under the regular provisions of this Subchapter unless the director and the certifying physician together voluntarily dismiss the petition.

(2) In all cases except those described in subdivision (1) above, the director shall conduct the investigation and may initiate juvenile proceedings and take all other steps authorized by the regular provisions of this Subchapter. If the director decides not to file a petition, the physician, the administrator, or that person's designee may ask the prosecutor to review this decision according to the provisions of G.S. 7B–305 and G.S. 7B–306.

(c) If, upon hearing, the court determines that the juvenile is found in a county other than the county of legal residence, in accord with G.S. 153A–257, the juvenile may be transferred, in accord with G.S. 7B–903(2), to the custody of the department of social services in the county of residence.

(d) If the court, upon inquiry, determines that the medical treatment rendered was necessary and appropriate, the cost of that treatment may be charged to the parents, guardian, custodian, or caretaker, or, if the parents are unable to pay, to the county of residence in accordance with G.S. 7B–903 and G.S. 7B–904.

(e) Except as otherwise provided, a petition begun under this section shall proceed in like manner with petitions begun under G.S. 7B–302.

(f) The procedures in this section are in addition to, and not in derogation of, the abuse and neglect reporting provisions of G.S. 7B–301 and the temporary custody provisions of G.S. 7B–500. Nothing in this section shall preclude a physician or administrator and a director of social services from following the procedures of G.S. 7B–301 and G.S. 7B–500 whenever these procedures are more appropriate to the juvenile's circumstances.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B-311. Central registry; responsible individuals list

(a) The Department of Health and Human Services shall maintain a central registry of abuse, neglect, and dependency cases and child fatalities that are the result of alleged maltreatment that are reported under this Article in order to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same juvenile or of other juveniles in the same family. This data shall be furnished by county directors of social services to the Department of Health and Human Services and shall be confidential, subject to rules adopted by the Social Services Commission providing for its use for study and research and for other appropriate disclosure. Data shall not be used at any hearing or court proceeding unless based upon a final judgment of a court of law.

(b) The Department shall also maintain a list of responsible individuals identified by county directors of social services as the result of investigative assessment responses. The Department may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children.

(c) It is unlawful for any public official or public employee to knowingly and willfully release information from either the central registry or the responsible individuals list to a person who is not authorized to receive the information. It is unlawful for any person who is authorized to receive information from the central registry or the responsible individuals list to release that information to an unauthorized person. It is unlawful for any person who is not authorized to receive information from the central registry or the responsible individuals list to access or attempt to access that information. A person who commits an offense described in this subsection is guilty of a Class 3 misdemeanor.

(d) The Social Services Commission shall adopt rules regarding the operation of the central registry and responsible individuals list, including:

(1) Procedures for filing data.

(2) Procedures for notifying a responsible individual of a determination of abuse or serious neglect.

(3) Procedures for correcting and expunging information.

(4) Determining persons who are authorized to receive information from the responsible individuals list.

(5) Releasing information from the responsible individuals list to authorized requestors.

(6) Gathering statistical information.

(7) Keeping and maintaining information placed in the registry and on the responsible individuals list.

(8) A definition of "serious neglect".

Added by S.L. 1998-202 § 6; amended S.L. 1999-456 § 60; amended S.L. 2005-399 § 2 added "responsible individuals list" to the end of the section heading.

§ 7B-320. Notification to individual responsible for abuse or substantial neglect

(a) Within five working days after the completion of an investigative assessment response that results in a determination of abuse or serious neglect, the director shall notify the Department of the results of the assessment and shall give personal written notice to the responsible individual of the determination.

(b) If personal written notice is not obtained within 15 days of the determination being made, the director shall send the notice to the responsible individual by registered or certified mail, return receipt requested, and addressed to the responsible individual at the individual's last known address. Only the responsible individual may receive the notice.

(c) The notice shall include all of the following:

(1) A statement informing the individual of the nature of the investigative assessment response and whether the director determined abuse or serious neglect or both.

(2) A statement summarizing the substantial evidence supporting the director's determination without identifying the reporter or collateral contacts.

(3) A statement informing the individual that the individual's name has been placed on the responsible individuals list as provided in *G.S. 7B-311*, and that the Department of Health and Human Services may provide information from this list to child caring institutions, child placing agencies, group home facilities, and other providers of foster care, child care, or adoption services that need to determine the fitness of individuals to care for or adopt children.

(4) A clear description of the actions the individual must take to have his or her name removed from the responsible individuals list. The description shall include information regarding how to request an expunction by the director of the individual's name from the responsible individuals list and procedures for seeking review by the district attorney and for seeking judicial review of the director's decision not to remove the individual's name from the list.

Added by S.L. 2005-399 § 3.

§ 7B-321. Requests for expunction; director review

(a) An individual who has been identified as a responsible individual as the result of an investigative assessment response may, within 30 days after receipt of the notice under *G.S. 7B-320(c)*, request that the director who determined the abuse or serious neglect and identified the individual as a responsible individual expunge the individual's name from the responsible individuals list. A request for expunction under this subsection shall be in writing, addressed to the director who determined the abuse or serious neglect and identified the individual as a responsible individual, and delivered in person or by certified mail, return receipt requested, within 30 days after receipt of notice.

(b) Upon receipt of a timely request for expunction under subsection (a) of this section, the director shall review all records, reports, and other information gathered during the investigative assessment response. The purpose of the review is to determine whether there is substantial evidence to support the determination and the placement of the individual's name on the responsible individuals list. Within 15 working days of receipt of the request for expunction, the director shall proceed as follows:

(1) If the director decides that there is not substantial evidence in the records, reports, and other information gathered during the investigative assessment response to support a determination of abuse or serious neglect and to support the identification of the individual as a responsible individual, the director shall notify the Department of Health and Human Services to expunge the individual's name from the responsible individuals list. The director shall also prepare a written statement of the director's decision and send the statement to the individual seeking expunction, by personal delivery or first-class mail.

(2) If the director decides that there is substantial evidence in the records, reports, and other information gathered during the investigative assessment response to support a determination of abuse or serious neglect and to support the identification of the individual as a responsible individual, the director may uphold or modify the

director's prior decision accordingly and refuse the request for an expunction. The director shall prepare a written statement of the director's decision including the reasons for the decision. The statement shall clearly indicate that it is a final decision and include information regarding the amount of time the individual has to request a review by the district attorney or to file a petition for expunction with the district court. The director shall send the statement to the individual seeking expunction by personal delivery or first-class mail. The director shall also include a second notice containing the information required by *G.S. 7B-320(c)* and a copy of a petition for expunction form.

(c) If the director does not provide a written response to a request for expunction within 15 working days after its receipt, the failure shall be considered a refusal to expunge the individual's name, and the individual may request a review of the decision by the district attorney or file a petition for expunction with the district court.

(d) If the director modifies the prior determination, the director shall notify the Department of Health and Human Services, which shall change its records upon receipt of the notification.

(e) An individual whose request for expunction has been refused by a director under this section may, within 30 days after receipt of the notice of refusal, request a review of the director's decision by the district attorney under *G.S. 7B-322* or file a petition requesting expunction with the district court under *G.S. 7B-323*.

Added by S.L. 2005-399 § 3.

§ 7B-322. District attorney review expunction request

(a) Within 30 days of the receipt of notice of the director's refusal to expunge the individual's name under *G.S. 7B-321(b)* or (c), the individual may request a review of the director's decision by the district attorney of the prosecutorial district in which the abuse or serious neglect report arose. The district attorney may delegate the review of the director's decision to a designee within the district attorney's office. The individual shall request a review under this section by submitting a letter directed to the attention of the district attorney. The letter shall contain the name, date of birth, address of the individual seeking expunction, and the name of the juvenile who was the subject of the determination of abuse or serious neglect. Failure to make a timely request to the district attorney to review the director's decision shall constitute a waiver of the individual's right of review by the district attorney, but shall not bar the individual from filing a petition for expunction under *G.S. 7B-323*.

(b) The director shall provide the district attorney all the information the director used in making the determination. The district attorney shall review the director's decision to refuse to expunge the individual's name from the responsible individuals list, and within 30 days' receipt of the request to review, make a determination of agreement or disagreement with the director's decision.

(c) If the district attorney determines that there is not substantial evidence to support a determination of abuse or serious neglect and to support the identification of an individual as a responsible individual, the district attorney shall notify the individual and the director in writing. The director shall notify the Department of Health and Human Services within five working days of the district attorney's determination, and the Department shall change its records upon receipt of the notification.

(d) If the district attorney determines that there is substantial evidence to support a determination of abuse or serious neglect and to support the identification of an individual as a responsible individual, the district attorney shall notify the director, and the individual in writing.

Added by S.L. 2005-399 § 3.

§ 7B-323. Petition for expunction; district court

(a) Within 30 days of the receipt of notice of the director's decision under *G.S. 7B-321(b)* or (c), or within 30 days from the date of a determination by the district attorney under *G.S. 7B-322*, whichever is later, an individual may file a petition for expunction with the district court of the county in which the abuse or serious neglect report arose. The request shall be by a petition for expunction filed with the appropriate clerk of court's office with a copy delivered in person or by certified mail, return receipt requested, to the director. The petition for expunction shall contain the name, date of birth, and address of the individual seeking expunction, the name of the juvenile who was the subject of the determination of abuse or serious neglect, and facts that invoke the jurisdiction of the court. Failure to timely file a petition for expunction constitutes a waiver of the individual's right to file a petition for expunction and to a district court hearing.

(b) The clerk of court shall maintain a separate docket for expunction actions and upon receipt of a filed petition for expunction shall calendar the matter for hearing at a session of district court hearing juvenile matters and send notice of the hearing to the petitioner and to the director. Upon the request of a party, the court shall close the hearing to all persons, except officers of the court, the parties, and their witnesses. At the hearing, the director shall have the burden of proving by a preponderance of the evidence the correctness of the director's decision determining abuse or serious neglect and identifying the individual seeking expunction as a responsible individual. The hearing shall be before a judge without a jury. The rules of evidence applicable in civil cases shall apply. However, the court shall have discretion to permit the admission of any reliable and relevant evidence if the general purposes of the rules of evidence and the interests of justice will best be served by its admission.

(c) At the hearing, the following rights of the parties shall be preserved:

(1) The right to present sworn evidence, law, or rules that bear upon the case.

(2) The right to represent themselves or obtain the services of an attorney at their own expense.

(3) The right to subpoena witnesses, cross-examine witnesses of the other party, and make a closing argument summarizing the party's view of the case and the law.

(d) Within 30 days after completion of the hearing, the court shall enter a signed, written order containing findings of fact and conclusions of law. A copy of the order shall be served on each party or the party's attorney of record. If the court concludes that the director has not established by a preponderance of the evidence the correctness of the determination of abuse or serious neglect or the identification of the responsible individual, the court shall reverse the director's decision and order the director to notify the Department of Health and Human Services to expunge the individual's name from the responsible individuals list. If the court concludes that sufficient evidence has not been presented to support a determination of abuse, but there is sufficient evidence to support a determination of serious neglect and the identification of the individual seeking expunction as a responsible individual, the court shall modify the director's decision and order the director to notify the Department of Health and Human Services to change the entry on the responsible individuals list to that of neglect.

(e) Notwithstanding any time limitations contained in this section or the provisions of *G.S. 7B-324(a)(3)* or (4), a district court may review a determination of abuse or serious neglect at any time if the review serves the interests of justice or for extraordinary circumstances.

(f) A party may appeal the district court's decision under *G.S. 7A-27(c)*.

Added by S.L. 2005-399 § 3.

§ 7B-324. Persons ineligible to request expunction; stay of expunction proceeding pending juvenile court case

(a) Any individual who has been identified as a responsible individual in an abuse or serious neglect case is not entitled to challenge the placement of the individual's name on the responsible individuals list if any of the following apply:

(1) The individual is criminally convicted as a result of the same incident. The district attorney shall inform the director of the result of the criminal proceeding, and the director shall immediately notify the Department of Health and Human Services. The Department shall consider this information when determining whether the individual's name should remain on or be expunged from the responsible individuals list.

(2) The individual is a respondent in a juvenile court proceeding regarding abuse or neglect resulting from the same incident. The director shall immediately notify the Department of Health and Human Services. The Department shall consider this information when determining whether the individual's name should remain on or be expunged from the responsible individuals list.

(3) That individual fails to make a timely request for expunction with the director who made the determination of abuse or serious neglect and identified the individual as a responsible individual.

(4) That individual fails to file a petition for expunction with the district court in a timely manner.

(5) That individual fails to keep the county department of social services informed of the individual's current address during any request for expunction so that the individual may receive notification of the director's decisions.

(b) If, prior to or during any proceeding provided for in this section, an individual seeking expunction is named as a respondent in a juvenile court case resulting from the same incident, the director, the district attorney, the district court judge, or the Court of Appeals shall stay any further proceedings for the expunction of that individual's name from the responsible individuals list until the juvenile court case is concluded or dismissed. If a juvenile court case resulting from the same determination of abuse or serious neglect is dismissed, or concludes without an adjudication of abuse or neglect, or with an adjudication that differs from the prior determination, the director shall notify the Department of Health and Human Services to expunge the individual's name from the responsible individuals list or modify the prior decision of the director accordingly.

Added by S.L. 2005-399 § 3.

§ 7B–401. Pleading and process

The pleading in an abuse, neglect, or dependency action is the petition. The process in an abuse, neglect, or dependency action is the summons.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–403. Receipt of reports; filing of petition

(a) All reports concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the director of the department of social services for screening. Thereafter, if it is determined by the director that a report should be filed as a petition, the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

(b) A decision of the director of social services not to file a report as a petition shall be reviewed by the prosecutor if review is requested pursuant to G.S. 7B–305.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

§ 7B–404. Immediate need for petition when clerk's office is closed

(a) When the office of the clerk is closed, a magistrate may be authorized by the chief district court judge to draw, verify, and issue petitions as follows:

(1) When the director of the department of social services requests a petition alleging a juvenile to be abused, neglected, or dependent, or

(2) When the director of the department of social services requests a petition alleging the obstruction of or interference with an investigation required by G.S. 7B–302.

(b) The authority of the magistrate under this section is limited to emergency situations when a petition is required in order to obtain a nonsecure custody order or an order under G.S. 7B–303. Any petition issued under this section shall be delivered to the clerk's office for processing as soon as that office is open for business.

Added by S.L. 1998–202, § 6, eff. July 1, 1999. Amended by S.L. 1999–456, § 60, eff. Aug. 13, 1999.

CHAPTER 11
RELEVANT FEDERAL LAWS AND NORTH CAROLINA STATUTES CODIFYING FEDERAL LAWS

There are a number of federal laws that are relevant to the representation of abused, neglected and dependent children. Some of them have been codified into North Carolina Law and some have not. This section of the manual attempts to provide some of the most relevant information on these laws. **The reader is encouraged, however, to consult the applicable statutes themselves for more detail when the statute is not set out verbatim in this manual, being aware that the following materials are not comprehensive.**

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I. LAWS INVOLVING PLACEMENT OF CHILDREN WHEN MORE THAN ONE STATE IS INVOLVED

§ 11.1 Introduction

Anytime a child custody/placement matter involves or could involve more than one state, it is important to examine the applicability of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Parental Kidnapping Prevention Act (PKPA), and the Interstate Compact on the Placement of Children (ICPC). The PKPA is the only one of the three that has not been codified into North Carolina Law but is applicable in many situations.

The following outlines give descriptions of each of these three sets of laws. The reader is encouraged to read about *all three* sets of laws in order to have a better understanding of the differences in the laws and how to apply them to custody/placement matters involving more than one state. There are situations in which *all three* sets of laws apply to a child custody proceeding.

§ 11.2 Relationship Among UCCJEA, PKPA, ICPC

A. Jurisdiction Under the UCCJEA and PKPA as Precedent to ICPC Issues

Jurisdictional issues generally (application of the UCCJEA and PKPA) will always precede the question of whether the ICPC applies to a case. When another state is or may become involved in a case, the first issue is whether or not the court and/or child welfare agency have ongoing jurisdiction over a child's custody under the UCCJEA and PKPA. Such jurisdiction is a condition precedent to having the authority to "send, bring, or cause a child to be brought or sent" to another party state under the ICPC.[1] "Although the immediate presence of a child within the court's jurisdiction may be satisfactory for a court to act on an *emergency* basis, if the question pertains to the child's custody, the court must establish that no other court has jurisdiction over the matter of the child's custody before determining that it will maintain ongoing involvement in the matter."[2]

The UCCJA was originally drafted in response to the growing public concern that thousands of children were being shifted from state to state and from one family to another every year while their divorcing parents or other persons battled over their custody in various state courts.[3] "The UCCJEA amends the UCCJA to bring it into conformity with two federal statutes, the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA), and to clarify various sections that have been interpreted inconsistently across the country. The new Act also provides new uniform methods for expedited interstate enforcement of custody and visitation orders. In harmonizing the UCCJA and PKPA, much of what the UCCJEA does in regard to initial, modification, and emergency jurisdiction is to codify what has emerged as good practice under these statutes."[4]

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[1] The Interstate Compact on the Placement of Children: a Manual and Instructional guide for Juvenile and Family Court Judges, a Collaboration of the National Council of Juvenile and Family Court Judges and the American Public Human Services Association, final draft, June 2001, page 47.
[2] *Id*.
[3] Melissa Crawford, "In the Best Interests of the Child? The Misapplication of the UCCJA and the PKPA to Interstate Adoption Custody Issues," 19 Vt. L. Rev. 99 (1994).
[4] Patricia M. Hoff, "The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act," Family Law Quarterly, Vol. 32, No. 2, Summer 1998.

The UCCJEA and the PKPA involve cases in which there are custody disputes and in which the courts of more than one state are involved or may have jurisdictional claims. The UCCJEA and the PKPA provide the means of determining which court will hear the case on the merits.[5] Most of the placements to which the ICPC applies do not involve lawsuits but involve a sending agency's proposal to place a child with a relative, prospective adoptive parent, residential treatment center, etc., sending a notice of intention to place the child to the receiving state compact administrator. That administrator makes determinations called for by the ICPC, and if there are problems or disagreements, they are worked out administratively by the sending agency, the receiving state, the placement recipient, and perhaps the compact administrator.[6] The UCCJEA has no bearing unless someone files a suit claiming custody of a child and a party or the court asserts that the courts of another state may have a basis for exercising jurisdiction over the case.[7]

B. Differences Between UCCJEA and PKPA

With the UCCJEA, there are four jurisdictional bases that inclue: home state, significant connection, emergency, and no other state having jurisdiction. The jurisdictional analysis is made at the date of filing of a proceeding.[8] Among other things, the PKPA generally requires states to enforce, without modifying, the custody and visitation orders of other states.[9] Some of the significant differences between the PKPA and the UCCJEA are as follows:

1. The UCCJEA is much more extensive, addressing a number of issues not addressed in the PKPA.

2. "[T]o the extent a state custody statute conflicts with the PKPA, the federal statute controls." *In re Bean*, 132 N.C. App. 363 (1999). Because the UCCJA was replaced by the UCCJEA, however, a number of conflicts between the two have been resolved.

3. While the UCCJEA does not apply to adoption cases, the PKPA has been interpreted to apply to cover adoption proceedings.[10]

4. The PKPA does not specifically address applicability to Indian tribes, and the UCCJEA does.

5. "The class of people who must remain in the state for extended home state jurisdiction purposes under the UCCJEA is a subset of the class allowed by the PKPA, which recognizes extended home state jurisdiction so long as a contestant continues to live in the state. The term 'contestant' is defined in the PKPA to mean a person, including a parent, who claims a right to custody or visitation of a child."[11] The UCCJEA substituted "person acting as a parent" where "contestant" appeared in the UCCJA, narrowing the class of persons whose presence may form a basis for jurisdiction.[12]

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[5] The Interstate Compact on the Placement of Children: a Manual and Instructional guide for Juvenile and Family Court Judges, a Collaboration of the National Council of Juvenile and Family Court Judges and the American Public Human Services Association, final draft, June 2001, Appendix J: Comparison of ICPC, UCCJA, UCCJEA and PKPA, by Mitchell Wendell, LL.B.Ph.D., March 26, 2001, page 247.
[6] *Id.*at 249.
[7] *Id*.
[8] The Interstate Compact on the Placement of Children: a Manual and Instructional guide for Juvenile and Family Court Judges, a Collaboration of the National Council of Juvenile and Family Court Judges and the American Public Human Services Association, final draft, June 2001, page 48.
[9] *Id.*
[10] Patricia Hoff, "The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act," Family Law Quarterly, Vol. 32, No. 2, Summer 1998.
[11] *Id.*
[12] *Id*.

§ 11.3 The Uniform Child-Custody Jurisdiction and Enforcement Act [UCCJEA: N.C.G.S. 50A-101 to 50A-317]

A. Recent Changes in the Law

In 1999, the North Carolina General Assembly enacted the Uniform Child-Custody Jurisdiction and Enforcement Act to replace the Uniform Child-Custody Jurisdiction Act. The former UCCJA was a model act promulgated by the National Conference of Commissioners on Uniform State Laws in 1968 (19 Vt. L. Rev. 99, 101) and was contained in G.S. 50A-1 to 50A-25 of the North Carolina General Statutes. The UCCJEA is contained in G.S. 50A-101 to 50A-317.

B. Purpose of the Act

The purposes of the Act are to:

1. Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which has in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
2. Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
3. Discourage the use of the interstate system for continuing controversies over child custody;
4. Deter abductions of children;
5. Avoid relitigation of custody decisions of other States in this State;
6. Facilitate the enforcement of custody decrees of other States.

-- Official Comments, N.C.G.S. 50A-101 (1999)

The former UCCJA was intended to prevent parents from forum shopping their child custody disputes and to assure that these disputes were litigated in the state with which the child and the child's family had the closest connection. *See In re Van Kooten*, 126 N.C. App. 764 (1997), *appeal dismissed*, 347 N.C. 576 (1998); *Holland v. Holland*, 56 N.C. App. 96 (1982).

C. Applicability of the Act

1. The UCCJEA does not govern an **adoption proceeding** or a proceeding pertaining to the authorization of **emergency medical care** for a child. **[G.S. 50A-103]**

2. G.S. 50A-104 addresses the application of the act to Indian tribes stating, among other things, that custody proceedings pertaining to an Indian child are not subject to the UCCJEA to the extent that they are governed by the **Indian Child Welfare Act**.

3. G.S. 50A-105 addresses **foreign countries**, stating that they shall be dealt with as though they were a state of the U.S. for the purposes of the act except for enforcement provisions – making an exception for laws that violate human rights.

4. **Initial and modification actions are covered by the UCCJEA,** but different rules govern initial jurisdiction and jurisdiction to modify an existing order.

D. Communication and Cooperation Between Courts; Preservation of Records; Testimony in Another State

1. G.S. 50A-110 addresses permissible communication between courts of different states. Unless the subject matter is scheduling, court records, or similar matters, a record must be made of the communication, and the parties must be given the opportunity to participate or to present facts and arguments.

2. Testimony of witnesses located in another state may be permissible under certain circumstances. G.S. 50A-111.

3. G.S. 50A-112 addresses the types of requests that one court can make of another, as well as the necessity of preserving records until the child is 18.

E. Requirements for Initial Child Custody Jurisdiction [G.S. 50A-201]

The following requirements are the exclusive jurisdictional basis for making a child custody determination by a court of this State. **[G.S. 50A-201(b)]** Physical 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)]** Note that the UCCJEA brings the UCCJA in conformity with the PKPA by prioritizing home state jurisdiction. Other than for purposes of emergency temporary jurisdiction, a court of this state has jurisdiction to make an initial child-custody determination only if one of the following four criteria are met:

1. This state is the home state of the child on the date of commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

> "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 any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period. **[G.S. 50A-102(7)]**

2. A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum due to convenience (under G.S. 50A-207) or unjustifiable conduct (G.S. 50A-208), and:

> a. 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 this State other than mere physical presence; and
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

3. All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 (convenience) or G.S. 50A-208 (unjustifiable conduct); or

4. No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

F. Exclusive, Continuing Jurisdiction* [G.S. 50A-202]

[G.S. 50A-202(a) paraphrased]: Except as provided for temporary emergency jurisdiction (G.S. 50A-04), a court of this state that has made a child-custody determination consistent with G.S. 50A-201 or 50A-203 has exclusive, continuing jurisdiction over the determination until

> "(1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of this State 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 this State.

(b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201."

*Note: This section was not contained in the UCCJA

G. Jurisdiction to Modify Determination [G.S. 50A-203]

"Except as otherwise provided in G.S. 50A-204 (temporary emergency jurisdiction), a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) [home state] or G.S. 50A-201(a)(2) and:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state."

H. Temporary Emergency Jurisdiction [G.S. 50A-204]

This provision allows a court to exercise temporary emergency jurisdiction if a child has been abandoned or it is necessary to protect the child (or sibling or parent) from mistreatment or abuse. The provision sets out the details and requirements for assuming temporary emergency jurisdiction. [see statute]

I. Notice and Opportunity to Be Heard [G.S. 50A-205]

Prior to making a child-custody determination, 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, and to any parent whose rights have not been terminated and anyone having physical custody of the child.

J. Simultaneous Proceedings [G.S. 50A-206]

A court of this state must make sure that a court in another state has not commenced proceedings involving child custody issues before hearing a child custody proceeding. [See statute for much greater detail.]

K. Declining Jurisdiction

A court that would have jurisdiction can decline to exercise it if it 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. See these provisions for details.

L. Case Law and the UCCJA (now UCCJEA)

1. Most cases decided under the UCCJA are likely to be good law under the UCCJEA. The major difference between them is the inclusion of enforcement provisions in the UCCJEA. While there were other changes as well, most of the cases relating to the UCCJA were decided according to provisions of the UCCJA that are the same or substantially the same as the UCCJEA and thus are applicable to cases falling under the new UCCJEA. However, it is still always important to verify applicability by carefully examining the language of the case and both old and new statutes.

2. The UCCJA and UCCJEA do apply to abuse, neglect, and dependency proceedings and must not be overlooked by the trial court. In G.S. 50A-102 of the UCCJEA, the phrase "child-custody proceeding" is defined to include a proceeding for neglect, abuse, dependency, termination of parental rights, and other proceedings. *In re Bean* and *In re Van Kooten* (discussed below) further clarify the applicability of the UCCJA (and therefore UCCJEA) to these cases. **Note, however, that several of these cases preceded the replacement of the UCCJA with the UCCJEA and that some of the conflicts between the UCCJA and the PKPA that are discussed in these cases have been resolved by the UCCJEA.**

a. *In re Bean*, 132 N.C. App. 363 (l999)

In l989, a Florida court adjudicated a child dependent and placed the child in the custody of the Florida Department of Social Services, which placed the child in the custody of nonrelatives, the petitioners in this case. The child's mother's rights were terminated in l992. In l994 the petitioners moved with the child to North Carolina with the consent of the court and DSS. In l996, the Florida court continued placement of the child in the long-term custody of petitioners and retained jurisdiction. In l997, the petitioners filed an action in North Carolina to terminate the parental rights of the child's father, who continued to reside in Florida. The trial court granted the father's motion to dismiss for lack of jurisdiction because the Florida court retained jurisdiction over the child.

The court of appeals rejected the petitioner's contention that G.S. 7A-289.23 [now 7B-1101] grants NC exclusive jurisdiction to terminate the parental rights of the parent to any child residing in the state without regard to the Uniform Child Custody Jurisdiction Act (UCCJA). The court held that the specific language of the North Carolina statute requires that the provisions of the UCCJA be satisfied in order to apply the other jurisdictional provision of the termination statute. In addition, this state's jurisdiction is governed by the Parental Kidnapping Prevention Act (PKPA).

The UCCJA establishes four routes by which a trial court may assert jurisdiction and requires the court to decline to exercise jurisdiction only when it is notified that a custody proceeding is ongoing in another jurisdiction. The PKPA, however, imposes a stricter requirement, and where the PKPA and the UCCJA conflict, the PKPA prevails since it is a federal law. Under the PKPA, the jurisdiction of a court that has made a child custody determination consistent with the PKPA continues as long as that court had proper jurisdiction under its state's laws and that state remains the residence of the child or any party. Because Florida was still the father's residence, Florida retained jurisdiction and the dismissal of the petition was affirmed.

b. *In re Van Kooten*, 126 N.C. App. 764 (1997)

A father appealed from an order adjudicating his children abused, neglected, and dependent and awarding custody of his children to DSS and argued lack of jurisdiction. In this case, the parents lived in Colorado up until their divorce when the father, who had custody of the children, movedwith the children to Iowa. The mother remarried and was living in North Carolina, having little contact with her children after the divorce.

While visiting their mother in North Carolina, allegations of abuse and neglect on the part of the father arose. The trial court in North Carolina issued a nonsecure custody order placing the children in DSS custody. Later, the trial court adjudicated the children abused, neglected, and dependent, noting that "Colorado is not the appropriate forum for additional proceedings . . . and the Iowa Courts have previously refused to exercise jurisdiction." *Id*. at 767.

In resolving this issue, the Court of Appeals examined the UCCJA, the PKPA, and the Juvenile Code. The court first confirmed the applicability of both the UCCJA and the PKPA to this proceeding. Concluding that Colorado was not the appropriate jurisdiction, because neither parents nor children had lived there in years, it then went on to address whether the trial court was precluded from adjudicating the children as abused, neglected, and dependent because Iowa was the "home state" of the children under the UCCJA. The Court of Appeals concluded that while Iowa was the home state, the North Carolina court had emergency jurisdiction pursuant to the UCCJA, which therefore gave it the authority to enter a temporary nonsecure custody order but not the authority to go further with the case without contacting Iowa. After nonsecure was granted, the trial court "was required to defer any further proceedings in the matter pending a response from Iowa as to whether that state was willing to assume jurisdiction to resolve issue of abuse, neglect, or dependency." Since the trial court did not do this, the adjudication order was vacated and the case was remanded to allow contact with Iowa. The order of nonsecure custody was affirmed. The court stated that upon remand, the North Carolina court could not assume jurisdiction unless Iowa declined to exercise it.

c. *In re Malone*, 129 N.C. App. 338 (1998)

In this case, as in *Van Kooten*, the Court of Appeals stated that the trial court should have determined the jurisdiction of another state court prior to assuming jurisdiction over a case. Here the court had properly assumed emergency jurisdiction for temporary custody, but the court of appeals stated that the trial court should have contacted the court that had original jurisdiction over the child as to whether it was willing to assume jurisdiction to resolve the issue of abuse.

d. *Potter v. Potter*, 131 N.C. App. 1 (1998)

In *Potte*r, the parents lived in Tennessee with their two children until their separation. At that timethe plaintiff, Mr. Potter, moved to North Carolina and filed for divorce and custody of the children.

Defendant mother appealed the trial court's order denying her motion to dismiss for lack of subject-matter jurisdiction. The mother asserted that the court did not have jurisdiction because the children had lived in Tennessee all their lives and were registered in the Tennessee school system. She conceded that the children spent weekends in North Carolina with their father. The trial court ruled that the children and the plaintiff had a significant connection to the state of North Carolina. The mother challenged the trial court's decision based on the requirements of the Uniform Child Custody Jurisdiction Act (UCCJA).

The North Carolina Court of Appeals held that a trial court may assume significant connection jurisdiction under UCCJA in initial child-custody matters only where the court has properly determined that the child has no home state as defined by Parental Kidnapping Prevention Act (PKPA) at the time the pending custody action begins. The PKPA allows significant connection jurisdiction only in the absence of a home state. In this case, Tennessee qualifies under PKPA as the children's home state. North Carolina did not have jurisdiction, and the trial court's refusal to dismiss the action was reversed.

e. *In re Poole*, 151 N.C. App. 472 (2002), *rev'd*, 357 N.C. 151 (2003).

In *Poole*, the Court of Appeals reversed an order of adjudication in which the father's address was listed as "unknown" and failed to issue a summons to him. On appeal the father argued lack of service of summons resulting in no personal jurisdiction. The Supreme Court reversed the decision of the Court of Appeals, and reinstated the adjudication order holding that the requirements set forth in the UCCJEA do not divest a court of jurisdiction where no other court has claim to jurisdiction over the action. Under the UCCJEA, the trial court need not have personal jurisdiction over a party in order to make a child custody determination.

M. Pleading Requirements and Confidentiality [G.S. 50A-209]

In child-custody proceedings, information must be submitted by each party in the first pleading or in an attached affidavit as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must also state information regarding any possibility that a court in another state has been involved in a child custody or visitation proceeding involving this child. [The statute is very specific regarding this type of information and should be consulted for detail.]

However, the Supreme Court has held that the absence of certain information (such as the child's current and past addresses) on a petition alleging that the child was neglected and dependent as required by G.S. 7B-402 and G.S. 50A-209 did not prevent the court from exercising subject matter jurisdiction. The trial court could easily determine whether it had subject matter jurisdiction from the facts in the petition, and holding to the contrary would "elevate form over substance" and impose limitations never intended by the General Assembly. *In re A.R.G.*, --- N.C. ---, 2007 N.C. LEXIS 597 (June 28, 2007).

Failure to provide such information would simply delay the proceedings (by way of a motion to stay by a party or the court itself) until such information is provided.

If the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed except by court order after a hearing on the matter.

N. Enforcement Provisions of the UCCJEA[13]

1. Generally, the UCCJEA requires recognition and enforcement of child-custody determinations made in substantial conformity with the Act or made under factual circumstances meeting the jurisdictional standards of the Act. It adds many enforcement procedures for custody and visitation orders that were not present in the UCCJA.

2. Registration of custody determinations is provided for by the new UCCJEA in G.S. 50A-305 and 306. "The purpose of registration is to secure an order confirming another state's custody order, which substantially limits possible defenses available in an enforcement proceeding. A request for registration may be accompanied by a request for enforcement. . . . A request for registration is sent to the court with copies of the custody order and other required information. The court then files the order as a foreign judgment and serves notice on any parent or person acting as a parent who has been awarded custody or visitation. Those persons have twenty days from service to request a hearing to contest the registration. If no such request is made, the order is confirmed as a matter of law."[14] A hearing may be requested to challenge the validity of the registration on certain grounds. A custody order may be registered to put the courts of another state on notice of the existing order and of the court's continuing jurisdiction and to obtain assurance of continued enforceability.

3. Expedited enforcement of child-custody determination is provided for by G.S. 50A-308. These provisions provide for an enforcement hearing, typically on the first court day after servicethat will result in an order authorizing the petitioner to take immediate physical custody of the child unless the respondent establishes one of the few defenses specified in the statute.

4. A warrant to take physical custody of child is permitted under G.S. 50A-311 if the child is likely to immediately suffer serious physical harm or be removed from this state. This provision sets out specific requirements for an application for such a warrant and for a hearing on the application.

5. Prosecutors or other public officials are entitled, under G.S. 50A-315, to take any lawful action to locate a child, obtain return of a child, or enforce a child-custody determination if there is:

- An existing child-custody determination;
- A request to do so from a court in a pending child-custody proceeding;
- A reasonable belief that a criminal statute has been violated; or
- A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

§ 11.4 The Parental Kidnapping Prevention Act (PKPA)

[13] Information for this subsection was originally taken, in part, from Patricia Hoff, "The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act," Family Law Quarterly, Vol. 32, No. 2, Summer 1998.
[14] *Id*.

[28 U.S.C. § 1738A]

A. Purpose of the PKPA[15]

Congressional findings and declaration of purposes indicate that the purpose of the PKPA is to:

1. Promote cooperation between state courts so that a determination of custody and visitation is rendered in the state which can best decide the case in the interest of the child;
2. Promote and expand the exchange of information and mutual assistance between states;
3. Facilitate the enforcement of custody and visitation decrees of sister States;
4. Discourage continuing interstate controversies over child custody
5. Avoid jurisdictional competition and conflict between state courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and
6. Deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

B. The Statute: § 1738A. Full faith and credit given to child custody determinations

The PKPA is not a lengthy statute and is set out verbatim as follows:

The Parental Kidnapping Prevention Act (PKPA)

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

[15] 42 U.S.C.S. § 13951 note.

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

Added Pub.L. 96-611, § 8(a), Dec. 28, 1980, 94 Stat. 3569, and amended Pub.L. 105-374, § 1, Nov. 12, 1998, 112 Stat. 3383; Pub.L. 106-386, Div. B, Title III, § 1303(d), Oct. 28, 2000, 114 Stat. 1512.

C. Relevant Case Law

For North Carolina cases, see § 11.3.L. above in the outline on the UCCJEA.

§ 11.5 Interstate Placement and the Interstate Compact on the Placement of Children (ICPC)

A. The Juvenile Code on Interstate Placement

N.C.G.S. 7B-3700 – 3806, Articles 37 and 38 of the Juvenile Code, relate to interstate placement of children. Under these statutes, "[n]o person, agency, association, institution, or corporation shall bring or send into the State any child for the purpose of giving custody of the child to some person in the State or procuring adoption by some person in the State without first obtaining the written consent of the Department of Health and Human Services." **[7B-3700(a)]** In addition, "[n]o child shall be taken or sent out of the State for the purpose of placing the child in a foster home or in a child-caring institution without first obtaining the written consent of the Department of Health and Human Services." **[7B-3702]** These statutes also discuss the rights of the Department of Health and Human Services and its agents to oversee and monitor the case. The ICPC does not apply when a child is brought into or sent into, or taken out of or sent out of the state, by the guardian of the person of such child, or by a parent, stepparent, grandparent, uncle or aunt, or brother, sister, half brother or half sister of such child if 18 or older.[16] **[7B-3705]**

B. The Interstate Compact on the Placement of Children (ICPC), contained in 7B-3800

1. Background on the ICPC

[16] Determining which situations are exempt from application of the ICPC can be complicated – please read the rest of this section for further clarification.

The ICPC was created prior to the UCCJA and the PKPA to deal with interstate placements of children and consists of ten articles, contained in 7B-3800. The purpose of the ICPC is to ensure appropriate interstate placement of children with appropriate persons or institutions, allowing for the best opportunity to exchange information and evaluate the child's circumstances. (See Article I.) The ICPC has been adopted by all states, each having a state Compact Administrator Office. There is also a National Association of Compact Administrators in Washington, D.C. North Carolina's ICPC office has a director (Compact Administrator) and two consultants who can be reached by calling 919-733-9464. This office is part of the Division of Social Services, Department of Human Resources of the State of North Carolina.

The Compact Administrator and his/her deputies serve as the central clearing point for all referrals for interstate placements. They are authorized to conduct the necessary investigation of the proposed placement and to determine whether or not the placement is contrary to the child's best interests. After the placement is approved and the child is moved into the state, they are responsible for overseeing the placement as long as it continues.[17]

2. Applicability of the ICPC

a. The ICPC does *not* apply to the sending or bringing of a child into a receiving state by any of the following individuals related to the child who leave the child with any such relative or nonagency guardian in the receiving state. [Article VIII.]

- parent
- stepparent
- grandparent
- adult brother or sister
- adult uncle or aunt
- guardian

Note that exclusion from application of the ICPC occurs only when both the placer and the placement recipient belong to the above classes of individuals.[18]

The ICPC also does not apply to placement in an institution caring for the mentally ill, epileptic, or mentallydefective or in any institution primarily educational in character or to placement in a hospital or other medical facility. [Article II(d)]

b. The ICPC *does* apply to the interstate placement of a child:

- for adoption by a child placing agency or county DSS
- for adoption by a private citizen
  (This includes the situation where natural parents send a child into another state for adoption. *See Stancil v. Brock*, 108 N.C. App. 745 (1993)).
- in a foster care home by a county DSS
- in a child caring institution by a county DSS or parent
- by juvenile court of a child in DSS custody with a relative

[17] Guide to the Interstate Compact on the Placement of Children, a publication of the American Public Human Services Association, revised 2002 page 3. This document can be accessed on line at: http://icpc.aphsa.org/Home/Doc/Guidebook_2002.pdf.
[18] Guide to the Interstate Compact on the Placement of Children, supra, page 2.

- by a parent with a relative not listed in Article VIII

Note that the ICPC applies when the child is placed with a parent or relative in another state when a parent or relative is not making the placement.[19]

3. What the ICPC requires, in a nutshell:

Prior to sending or bringing a child from one state to another (into the applicable situations named above), the sending agency must furnish the receiving state with written notice of its intention to send, bring, or place the child. [Article III. (b)](see article for content of notice). The receiving state may then request any supporting or additional information as 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)]. There are specific forms available for these purposes.

The sending agency must prepare and forward a social history of the child and a case plan to the prospective receiving state's Compact Administrator. The receiving state Compact Administrator will forward the documents to whatever local agency or facility is being asked to accept the child.[20] "The 'action' needed on any particular request will vary depending upon the nature of the proposed placement, and may include a study of a prospective adoptive or foster family, or relative home, or review by the facility to determine whether or not its program will meet the child's needs."[21]

"After the local agency has completed the necessary work, it prepares a report that includes a recommendation on whether the placement should be made. This information is returned to the Compact Administrator in the receiving state for review. If the local agency's recommendation is favorable and the Compact Administrator determines that all requirements of the receiving state's laws have been met, the placement will be approved. If, however, the local agency recommends against the placement or the Compact Administrator determines that the placement cannot lawfully be completed, the placement will be denied unless the problems can be remedied. In either case, the Compact Administrator notifies the sending state's Compact office and forwards copies for the sending agency."[22]

4. Jurisdiction and responsibility for child under the ICPC [Article V]

The sending agency retains jurisdiction over the child sufficient 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 also includes the power to return the child 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, public agencies may enter into agreements with agencies in the receiving state to provide for services as an agent for the sending agency. [Article V] Financial responsibility and agreements between agencies are also addressed in 7B-3801, -3802, and -3803.

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[19] See opinion of Attorney General Dr. Sarah T. Morrow, Secretary, North Carolina Department of Human Resources, 52 N.C.A.G. 22 (1982); Also see Guide to the Interstate Compact on the Placement of Children, supra, page 2.
[20] Guide to the Interstate Compact on the Placement of Children, supra, page 4.
[21] *Id.*
[22] *Id*. at page 5.

5. Regulation 7 and priority placement procedures

One of the problems with the ICPC is the length of time it can take for states to process cases and approve interstate placements. Six weeks or 30 working days is the recommended processing time from the date of notice until approval or denial.[23] ICPC Regulation 7 was adopted by Compact Administrators to alleviate the fact that processing can take so long, allowing for expedited ICPC procedures when a judge finds a child meets the criteria for priority ICPC status. DSS offices have forms and sample orders relating to regulation 7.

6. Illegal Placements

Article IV of the Interstate Compact addresses placements made in violation of the Compact, stating the penalties violators will be subject to.

C. ICPC Regulations & Information

These regulations govern many of the ICPC procedures, helping to define and clarify the language of the Compact. Information on ICPC regulations can be obtained from the Compact Administrator's Office at 919-733-9464.

D. ICPC and GAL Advocacy

The best way that a GAL can advocate for a child when the ICPC is impacted is to ensure that the paperwork is promptly done at the local level and sent to the Compact Administrator's Office. The GAL may want to literally follow the paperwork from the local agency to the state office. From that point, the GAL can contact the receiving state's Compact Administrator's Office and follow the paperwork to that state's local agency.[24] Most of the time the reason that ICPC home studies are so time consuming is the fact the paperwork must cross several desks and also must be properly completed. Staying on top of the paperwork and being the "squeaky wheel" is the best advocacy for a child when the GAL believe an out-of-state relative placement will ultimately service the child's best interest.

II. ACCESS TO SUBSTANCE ABUSE RECORDS [42 C.F.R. PART 2]

§ 11.6 Introduction

It is common for substance abuse records of a party or individual involved in child protection proceedings to become relevant to the proceedings. However, anyone who seeks those records or holds those records must be aware that such records are protected by federal law. The records are not necessarily inaccessible, but can only be released under certain circumstances and by following very specific procedures set out in 42 C.F.R. Part 2.

The following outline, by Mark Botts of the Institute of Government, is intended to provide the reader with information regarding 42 C.F.R. Part 2 that is most relevant to Guardians ad Litem and Guardian ad Litem Attorney Advocates. For more detailed information, contact the legal staff in the Guardian ad Litem state office who can refer you to other resources.

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[23] *Id.*

[24] The following link gives contact information for each state's Compact Administrator: http://icpc.aphsa.org/Home/states.asp

Please see the appendix in this manual for sample forms, motions, and orders related to accessing substance abuse records.

§ 11.7 Federal Confidentiality Law Governing Substance Abuse Patient Records*

I. The Duty of Confidentiality

A. State Law. North Carolina law restricts the disclosure of information relating to clients of mental health, developmental disabilities, and substance abuse facilities.[25]

1. Unauthorized disclosure is a Class 3 misdemeanor punishable by a fine up to $500.[26]

2. Employees of "area facilities" face suspension, dismissal, or other disciplinary action if they disclose information in violation of G.S. 122C.[27]

B. Federal law (42 U.S.C. 290dd-2; 42 C.F.R. § 2) restricts the use and disclosure of patient information received or acquired by a federally assisted alcohol or drug abuse program. [28]

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).

C. Professional Codes of Conduct. Codes of ethics and standards of practice governing mental health and substance abuse professionals generally require them to protect client information and adhere to confidentiality laws.[29]

Violations of these standards may jeopardize a mental health professional's license or certification.

D. Civil Liability. The unauthorized disclosure of confidential information could result in civil liability for the treatment facility or the employee who disclosed the records.[30]

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* This outline was originally prepared for a Guardian ad Litem Legal/Staff Training in October, 2000 and was reprinted with permission from the author, Mark Botts, Institute of Government, The University of North Carolina at Chapel Hill.

[25] *See* G.S. 122C-52.

[26] *See* G.S. 122C-52(e). State law also contains several privileges that may shield information maintained by mental health facilities. *See* G.S. 8-53 (doctor-patient privilege), -53.3 (psychologist-client privilege), -53.7 (social worker privilege), -53.8 (counselor privilege).

[27] *See* 10A NCAC26 B.0104. An "area facility" is a facility operated by, or under contract with, an area mental health, developmental disabilities, and substance abuse authority (area authority or area program)[G.S. 122C-3].

[28] The regulations in 42 C.F.R. § 2, apply to federally-assisted organizations and individual practitioners that specialize in providing, in whole or in part, individualized alcohol or drug abuse diagnosis, treatment, or referral for treatment. The regulations govern any information that reveals that a person is receiving, has received, or has applied for such services. *See* 42 C.F.R. § 2.11.

[29] *See, e.g.*, Ethical Standards of the N.C. Substance Abuse Professional Certification Board, Inc., Ethical Standard No. 8 (1994); Code of Ethics of the National Association of Social Workers, Ethical Standard 1.07; Code of Ethics of the Clinical Social Work Federation, Ethical Principles III and VI; and 21 NCAC 63.0507 (ethical guidelines for the practice of social work).

[30] The unauthorized disclosure of a patient's confidences by a physician, psychiatrist, psychologist, marital and family therapist, or other health care provider constitutes medical malpractice. *See Watts v. Cumberland County Hosp. System, Inc*., 75 N.C. App. 1, 9-11, 330 S.E.2d 242, 248-250 (1985) (holding that malpractice consists of any professional

II. State Confidentiality Law – GS 122C

A. Covered providers: Any "facility," which means any individual, firm, partnership, corporation, association, company, or agency at one location whose primary purpose is to provide services for the care, treatment, habilitation, or rehabilitation of persons who are mentally ill, developmentally disabled, or substance abusers. "Facility" includes an "area facility," which is a facility operated by or under contract with an area authority, a "state facility," which is a facility operated by the Dep't of Health and Human Services (regional psychiatric facilities, mental retardation centers, alcohol and drug abuse treatment centers, special care centers, schools for emotionally disturbed children), a "licensable facility" which provides services for one or more minors or two or more adults, a "private facility," a psychiatric service of UNC, a "residential facility," a "24-hour facility," and a "VA facility."[31]

B. Confidential information: Any information, whether recorded or not, relating to an individual served by a facility and received in connection with the performance of any function of the facility is confidential and may not be disclosed except as authorized by G.S. 122C-51 through 122C- 56 and implementing regulations at 10 NCAC 18D.[32]

III. Federal Law Governing Alcohol and Drug Abuse Patient Records – 42 CFR 2

A. Covered programs: The federal law applies to any person or organization that, in whole or in part, holds itself out as providing and does provide alcohol or drug abuse diagnosis, treatment, or referral for treatment with direct or indirect federal financial assistance.

1. Only programs that specialize in, and hold themselves out as providing, substance services.

    a. any free-standing substance abuse facility or independent substance abuse program, including
        - an outpatient substance abuse clinic
        - a residential drug or alcohol treatment facility
        - an independent physician or other therapist with a specialty in substance abuse treatment or diagnosis
    b. any part of a broader organization that is identified as providing substance abuse services, for example
        - a school-based program, but not an entire school or school system;
        - the substance abuse program of an area authority, but not mental health programs outside of the substance abuse program;
        - a detox unit or substance abuse program of a general hospital, but not the entire hospital.[33]

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misconduct or lack of fidelity in professional or fiduciary duties, including breach of duty to maintain confidentiality of patient information), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

[31] For further explanation, *see* G.S. § 122C-3.

[32] These regulations also appear in a publication of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, entitled "Confidentiality Rules" (APSM 45-1). Local hospitals that contract with an area facility or provide services for a state facility and are JCAHO accredited are excluded from the rules in 10 NCAC 18D. Instead, the confidentiality policies of the accredited hospital apply.

[33] A general medical care facility (general hospital) is not a "program" unless it has an identified unit that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment, or has staff whose primary function is to provide substance abuse services and who are identified as such providers.

2. Not only treatment programs, but also programs providing just diagnosis or referral, including an employee assistance program that provides no treatment but evaluates whether a person has a substance abuse problem and then refers the person to treatment at an independent program.

3. Only programs that receive, directly or indirectly, federal financial assistance, including programs that
   a. receive federal grants or Medicare or Medicaid reimbursement;
   b. through federal revenue sharing or other forms of assistance, receive federal funds which could be (but are not necessarily) spent for an alcohol or drug abuse program (e.g., programs operated or funded by state or local government);
   c. are licensed or certified by the federal government (e.g., certification of provider status under the Medicare program, authorization to conduct methadone treatment, or registration to dispense a controlled substance for substance abuse treatment); or
   d. organizations exempt from federal taxation. [*see* 42 C.F.R. § 2.12]

B. Covered information: The federal prohibition against disclosure 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 at a federally assisted program—as a substance abuser or recipient of substance abuse services, and
- is information obtained by a federally assisted alcohol or drug abuse program for the purpose of treating substance abuse, making a diagnosis for that treatment, or making a referral for that treatment.

1. "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.

2. "Diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition that is identified as having been caused by that abuse, which is made for the purpose of treatment or referral for treatment.[34]

3. "Treatment" means the management and care of a patient suffering from alcohol or drug abuse, a condition that is identified as having been caused by that abuse, or both, in order to reduce or eliminate the adverse effects upon the patient.[35]

C. "Patient-identifying information": Restrictions on disclosure apply only to information that would identify a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as a substance abuser or a recipient of substance abuse services.

1. Example: Child mental health record contains information that a parent or family member abuses alcohol or other drugs, but that person is not a substance abuse patient. The identity of the parent or family member and the information about substance abuse is not covered by the federal rules because the parent or family member is not a "patient" and the reference to his or her substance abuse is not made for the purpose of treatment or referral for treatment, i.e., is not a "diagnosis."

[34] See 42 C.F.R. § 2.11.
[35] *Id*.

2. Example: Child mental health record contains information that a parent abuses alcohol or other drugs and this parent is a client or former client of substance abuse services provided by the facility. The federal rules would apply to restrict the disclosure of any information that would identify the parent as a drug or alcohol abuser or a recipient of alcohol or drug services.

IV. Relationship of Federal Law to State Law

A. Federal law controls where it is more restrictive: No state law may authorize or compel any disclosure prohibited by the federal drug and alcohol confidentiality law. Where state law authorizes or compels disclosure that the federal law prohibits, the federal law must be obeyed. [42 C.F.R. § 2.20]

B. State law controls where it is more restrictive: 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 must be obeyed. [42 C.F.R. § 2.20]

V. Disclosures Without Consent

A. General principles:

1. The legal requirement of confidentiality is subject to numerous exceptions. Client consent to disclosure is the primary exception to maintaining the confidentiality of client information, but the federal law recognizes exceptions to confidentiality that do not depend on client consent. [42 C.F.R. § 2.31]

2. Because confidentiality is the rule and disclosure is the exception, disclosure must be limited to exceptions recognized by the applicable confidentiality law. If the person in possession of confidential information cannot point to a particular exception expressed in the law, then the information should not be disclosed.

B. Court order: A federal, state, or local court may authorize a program to make a disclosure that would otherwise be prohibited. [42 C.F.R. § 2.61]

1. A subpoena, alone, does not permit disclosure, even when signed by a judge.

2. A court is not entitled to a patient's treatment information merely because the court ordered the patient into treatment.

3. 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.[36] [42 C.F.R. § 2.64]

4. Judge must review records *in camera* ("in chambers," rather than in open court). [42 C.F.R. § 2.64-65]

5. Court must find "good cause" for disclosure.[37]

[36] When the records are sought for the purpose of criminally investigating or prosecuting a patient, only the holder of records is entitled to notice and an opportunity to appear and be heard. [42 C.F.R. § 2.65]

6. Any order authorizing disclosure must (i) limit disclosure to parts of record essential to fulfill the 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. [42 C.F.R. § 2.64]

C. Child protective services:

1. Reporting: Program staff must comply with state law (G.S. 7B-301) requiring the reporting of suspected child abuse, neglect, dependency, or death by maltreatment to the county social services department.

2. Investigation: State law, G.S. 7B-302, authorizes a DSS director (or the director's representative), when carrying out his or her investigative duties in response to a report, to make a written demand for any information or reports that the director believes to be relevant to the investigation of, or the provision for, protective services, *unless* the disclosure is prohibited by federal law or regulation. Program staff must *not* provide information pursuant to 7B-302 alone. The federal rules do not permit disclosure of information beyond the initial report (subsection a., above) for purposes of investigating a report or for court proceedings that may result from the report, absent the patient's written consent or a court order issued pursuant to the federal regulations.[38]

3. Guardian ad litem: State law, G.S. 7B-601, provides for the court appointment of guardians ad litem to represent children alleged to be abused, neglected, or dependent in Juvenile Court proceedings. This statute gives the GAL 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." No state law, however, may compel or authorize a disclosure prohibited by the federal regulations. Because the federal rules do not permit disclosure under these circumstances, substance abuse programs must not disclose confidential information to a guardian ad litem unless presented with a court order issued according to the special procedures and criteria set forth at 42 C.F.R. 2.61-2.67, or unless some other federally-recognized exception to confidentiality applies (e.g., patient consent).

4. Multiagency sharing—G.S. 7B-3100 and 28 NCAC 01A.0302 that designate agencies authorized to share information do not allow or compel the disclosure of information protected by the federal drug and alcohol confidentiality law, and the federal law does not permit the disclosure of patient-identifying information pursuant to these state laws and regulations.

- Unless a provision in the federal law applies that would permit disclosure, substance abuse programs should not, in response to a request for information under the OJJ rules, disclose information protected by the federal drug and alcohol confidentiality law.

- At the request of the agency soliciting information protected by the federal law, the agency refusing the request must inform "that agency of the specific law or regulation that is the basis for the refusal." 28 NCAC 01A.0302(b).

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[37] 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. [42 C.F.R. § 2.64]

[38] 42 C.F.R. 2.12(c)(6).

- Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." An inquiring party may be given a copy of the federal regulations and advised that they restrict the disclosure of substance abuse patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. [42 CFR 2.13(c)(2)]

VI. Disclosures of 42 CFR 2 Information With Consent

The content of any record may be disclosed in accordance with the prior written consent of the patient, but only to the extent, under such circumstances, and for such purposes as permitted by the written consent.

A. Effect: Consent to disclose operates to remove the prohibition on disclosure but does not compel disclosure.

B. Consent form:

1. Consent must be voluntary and informed.

2. Consent must be in writing and must include[39]:
   a. patient's name;
   b. name of facility or person disclosing the information;
   c. name of individual or individuals, agency or agencies, to whom information is being disclosed;
   d. information to be released (how much and what kind);
   e. the purpose of the disclosure;
   f. the date, event, or condition upon which the consent will expire if not revoked before;
   g. statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance on the consent;
   h. signature of the patient and, when required for a patient who is a minor, signature of the patient's legally responsible person; and
   i. date consent is signed.

C. Who May Consent:

1. Minor patients: Even if the patient is a minor, he or she must sign the consent form.

a. When a minor is admitted to substance abuse treatment that requires the consent of the minor's legally responsible person (LRP) (defined below), any written consent for disclosure must be signed by both the minor and his or her LRP.

b. When the minor consents to substance abuse treatment pursuant to GS 90-21.5, only the minor may consent to disclose confidential information. The LRP and others have access to information only upon written consent of the minor.

c. If a minor applies for treatment that requires parental consent under state law, the fact of the minor's application for treatment may be communicated to the LRP only if:
   - the minor gives written consent to the disclosure, or
   - the minor, due to extreme youth or mental or physical condition, lacks the capacity to make a rational decision whether to consent to a disclosure to his or her LRP and the applicant's

[39] See 42 C.F.R. 2.31 for form of written consent required by federal regulations.

situation poses a substantial threat to the life or physical well-being of the applicant or other individual which may be reduced by communicating relevant facts to the LRP. [42 C.F.R. § 2.14]

2. Incompetent patients [42 C.F.R. § 2.15]

a. If the patient is adjudicated incompetent, the individual appointed by the court as guardian-for-the-person or general guardian may sign the consent for release.

b. When a patient has not been adjudicated incompetent, but suffers from a medical condition that prevents knowing or effective action on his or her behalf, the program director may exercise the right of the patient to consent to a disclosure for the sole purpose of obtaining payment for services from a third-party payer.

D. Redisclosure. Each disclosure made with the patient's written consent must be accompanied by a written notice prohibiting any further disclosure unless disclosure is expressly permitted by the written consent of the patient or is otherwise permitted by the federal regulations.[40]

E. "Legally responsible person" means: (i) when applied to an adult, who has been adjudicated incompetent, a guardian; or (ii) when applied to a minor, a parent, a guardian, a person standing in loco parentis, or a legal custodian other than a parent who has been granted specific authority by law or in a custody order to consent for medical care, including psychiatric treatment; [41] or (iii) when applied to an adult who is incapable as defined by G.S. 122C-72(c) and who has not been adjudicated incompetent, a healthcare agent named pursuant to a valid health care power of attorney as prescribed in Article 3 Chapter 32. [10A NCAC 26B.0103].

1. "**Parent**" means the biological or adoptive mother or father of a minor.

2. Guardian: a person appointed as a guardian of the person or general guardian by the court under Chapters 7A or 35A or former Chapters 33 or 35 of the General Statutes. [G.S. § 122C-3(15)]

3. Person Standing in Loco Parentis means one who has put himself in the place of a lawful parent by assuming the rights and obligations of a parent without formal adoption.[42]

a. Whether such a relationship exists depends upon the facts of the particular case, and all of the facts and surrounding circumstances must be considered.

b. Intent is a significant factor: The "relationship of *in loco parentis* . . . is established only when the person with whom the child is placed ***intends*** to assume the status of a parent--by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance."[43] The intent to assume parental status can be inferred from parties' acts and declarations.[44] Because the relationship exists at the will of the party assuming the obligations of parent, it may be abrogated by such party at any time.

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[40] See 42 C.F.R. 2.32 for specific notice statement required by the federal regulations.
[41] G.S. 122C-3(20).
[42] 10A NCAC 26B.0103.
[43] *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809 (1980).
[44] See *Hush v. Devilbiss Co.*, 77 Mich. App. 639, 259 N.W.2d 170, 174 (Mich. App. 1977).

c. Factors that have been considered relevant in other cases include "the age of the child; the degree to which the child is dependent on the person claiming to be standing in loco parentis; the amount of support, if any, provided; the extent to which duties commonly associated with parenthood are exercised;"[45] the amount of time the child has lived with the person and the degree to which a "psychological family" has developed.

4. Legal custodian:

a. Legal custodian granted specific authority in a **custody order**: If, in a custody order, the judge specifically authorizes the legal custodian to consent to medical and psychiatric care, then the legal custodian is an LRP for purposes of the confidentiality rules.

b. Legal custodian granted specific authority **by law** to consent for treatment: Under certain conditions, provisions of the Juvenile Code grant the director of DSS the authority to arrange for, provide, or consent to "any psychiatric, psychological, educational, or other remedial evaluations or treatment" for the juvenile.[46]

[45] *Hush*, 77 Mich. App. at 649, 259 N.W.2d at 174-75.

[46] See G.S. 7B-903(2)(c); 2503(1)(c); and 2506(1)(c). This authority arises only if the following conditions have been met:

a. a judge has placed the child in the custody or physical custody of a county department of social services pursuant to a dispositional order under G.S. 7B-903, -2503, or -2506;
b. the judge has not "otherwise ordered" (i.e., no provision of the court order overrides the statutory authority of DSS to consent to treatment);
c. the parent is unknown, unavailable, or unable to act on the child's behalf; and
d. the director has made reasonable efforts to obtain consent from the parent or guardian of the affected child.

III. ACCESS TO EDUCATION RECORDS: THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) [20 U.S.C. §1232g]

§ 11.8 Introduction and Overview of FERPA [47]

FERPA is a federal law that governs the disclosure of information by all public elementary and secondary schools.

Before an educational agency or institution may provide personally identifiable information from a student's education records, the parent or eligible student must give written consent. The consent must contain specific information indicating that the records may be disclosed, explaining the purpose of the disclosure, and identifying to whom the disclosure may be made. **[20 U.S.C. 1232g (b) (1) and (b) (2) (A)]**

There are several exceptions to the prior consent requirement, four of which may apply specifically to guardians ad litem: if the information provided is (1) to comply with a judicial order or subpoena; (2) needed in relation to a health or safety emergency; (3) defined as directory information; and (4) to comply with a state statute relating to the juvenile justice system.

Under the first applicable exception, an educational agency or institution may disclose personally identifiable information from a student's education record without the required written consent if the disclosure is to comply with a judicial order or subpoena. The agency or institution must first make a reasonable effort to notify the parent or eligible student of the order before complying so that the parent or eligible student is given the opportunity to seek legal recourse. Reasonable effort to notify is not required if the disclosure is in compliance with a federal grand jury subpoena or any other subpoena issued for a law enforcement purpose, and the court has ordered that the existence or the contents of the subpoena or the information provided not be disclosed to any other person. **[20 U.S.C. 1232g (b)(1), (b)(2)(A), (2)(B), and (b)(1)(J)]**

The second applicable exception states that an educational agency or institution may disclose personally identifiable information from a student's education record to appropriate parties without the required written consent, if the disclosure is in connection with a health or safety emergency. That is, prior written consent is not pertinent if knowledge of the information disclosed is necessary to protect the health and safety of the student or other individual. **[20 U.S.C. 1232g (b)(1) (I)]**

Under the third applicable exception, prior written consent is not required if the disclosure is of information defined as "directory information" by the agency or institution, and public notice has been given to the parents and/or eligible student. Directory information includes but is not limited to, the student's name, address, and telephone number; date and place of birth; major field of study; official activities; dates of attendance; height and weight for sports; degrees and honors received; most recent previous education institution; and photograph. **[20 U.S.C. 1232g (a)(5)(A) and (B)]**

Under the fourth applicable exception, prior written consent is not required if the disclosure is being made to state and local officials or authorities to comply with a state statute relating to the juvenile justice system and the system's ability to effectively serve the student whose records are being released before adjudication. If disclosure is permitted by a state statute that was adopted after Nov. 19, 1974, and concerns the juvenile justice

[47] Thanks to Julie Bickham for her work on this summary which was based on the following Department of Justice Public Document.

system, the authorities receiving the information shall certify in writing that the information will not be disclosed to any other party. [20 U.S.C. 1232g(b)(7)(E)]

EXCERPTS FROM "SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS*

§ 11.9 Information Sharing Between Schools and Other Youth-Serving Agencies Under the Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act (FERPA) is a complex Federal law that protects the privacy interests of parents and students with regard to education records. It affects every public elementary and secondary school and virtually every postsecondary institution in the country. First enacted in 1974, FERPA has been amended by Congress seven times, most recently through the Improving America's Schools Act of 1994 (IASA).

FERPA defines the term "education records" broadly to include all records, files, documents, and other materials, such as films, tapes, or photographs, containing information directly related to a student that an education agency or institution or a person acting for the agency or institution maintains. For example, education records include information that schools maintain on students in report cards, surveys and

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* The following information on the Family Educational Rights and Privacy Act (FERPA) in sections 11.9 through 11.15 consists of excerpts from a publication titled: "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," June 1997, from the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, and the U.S. Department of Education, Family Policy Compliance Office. Principal Authors are Michael L. Medaris, Office of Juvenile Justice and Delinquency Prevention; Ellen Campbell, Family Policy Compliance Office; and Professor Bernard James, J.D., Pepperdine University School of Law.

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assessments, health unit records, special education records, and correspondence between the school and other entities regarding students. Education records also include information that a school maintains about parents.

> **Examples of Valid Disclosures Under FERPA--Jane**
> Jane, 10, has been reported to the child protective services agency as a possible sex abuse victim. The agency contacts Jane's teachers to determine if Jane has exhibited any unusual behavior. FERPA permits Jane's teachers to share information about their observations regarding Jane. Oral information based on personal observation or knowledge is not subject to the provisions of FERPA.

Generally, FERPA gives parents the right to inspect and review their children's education records, request amendment of the records, and have some control over the disclosure of information from the records. When a student turns 18 or enters college, FERPA classifies him or her as an "eligible student" and transfers the rights under the Act from the parent to the student. FERPA requires school districts to notify parents and eligible students annually of their rights under the Act. (See appendix B for a sample notification document.)

The recent IASA amendments to FERPA enhanced the penalty for improperly disclosing information from education records. FERPA now prohibits a school from providing information for at least 5 years to a third party who received information and redisclosed it without the required consent.

> **Examples of Valid Disclosures Under FERPA--Ryan (Part I)**
> Ryan, 13, is adjudicated delinquent for breaking into a warehouse. As this is his first offense, the court returns Ryan to school and shares information about the offense with the school. FERPA does not govern the decision by local juvenile justice system officials to divulge this information to the schools. Schools may receive and use information from law enforcement, courts, and other justice system components in order to provide services to Ryan and to maintain a safe and effective learning environment. However, once the information on Ryan is received and maintained by the school, it is subject to FERPA and exceptions.

The Prior Consent Requirement for Disclosure of Education Records

For elementary or secondary school students, FERPA restricts the release of their school records or information from their records that could identify the student ("personally identifiable information"). Before releasing such records or information to a party outside the school system, the school must obtain the consent of the student's parents unless the student is 18 or over, in which case only the student can consent to the release, or unless the release falls under one of the exceptions to the consent requirement.

Educators are free to share information with other agencies or individuals concerning students based on their personal knowledge or observation, provided the information does not rely on the contents of an education record. Oral referrals to other agencies based on personal observations are not subject to the provisions of FERPA. Of course, the process of interagency information sharing is a dynamic process, and educators should take care not to circumvent the requirements of FERPA by making a referral that is predicated on knowledge obtained from education records.

Exceptions to the Prior Consent Requirement

Statutory exceptions applicable to the prior consent requirement are set forth in detail under §99.31 of the FERPA regulations. As a general rule, educators may disclose information without prior consent if they can answer yes to any of the following questions.

Is the disclosure being made--

- To other school officials, including teachers, within the school or school district who have been determined to have legitimate educational interests? (A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.) (See §99.31(a)(1) of the FERPA regulations.)

- To officials of another school, school system, or postsecondary institution where the student seeks or intends to enroll? (See §99.34 of the FERPA regulations.)

- To authorized representatives of the Comptroller General of the United States, the U.S. Secretary of Education, or State and local education authorities? This exception applies only under certain conditions. Typically, disclosures under this provision must be in connection with an audit or evaluation of a Federal- or State-supported education program or in compliance with Federal legal requirements related to those programs. (See §99.35 of the FERPA regulations.)

- In connection with the student's application for or receipt of financial aid? (See §99.31(a)(4) of the FERPA regulations.)

- To State and local officials or authorities in compliance with a State statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are being released? (This condition is discussed further in "Disclosures Under the Juvenile Justice System Exception," p. 8.) (See §99.31(a)(5) and §99.38 of the FERPA regulations.)

- To organizations conducting studies for, or on behalf of, education agencies or institutions, in order to develop tests, administer student aid, or improve instruction? (See §99.31(a)(6) of the FERPA regulations.)

- To accrediting organizations to carry out their accrediting functions? (See §99.31(a)(7) of the FERPA regulations.)

- To parents of a dependent student, as defined by the Internal Revenue Code, even if the student is an "eligible student" under FERPA? (See §99.31(a)(8) of the FERPA regulations.)

- To comply with a judicial order or lawfully issued subpoena? The regulations direct the school to make a reasonable effort to notify the parent or eligible student of the court order or subpoena in advance of compliance. (See appendix C for sample court orders.) However, the IASA amendments removed this notification requirement for instances in which a court or other agency issues either a Federal Grand Jury subpoena or a subpoena for a law enforcement purpose and the court has ordered the school not to disclose the existence of the subpoena. (See §99.31(a)(9) of the FERPA regulations.)

- In connection with a health or safety emergency? (See §99.31(a)(10) of the FERPA regulations. See also "Disclosures Under the Health or Safety Emergency Exception," p. 7.)

- To teachers and school officials in other schools who have legitimate educational interests in the behavior of the student when the information concerns disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community? (See §99.36 of the FERPA regulations.)

- To provide information that the school district has designated as "directory information"? (See §99.37 of the FERPA regulations. See also "Disclosures Under the Directory Information Exception," p. 7).

- To provide information from the school's law enforcement unit records? (See §99.3 definition of "education records" and §99.8 of the FERPA regulations. See also "Disclosures Under the Law Enforcement Unit Records Exception," p. 5).

Four of the exceptions specified above require additional explanation:

- Disclosures Under the Law Enforcement Unit Records Exception.

- Disclosures Under the Directory Information Exception.

- Disclosures Under the Health or Safety Emergency Exception.

- Disclosures Under the Juvenile Justice System Exception.

Each of these types of disclosures is discussed in the sections that follow.

Disclosures Under the Law Enforcement Unit Records Exception

Under FERPA, schools may disclose information from "law enforcement unit records" to anyone--Federal, State, or local law enforcement authorities, social service agencies, or even the media--without the consent of the parent or eligible student. FERPA specifically exempts from the definition of "education records"--and thereby from the restrictions of FERPA--records that a law enforcement unit of a school or school district creates and maintains for a law enforcement purpose. In some instances, State open records laws may require that schools provide public access to law enforcement unit records because FERPA does not protect these records. (Educators may wish to check with their State attorney general's office on this point.)

> **Examples of Valid Disclosures Under FERPA--Rodney, Jeff, and Mark (Part I)**
> A School Resource Officer (SRO) who is a member of the school's law enforcement unit receives a report from the local police department that Rodney, Jeff, and Mark are active members of the Five Crew gang. The SRO creates a file and places the report in it. The SRO also informs the principal, who makes appropriate notations in each student's education record. Several weeks later, a detective from a neighboring jurisdiction contacts the SRO. The detective is investigating a rideby shooting involving gangs at a basketball game between the two schools. FERPA does not restrict the SRO from sharing information about the Five Crew members from the law enforcement unit record with the investigator.

A "law enforcement unit" is an individual, office, department, division, or other component of a school or school district--such as a unit of commissioned police officers or noncommissioned security guards--that is officially authorized or designated by the school district to (1) enforce any Federal, State, or local law, or (2) maintain the physical security and safety of schools in the district. Educators may employ commissioned police officers who are responsible for enforcing laws or officially designate an individual in the school district to carry out the responsibilities of a law enforcement unit.

Additionally, some school districts make special arrangements with local law enforcement authorities for the purpose of maintaining safe and drug-free schools. Although the Departments of Justice and Education encourage schools without separate law enforcement units to develop working relationships with local police authorities, compliance with FERPA calls for certain precautions. School districts should use a contract or memorandum of understanding to officially designate a local police officer(s) as the district's law enforcement unit. Without this designation, FERPA would prohibit the school from disclosing information from a student's education records, unless one of the other exceptions to FERPA applies, such as the health or safety exception. Regardless of whether the school district has designated one individual or a group of commissioned officers as the law enforcement unit, the district should include this designation in the annual notification of rights to parents and students under the section concerning the disclosure of information to school officials with a legitimate educational interest in the records. This is so that schools may freely share information about students with their law enforcement units and so that parents and students will know that information from education records may be disclosed for the purpose of maintaining safe schools.

Because this FERPA exemption applies specifically to records that a law enforcement unit creates and maintains for a law enforcement purpose, FERPA would protect records that the law enforcement unit created for a purpose other than law enforcement--even when they are in the possession of the law enforcement unit. On the other hand, even if the law enforcement unit shares with another component of the school a copy of a record the unit created for a law enforcement purpose, FERPA would not restrict dissemination of the records maintained by the law enforcement unit.

Law enforcement unit records should not be confused with the records of a school's disciplinary actions or proceedings, which are education records. Although schools may disclose information from their law enforcement unit to other school officials (including educators in other schools), the *copy* that the law enforcement unit gives to a principal or other school official becomes an education record once that official receives and maintains it. As such, the information is subject to FERPA and the principal or other official cannot disclose it to a third party without prior parental consent, unless one of the other exceptions to FERPA applies. However, the original document that the law enforcement unit created and maintained, which relates to activity that formed the basis for subsequent disciplinary actions or proceedings, does not become an education record merely because the unit shared it with another component of the school or because a copy is placed in the student's education file. It is, therefore, disclosable like other law enforcement unit records.

Examples of Valid Disclosures Under FERPA--Donna and Linda

Donna, 13, and Linda, 14, get into an argument and begin shoving each other. A school resource officer (SRO), who is a member of the school's law enforcement unit, separates them and makes an incident report. Several days later, the SRO again breaks up a fight between the two girls and makes another incident report. Copies of the two incident reports are forwarded from the law enforcement unit to the Assistant Principal who is responsible for school discipline. Because this is the second time the girls have been involved in a fight, they are suspended for a day. The incident reports that provided the basis of the disciplinary hearing and the disposition are entered into each girl's education record. Several days later, Donna and Linda see each other at a neighborhood record store and begin fighting again. The police are called and take the girls into custody. An officer contacts the school SRO and learns that Donna and Linda have gotten into fights at school. While the record of the school discipline hearing is an education record that is subject to FERPA constraints, the incident reports created and maintained by the SRO are disclosable under the law enforcement unit record exception.

It should be noted that nothing in FERPA prevents a school official from disclosing to local law enforcement authorities information that is based on that official's personal knowledge or observation and not from an education record. As long as the reporting of the information does not rely on information contained in education records, FERPA does not restrict the reporting of crime to local law enforcement.

For instance, if a teacher were to observe that a student is involved in a gang or in illegal activities, FERPA would not prevent that teacher from reporting the student to law enforcement authorities. Should the authorities decide to investigate the teacher's observations and need information from the student's education record, they should obtain a subpoena unless circumstances trigger one of the other exceptions under FERPA.

Disclosures Under the Directory Information Exception

A school can disclose "directory information" from the education record without prior parental consent after giving notice of its intention to do so. "Directory information" is information in a student's education records that is not generally considered harmful, and its release is not considered an invasion of the student's privacy. A critical distinction exists between directory information and all other information present in school files. School districts can choose how much directory information from education records they will disclose. Directory information includes, but is not limited to, the following data about the student:

- Name.
- Address and telephone.
- Date and place of birth.
- Major field of study.
- Official activities.
- Dates of attendance ("from and to" dates of enrollment).
- Height and weight for sports.
- Degrees and honors received.
- Most recent previous education institution.
- Photograph.

The Department of Education considers these items to be directory information. In most instances, disclosure is helpful to both the institution and the student. However, school districts must establish a policy and give notice as to the specific types of directory information they intend to disclose. Parents can, however, retain the right to consent to the disclosure of directory information. Parents who wish to retain this right must so advise the school. (See §99.3 and 99.37 of the FERPA regulations.)

With the passage of the juvenile justice system exception, discussed on p. 8, education records, including directory information, may be shared with juvenile justice system agencies, prior to adjudication of the student, to the extent that State law allows.

Disclosures Under the Health or Safety Emergency Exception

The health or safety emergency provision is a commonsense acknowledgment that there may be situations when the *immediate* need for information to avert or diffuse certain unusual conditions or disruptions requires the release of information. Educators determine what constitutes an "emergency," but FERPA requires that they construe the term strictly. For example, on-campus disruptions that constitute criminal acts, particularly those involving weapons and drugs, fall within the scope of the term, as do crisis situations off campus that affect school campuses or the public health or safety. When a health or safety emergency exists, schools may share relevant information about students involved in the emergency with appropriate parties--that is, those whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. (See discussion of recordation requirements on p. 11.)

Examples of Valid Disclosures Under FERPA--Rodney, Jeff, and Mark (Part II)
The principal receives information from a student that members of Five Crew are planning an assault at the other high school in retaliation for the previous shooting. Under the emergency exception, the principal can provide information from each student's education record to the appropriate school officials and law enforcement agencies.

Disclosures Under the State Law Juvenile Justice System Exception

FERPA allows schools to play a vital role in a community's efforts to identify children who are at risk of delinquency and provide services prior to a child's becoming involved in the juvenile justice system. The 1994 IASA amendments modified FERPA to permit educators to share information with juvenile justice system agency officials on children who are at risk of involvement or have become involved in the juvenile justice system, prior to adjudication, to the extent State statute allows. System officials to whom the information is disclosed must certify in writing that they will not disclose personally identifiable information to any third party except as provided by State law. Consequently, schools in States with such statutes may disclose information about students to other State and local agencies as part of an effort to serve the student whose records are being released, prior to adjudication. As more and more States establish information sharing programs to serve students through cooperation with the juvenile justice system, the emphasis on neighborhood school participation in interagency information sharing agreements will increase. FERPA need not be a barrier to this progress toward proactive information sharing networks.

Examples of Valid Disclosures Under FERPA--Mary
Mary, 13, is arrested for shoplifting. This is her first offense, and the police department's juvenile division contacts the school for information about Mary's school attendance and academic performance. The school can release school attendance, academic performance, or other information from Mary's education record with the consent of one of her parents. If State law authorizes the disclosure to juvenile justice system agencies, the school can share information from Mary's education record without parental consent. Absent such a State law, the school should ask the police department to obtain a subpoena for the records.

The juvenile justice system exception to FERPA's prior written consent provision allows the disclosure of education records, or information from education records, without consent of the parent or eligible student, if four conditions (see §99.38 of the FERPA regulations) are met:

(1) The disclosure or reporting of the records must be to a State or local juvenile justice system agency.

(2) The disclosure must be based on a State statute authorizing the disclosure.

(3) If the State law was passed after November 19, 1974 (the date FERPA was enacted), the disclosure must relate to the juvenile system's ability to serve, prior to adjudication, the student whose records are being released.

(4) The State or local officials must certify, in writing, that the institution or individual receiving the personally identifiable information has agreed not to disclose it to a third party, other than another juvenile justice system agency.

Adjudication is the process of determining whether a juvenile has committed an act which, if committed by an adult, would be considered criminal conduct. The process is triggered by a "petition" alleging an act of delinquency. The petition may result in a finding or determination that the juvenile committed the alleged act of delinquency. For the purposes of FERPA, once this finding or determination is made and the court has made a disposition of the case, the juvenile would be considered an "adjudicated delinquent." The disposition of a delinquency case is the equivalent of a "sentence" in a criminal case.

The fact that a juvenile has been adjudicated delinquent is not, in and of itself, determinative of whether the State law juvenile justice system exception for the release of information that concerns the "juvenile justice system's ability to effectively serve a student prior to adjudication" is applicable.

If the juvenile justice system seeks the disclosure of information on a student in order to identify and intervene with a juvenile at risk of delinquency, rather than to obtain information solely related to supervision of an adjudicated delinquent, the juvenile could be classified as a preadjudicated delinquent for purposes of this exception. The Secretary of Education believes that each school, working in conjunction with State and local authorities, can best determine whether a release of personally identifiable information from an education record "concerns the juvenile justice system's ability to effectively serve a student prior to adjudication." Thus, FERPA gives schools flexibility in determining whether an education record of a juvenile may be released without the prior written consent of the parent.

Florida provides an example of a State law that allows State and local officials to make use of this IASA amendment to FERPA. The State enacted legislation requiring Florida's Department of Juvenile Justice (DJJ) to establish an early delinquency intervention program with the cooperation of local law enforcement agencies, the judiciary, district school board personnel, the office of the State's Attorney, the office of the Public Defender, and community service agencies that work with children.

The Florida law specifies the type of information the cooperating agencies are to share with DJJ and directs specified agencies and persons to develop information sharing agreements within each county. The law states, "Within each county, the sheriff, the chiefs of police, the district school superintendent shall enter into an interagency agreement for the purpose of sharing information about juvenile offenders.... The agreement must specify the conditions under which summary criminal history information is to be made available to appropriate school personnel, and the conditions under which development records are to be made available to appropriate department personnel." In addition, the law requires the school district to be notified when a youth is arrested for a felony or a crime of violence. FERPA further requires that juvenile justice system agencies certify in writing that they will not redisclose education records to any third party except as provided by State law.

Examples of Valid Disclosures Under FERPA--Johnny (Part I)

Johnny, 11, is having problems in school. He is inattentive, does not complete homework assignments, falls asleep in class, and is hostile to some of the other children. When the school counselor interviews him, Johnny is sullen and unresponsive. The school counselor makes several unsuccessful attempts to reach the parents. In this situation, the teacher or the counselor can share personal observations with a family services agency but cannot rely on an education record as the source of this personal knowledge

of Johnny's situation. If, however, State law authorizes the disclosure and the receiving entity is a juvenile justice system agency, the teacher or the counselor can, to the extent authorized by State statute, then also use information contained in Johnny's education record in making the referral. Thus, FERPA gives schools flexibility in determining whether an education record of a juvenile may be released without the prior written consent of the parent.

Examples of Valid Disclosures Under FERPA--Johnny (Part II)
Before the counselor can refer Johnny to an appropriate agency, the police department picks him up on the street at 2 a.m. on a school night. No one is home when the police attempt to contact the parents. Johnny spends the night in a temporary foster home, and the police refer his case to family services the next day. During the assessment process, the agency contacts the school and asks for information about Johnny's attitude and school performance. The school can provide information from Johnny's education record if at least one of these conditions is met:

(1) A parent consents, or
(2) There is a court order or lawfully issued subpoena directing the release of information, or
(3) A State law authorizes information sharing between educators and juvenile justice agencies.

§ 11.10 Recordkeeping Requirements Under the Family Educational Rights and Privacy Act

A school district must follow certain FERPA recordkeeping requirements. Section 99.32 of the FERPA regulations requires that schools maintain with each student's education records a record of all individuals, agencies, or organizations that requested or obtained access to the student's education records, specifying the legitimate interest that each party had in obtaining the information. Accordingly, educators should document all disclosures of information from a student's education records unless the request is from and the disclosure is to one of the following:

- The parent or eligible student.
- A school official within the school system.
- A party with written consent from the parent or eligible student.
- A party seeking directory information.
- A party requesting or receiving the records as directed by a Federal grand jury or other law enforcement subpoena when the issuing court or agency has ordered that no one disclose the existence or the contents of the subpoena or the information furnished in response to the subpoena.

Examples of Valid Disclosures Under FERPA--Ryan (Part II)
Ryan, now 14, is adjudicated delinquent for breaking into several vehicles on a parking lot. This is his second offense. As a condition of his probation, the court orders Ryan to attend school regularly and to achieve passing grades in his classes. FERPA does not prevent a school from receiving information about Ryan's status as an adjudicated delinquent. The school, in turn, can assist juvenile probation by providing information from Ryan's education record concerning Ryan's attitude and performance in school. However, because of the fact that Ryan has been adjudicated and the information being sought is solely related to Ryan's status as an adjudicated delinquent, his school can only provide this information if one of the following conditions is met:

(1) A parent consents, or
(2) There is a court order or lawfully issued subpoena directing the release of the information.

§ 11.11 Administration of the Family Educational Rights and Privacy Act

The U.S. Department of Education's Family Policy Compliance Office

The Family Policy Compliance Office in the U.S. Department of Education administers FERPA. The Office provides technical assistance on FERPA to education agencies and institutions, State and local officials, and parents. The Office also investigates alleged violations of the law.

Family Educational Rights and Privacy Act Regulations

Another responsibility of the Family Policy Compliance Office is to develop and issue regulations to aid in effective administration of FERPA. On November 21, 1996, the Department of Education published regulations to implement the IASA amendments to FERPA. At the same time, in an effort to reduce the burden on schools and to streamline the complaint procedures, the Department of Education also revised the FERPA regulations to do the following:

- Give schools greater flexibility by removing the requirement for adoption of a formal written student records policy.

- Require schools to include additional information in the mandatory annual notification of rights so that parents and students will receive more effective notification of their rights and procedures to pursue them. (A sample notification is included in appendix B.)

- Clarify FERPA requirements for State education agencies (SEA's) to afford parents access to any education records that SEA's maintain on their children.

- Clarify what constitutes legal standing to file FERPA complaints with the Department of Education. The complainant must be a parent or an eligible student affected by an alleged violation.

- Clarify the requirement that a school district make a reasonable effort to notify in advance the parent or student of its intent to disclose information from education records to a court in cases where a school district is initiating legal action against a parent or student.

The Family Educational Rights and Privacy Act and State Laws

If a school wishes to continue to receive Federal funds, the recipient must comply with FERPA's provisions on the disclosure of education records. (A school district is considered a "recipient" if it receives any funds directly from a program administered by the Secretary of Education or is under the auspices of a State education agency that receives such funds.) Compliance with portions of a State law that conflict with FERPA may jeopardize continued eligibility to receive Federal education funds. If educators believe that a State law conflicts with FERPA, they should bring this to the attention of appropriate State officials.

§ 11.12 Multiagency Agreements to Facilitate Cooperation and Information Sharing

RELEVANT FEDERAL LAWS

Purpose

Multiagency agreements formulated to be consistent with Federal, State, and local laws provide an organizing framework for State and local juvenile justice reform efforts. These agreements are crucial to the development of a juvenile justice network. Typically agencies involved in these agreements provide a wide range of services to juveniles. Parties to such an agreement may be child welfare, mental health, and social services agencies; licensed private community organizations; law enforcement agencies; juvenile courts; district attorney (or State's attorney), probation, corrections, and public defenders offices; and local schools.

Generally, delinquency prevention and intervention, community safety, efficiency, and coordination are the objectives that drive the development of multiagency agreements. More specifically, these objectives may include the following:

- Providing appropriate programs and services to intervene with juveniles currently involved in the juvenile justice system.
- Providing appropriate programs and services designed to deter at-risk juveniles from delinquent behavior.
- Increasing the safety and security of the community and its children by reducing juvenile crime.
- Eliminating duplication of services.
- Coordinating efforts to share resources and training programs.

The contents of interagency agreements underscore the commitment of each agency to offer a maximum degree of cooperation and planning to achieve the group objectives. Typically these agencies agree to participate in interagency planning and development meetings, assign staff to participate in consolidated case management systems where feasible, develop internal policies and procedures to implement the agreement to the fullest extent, and comply with Federal and State laws in implementing the agreement.

Other provisions of the agreement may identify the unique role of each agency. Law enforcement officials might agree, for example, to promptly notify other agencies when juveniles are arrested for truancy or certain violent crimes. The juvenile court might agree to provide periodic information on the disposition of cases or seek input from agencies on dispositional alternatives. The probation office might agree to share information about the move of a juvenile offender into or out of the jurisdiction and the terms, if any, of probation. Other agencies might be willing to share information on the achievement, behavioral, and attendance history of juvenile offenders to improve assessment and proper treatment. Educators might also agree to make referrals to appropriate agencies when students or staff commit certain offenses or exhibit at-risk behavior. (See sample interagency agreement in appendix D.)

Legal Considerations

Relevant Federal and State record confidentiality laws can resolve potential legal problems that arise in connection with interagency agreements. Laws that govern the activities of each State agency may also create standards for information sharing. Policies on juvenile record information vary greatly from State to State. For example, some States treat juvenile court records as public information (see Washington Revised Code 13.50.050; 13.50.010). Other States permit access to court records only by the juvenile and the agencies directly involved in the juvenile justice system. Most States use a method of conditional disclosure of juvenile court

records in which a judge permits access to agencies that are not a part of the juvenile justice system by court order (see Pennsylvania Revised Code 6307, 6308).

State law may occasionally require local agencies to share information. Some States direct law enforcement units to report arrest information to schools when the arrest involves violent offenses of an enrolled student (see Florida Statutes 39.045). Other States require the formation of interagency teams for specific purposes (see Illinois Statutes, Chapter 75, Section 405/1-8.2). State law may also regulate the disclosure of records that other child care agencies maintain on juveniles. These laws should be consulted as well. All agencies are vital components of a comprehensive local strategy to combat juvenile delinquency. Those interested in developing a comprehensive local strategy should identify State laws that frustrate strategies of local teams to share files of record information and advocate for their appropriate reform. Statutes from Florida and Illinois (see appendix E) illustrate comprehensive legislative approaches to delinquency prevention designed to both prevent delinquency and intervene in the lives of at-risk juveniles.

An Effective Program Based on Multiagency Agreements: the Serious Habitual Offender Comprehensive Action Program

A current example of multiagency agreements that unify community resources to improve the delivery of services to juveniles is the Serious Habitual Offender Comprehensive Action Program (SHOCAP). When research indicated that a small proportion of offenders commit most serious and violent juvenile crime, OJJDP introduced the Serious Habitual Offender/Drug-Involved Program in 1983. SHOCAP, which grew out of those initial efforts, seeks to improve public safety by involving those agencies working within the juvenile justice system, for example, law enforcement, prosecution, education, probation, corrections, and social services in a cooperative process to share information and manage juvenile justice system agency cases. The program provides the structure for focusing attention on serious habitual offenders (SHO's) and enhances the quality and relevance of information exchanged through active interagency collaboration.

SHOCAP has four main goals:

- To provide a structured, coordinated juvenile justice system focus on habitual juvenile offenders.
- To establish specific juvenile justice policies that enhance the effectiveness of system procedures for handling habitual juvenile offenders.
- To promote public safety by identifying, tracking, arresting, and prosecuting the most violent habitual juvenile offenders.
- To identify pre-Serious Habitual Offender juveniles (pre-SHO's) and provide early intervention services designed to prevent these juveniles' development into SHO's.

In short, SHOCAP identifies a community's most dangerous and violent juvenile offenders and focuses community resources on immediate and aggressive intervention, including detention, vertical prosecution, and enhanced sentences when they offend or reoffend. The program prevents youth from falling through the cracks by ensuring that relevant case information is made available immediately for juvenile justice decisionmakers. With increased interagency cooperation and information sharing, SHOCAP provides a framework for more efficient service delivery by reducing duplicate services. This increased efficiency allows SHOCAP programs to establish additional early intervention and treatment resources for pre-SHO youth before they become more serious habitual offenders.

Examples of Valid Disclosures Under FERPA--Ronald

Ronald has been involved in several strong-arm robberies and is at risk of becoming a career criminal offender. The county SHOCAP program designates Ronald as a serious habitual offender and develops a supervision and treatment program. He is required to go to school each day, attend a jobs program three times a week, and go to counseling. Nothing in FERPA restricts Ronald's school from receiving information regarding his SHO status. If there is a State law authorizing information sharing with juvenile justice system agencies, Ronald's school can assist in the treatment program by sharing information from his education record about his attendance, performance, and behavior with other agencies providing supervision and services to Ronald.

Florida is developing a statewide SHOCAP program. The program involves a Federal and State partnership: selected county sites receive SAFE POLICY training, provided by OJJDP, and technical assistance, provided by the Florida Department of Law Enforcement. Currently there are 26 SHOCAP sites in Florida with 5 additional sites scheduled for implementation in 1997. For more information regarding SHOCAP, please refer to "Sources of Technical Assistance," p. 21.

Schools are indispensable partners in effective SHOCAP programs because adjudicated offenders who are not placed in detention are likely to return to campus. As noted previously, where State law authorizes or directs disclosures, educators should be advised when alleged juvenile offenders return to the school population and given appropriate information about the youth's offense and current status. Educators can assist in this partnership, to the extent authorized by Federal and State law, by providing information to supervising agencies to better assess the rehabilitation process by tracking attendance, academic achievement, and in-school behavior.

§ 11.13 Appendix A: Family Educational Rights and Privacy Act Regulations

Family Educational Rights and Privacy Act Regulations

34 CFR Part 99

(Current through June 21, 2007; 72 FR 34179)

SUBPART A--GENERAL

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

§ 99.62 What information must an educational agency or institution submit to the Office?

§ 99.63 Where are complaints filed?

§ 99.64 What is the complaint procedure?

§ 99.65 What is the content of the notice of complaint issued by the Office?

§ 99.66 What are the responsibilities of the Office in the enforcement process?

§ 99.67 How does the Secretary enforce decisions?

§ 11.14 Appendix C: Court Order Allowing Interagency Information Exchange

STATE OF _____, SUPERIOR COURT

COUNTY OF _____, JUVENILE COURT

ORDER OF THE JUVENILE COURT AUTHORIZING RELEASE AND EXCHANGE OF INFORMATION BETWEEN SCHOOL DISTRICTS, LAW ENFORCEMENT, PROSECUTORS, COUNTY COUNSELS, CHILD PROTECTIVE SERVICES, AND PROBATION DEPARTMENT OF _____ COUNTY

Pursuant to the authority vested in the court by

(Code, Sections)

IT IS HEREBY ORDERED that juvenile court records and any other information that may be in the possession of school districts, law enforcement, prosecutors, county counsels, child protective services, and probation departments regarding minors may be released, for governmental purposes only, to the following persons who have a legitimate and official interest in the information:

1. The minor
2. The minor's attorney
3. The minor's parents or guardians
4. Foster parents
5. All district attorneys offices
6. All law enforcement agencies
7. All county attorneys
8. All school districts
9. All probation departments
10. All public welfare agencies
11. All youth detention facilities
12. All corrections departments
13. Authorized court personnel
14. All courts
15. All treatment or placement programs that require the information for placement, treatment, or rehabilitation of the minor
16. All multidisciplinary teams for abuse, neglect, or delinquency
17. All juvenile justice citizens advisory boards
18. All State central information registries
19. All coroners
20. All victims may receive information from law enforcement, probation or the prosecutor to enable them to pursue civil remedies. These same agencies may release information to identifiable potential victims that a minor constitutes as a threat to their person or property. They may release the name, description, and whereabouts of the minor and the nature of the threat toward the potential victim.

All information received by authorized recipients listed above may be further disseminated only to other authorized recipients without further order of this court.

IT IS FURTHER ORDERED that the release of information to the media regarding minors shall be as follows:

District attorneys, probation and law enforcement officials may divulge whether or not an arrest has been made, the arresting offenses, and disposition of the arrest.

District attorneys, county counsels, law enforcement, child protective services, and probation officials may divulge whether or not they plan to file a petition and the charges alleged therein, the detention or release status

of the minor, the date and location of hearings, the names of the judge or referee who will hear the matter, and the finding and disposition of the court.

In the event of runaways or escapes from juvenile placements or institutions, district attorneys, law enforcement, child protective services, and probation officials may confirm the fact of the runaway or escape to the media and the name of the juvenile, the general type of record of the juvenile, and the city of residence of the juvenile.

IT IS FURTHER ORDERED that this order does not prohibit release of information by law enforcement, probation officials, or district attorneys about crimes or the contents of arrest reports except insofar as they disclose the identity of the juvenile.

This order supersedes the previous order of the Court concerning release of information dated _____ .

_____ _____

DATE PRESIDING JUDGE, JUVENILE COURT

§ 11.15 Appendix D: Model Interagency Agreement

This Agreement made and entered into as of the date set forth below, by and between the

[List Agencies Here]

WITNESSETH:

WHEREAS, all parties are committed to providing appropriate programs and services to prevent children from becoming at risk and to intervene with children already involved in the juvenile justice system; and

WHEREAS, the parties to this agreement desire a maximum degree of long range cooperation and administrative planning in order to provide for the safety and security of the community and its children; and

WHEREAS, all parties are committed to improving services to children in the juvenile justice system through sharing information, eliminating duplication of services and coordinating efforts; and

WHEREAS, all parties mutually agree that sharing resources, where feasible, and in particular, training efforts, may result in improved coordination; and

WHEREAS, it is the understanding by all parties that certain roles in serving children and youth are required by law, and that these laws serve as the foundation for defining the role and responsibility of each participating agency; and

WHEREAS, all parties mutually agree that all obligations stated or implied in this agreement shall be interpreted in light of, and consistent with governing State and Federal laws;

NOW, THEREFORE in consideration of the following agreements, the parties do hereby convenant and agree to do the following:

EACH OF THE PARTIES AGREE TO:

1. Promote a coordinated effort among agencies and staff to achieve maximum public safety with the goal of reducing juvenile crime.

2. Participate in interagency planning meetings, as appropriate.

3. Assign staff, as appropriate, to participate in a consolidated case management system, reentry into school of children returning from detention or commitment program, and other information-sharing activities to assess and develop plans for at-risk youth and those involved in the juvenile justice system.

4. If applicable, participate in the planning and implementation of a juvenile assessment, receiving, and truancy center to the extent feasible for each party.

5. Jointly plan, and/or provide information and access to, training opportunities, when feasible.

6. Develop internal policies and cooperative procedures, as needed, to implement this agreement to the maximum extent possible.

7. Comply with relevant State and Federal law and other applicable local rules which relate to records use, security, dissemination, and retention/destruction.

THE JUVENILE COURT AGREES TO:

1. Notify the Superintendent, or designee, of the name and address of any student found to have committed a delinquent act or who has had adjudication withheld. Notification shall be within 48 hours and shall include the specific delinquent act found to have been committed or for which adjudication was withheld, or the specific felony for which the student was found guilty.

2. Identify sanctions for youth who are in contempt of court due to violation of a court order on school attendance.

3. Upon request by the school district, share dispositional information with the Superintendent or his designee regarding juveniles who are students within the educational system for purposes of assessment, placement, or security of persons and property.

4. Consider the issuance of court orders necessary to promote the goals of this agreement, particularly information sharing between the agencies involved.

5. Develop, in corporation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

6. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

THE DEPARTMENT OF PROBATION AGREES TO:

1. Notify the Sheriff and Superintendent of Schools or designees, immediately upon learning of the move or other relocation of a juvenile offender into, out of, or within the jurisdiction, who has been adjudicated, or had adjudication withheld for a violent misdemeanor or felony.

2. Share dispositional, placement, and case management information with other agencies as appropriate for purposes of assessment, placement, and enhanced supervision of juveniles.

3. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

4. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

THE DEPARTMENT OF HEALTH [OR SOCIAL SERVICES OR SIMILAR AGENCY] AGREES TO:

1. Provide notice to the Superintendent of Schools or a designee, immediately upon the initiation of planning efforts with private nonprofit entities or governmental entities, including agencies part of this Agreement, which could result in the creation, relocation, or expansion of youth services programs and which may impact the school district.

2. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

3. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

THE SCHOOL SUPERINTENDENT AGREES TO:

1. Notify, within 24 hours, the child's principal of juveniles arrested for crimes of violence or violation of law upon receipt of such information from law enforcement or the court system or probation department. The principal, within 24 hours of such notice, shall provide such information to student service personnel, the school resource officer, the student assistance coordinator, and the student's immediate teachers.

2. Designate the contact person to be responsible for receiving juvenile arrest information and inform all parties as to the Superintendent's designee.

3. Request criminal history information only for the purposes of assessment, placement, or security of persons and property.

4. Designate the contact person(s) to be responsible for receiving confidential criminal history information and inform all parties as to the names of those individuals.

5. Develop appropriate internal written policies to insure that confidential criminal history information is disseminated only to appropriate school personnel.

6. Share information on student achievement, and behavioral and attendance history on juvenile offenders and juveniles at risk of becoming offenders with the parties to this agreement, for the purpose of assessment and treatment.

7. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

8. Notify the appropriate law enforcement agency when an adult or a student commits any of the following offenses on school property, on school sponsored transportation, or at school sponsored activities: Homicide; Sexual Battery; Armed Robbery; Aggravated Battery on a teacher or other school personnel; Kidnapping or abduction; Arson; Possession, use, or sale of any firearm; Possession, use, or sale of any explosive device; Possession, use, or sale of any controlled substance; or any act that compromises school or community safety. Additionally, if the offense involves a victim, school officials shall notify the victim and the victim's parents of the offense and the victim's right to press charges against the offender. School personnel shall cooperate in any investigation or other proceedings leading to the victim's exercise of right as provided by law.

EACH LAW ENFORCEMENT CHIEF [OR SHERIFF] AGREES TO:

1. Notify the Superintendent, or designee, of the name and address of any student arrested for crimes. Notification shall be within 24 hours and shall include the specific delinquent which led to the arrest.

2. Upon request by the school district, share summary criminal history information with the Superintendent or his designee regarding juveniles who are students within the educational system for purposes of assessment, placement, or security of persons and property.

3. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

4. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

5. Notify the Superintendent, or designee, of the name and address of any employee of the school district who is charged with a felony or with a misdemeanor involving the abuse of a minor child or the sale or possession of a controlled substance. Notification shall be within 24 hours and shall include the specific act which led to the arrest.

THE STATE ATTORNEY [OR DISTRICT ATTORNEY] AGREES TO:

1. Notify the Superintendent or designee when a student is formally charged with a felony, or with a delinquent act which would be a felony if committed by an adult in a timely manner.

2. Provide copies to the Superintendent or designee of all Petitions, Informations, or No File decisions, as to students for violent misdemeanors and felonies or delinquent acts which would be a felony if committed by an adult in a timely manner.

ADMINISTRATIVE

TERM OF AGREEMENT:

This agreement shall be in effect as of the date the agreement is signed by the majority of the initiating parties and shall renew automatically unless otherwise modified. All parties are signatory to this agreement when signing or when the majority of the initiating parties signs, whichever is later. Any party signatory to this agreement may terminate participation upon thirty days notice to all other signed parties to the agreement.

AGENCY REPRESENTATIVES:

The parties will develop procedures for ongoing meetings and will, at least annually review and if necessary, recommend any changes.

MODIFICATION OF AGREEMENT:

Modification of this agreement shall be made only by consent of the majority of the initiating parties. Such shall be made with the same formalities as were followed in this agreement and shall include a written document setting forth the modifications, signed by all the consenting parties.

OTHER INTERAGENCY AGREEMENTS:

All parties to this agreement acknowledge that this agreement does not preclude or preempt each of the agencies individually entering into an agreement with one or more parties to this agreement. Such agreements shall not nullify the force and effect of this agreement. This agreement does not remove any other obligations imposed by law to share information with other agencies.

SIGNATURES OF PARTIES TO THIS AGREEMENT:

Upon signing this agreement, the original agreement and signature shall be filed with the clerk of the court and placed in the public records of the jurisdiction. A certified copy of the agreement and the signatures shall be provided to each signatory to the agreement.

Cautions for Model Interagency Agreement

As educators and juvenile justice professionals work on developing interagency information sharing agreements, they should ensure that the laws of their State permit information and record sharing. Further, the interagency agreement should contain a clause prohibiting the release of information to third parties not covered by the agreement.

IV. THE MULTIETHNIC PLACEMENT ACT AND INTERETHNIC ADOPTION PROVISIONS

§ 11.16 A Guide to the Multiethnic Placement Act of 1994, As Amended by the Interethnic Adoption Provisions of 1996*

Chapter 1: Introduction

The Multiethnic Placement Act (MEPA) was enacted in 1994 amid spirited and sometimes contentious debate about transracial adoption and same-race placement policies. At the heart of this debate is a desire to promote the best interests of children by ensuring that they have permanent, safe, stable, and loving homes that will meet their individual needs. This desire is thwarted by the persistent increases in the number of children within the child protective system waiting for, but often not being placed in, adoptive families. Of particular concern are the African American and other minority children who are dramatically over-represented at all stages of this system, wait far longer than Caucasian children for adoption, and are at far greater risk of never experiencing a permanent home. Among the many factors that contribute to placement delays and denials, Congress found that the most salient are racial and ethnic matching policies and the practices of public agencies which have historically discouraged individuals from minority communities from becoming foster or adoptive parents. MEPA addressed these concerns by prohibiting the use of a child's or a prospective parent's race, color, or national origin to delay or deny the child's placement and by requiring diligent efforts to expand the number of racially and ethnically diverse foster and adoptive parents.

MEPA was signed into law by President Clinton in 1994 as part of the Improving America's Schools Act. In April 1995, the Department of Health and Human Services (HHS) issued a detailed Guidance to assist states and agencies in implementing MEPA and understanding its relationship to the equal protection and anti-discrimination principles of the United States Constitution and Title VI of the Civil Rights Act. In 1996, MEPA was amended by the provisions for Removal of Barriers to Interethnic Adoption (IEP) included in the Small Business Job Protection Act. As explained in the Information Memoranda on IEP issued by HHS in June 1997, and May 1998, the amendments remove potentially misleading language in MEPA's original provisions and clarify that "discrimination is not to be tolerated," whether directed at children in need of appropriate, safe homes, at prospective parents, or at previously "underutilized" communities who could be resources for placing children. The IEP also strengthens compliance and enforcement procedures, including the withholding of federal funds and the right of any aggrieved individual to seek relief in federal court against a state or other entity alleged to be in violation of the Act.

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This Guide will not resolve the ongoing controversies about the role of race and ethnicity in child welfare policies. However, it will assist states and child welfare agencies in their efforts to comply with the new federal mandates concerning the role of race, color, and national origin in foster care and adoptive placements, hereinafter referred to as MEPA-IEP. States and agencies are encouraged to take full advantage of the opportunities the law creates for improving policies and practices and, as a consequence, improving the quality of children's lives. In addition to providing advice for determining precisely what the law does and does not require, the Guide contains practical suggestions for child welfare administrators and social workers who must implement MEPA-IEP in the best interests of the children they serve.

A. Overview of MEPA-IEP

MEPA-IEP is one of several recent federal initiatives and laws aimed at removing the barriers to permanency for the hundreds of thousands of children who are in the child protective system. The specific intentions of MEPA-IEP are to:

- decrease the length of time that children wait to be adopted,
- facilitate the recruitment and retention of foster and adoptive parents who can meet the distinctive needs of children awaiting placement, and
- eliminate discrimination on the basis of the race, color, or national origin of the child or the prospective parent.

To achieve these goals, MEPA-IEP has three basic mandates:

(1) It prohibits states and other entities that are involved in foster care or adoption placements, and that receive federal financial assistance under Title IV-E, Title IV-B, or any other federal program, 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;

(2) It prohibits these states and entities from 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; and

(3) It requires that, to remain eligible for federal assistance for their child welfare programs, states must 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.

Although MEPA-IEP does not explicitly incorporate a "bests interests" standard for making placements, the 1997 and 1998 HHS Guidances note that "the best interests of the child remains the operative standard in foster care and adoptive placements." Nonetheless, to be consistent with constitutional "strict scrutiny" standards for any racial or ethnic classifications, as well as with MEPA-IEP, a child's race, color, or national origin cannot be routinely considered as a relevant factor in assessing the child's best interests. Only in narrow and exceptional circumstances arising out of the specific needs of an individual child can these factors lawfully be taken into account. Even when the best interests of an individual child appear to compel consideration of these factors, caseworkers cannot assume that needs based on race, color, or national origin can be met only by a racially or ethnically matched parent. Much will depend on the nature of the child's specific needs and on the capacity of individual prospective parents to respond to these needs.

MEPA-IEP is fully consistent with President Clinton's Adoption 2002 Initiative, with its goal of doubling by the year 2002 the number of adoptions of children who cannot return to their biological parents. MEPA-IEP also

complements the emphasis of the 1997 Adoption and Safe Families Act (ASFA) on a child's health and safety as the paramount concern in child welfare decisions. This emphasis implies that no factors, including racial or ethnic factors, should be taken into account in placement decisions unless they have a specific and demonstrable bearing on the child's health and safety.

In conjunction with these and other federal policies, MEPA-IEP offers child welfare agencies an unprecedented opportunity to make early and individualized assessments of a child's needs, expand the pool of qualified foster and adoptive parents, and make prompt placements based on the distinctive characteristics of each child.

B. Children in Out-of-Home Care

In enacting MEPA, Congress found that there are nearly 500,000 children in out-of-home care, of whom many tens of thousands are waiting for adoption, and that children who are eventually adopted wait an average of 2.67 years after they are legally available for permanent placement. More recent data shows that compared to whitechildren, African-American and American Indian/Alaskan Native children typically spend considerably more time in foster care before being adopted.

African American children are vastly over represented within the child welfare system compared to their proportion within the population as a whole. They also constitute more than half of the children legally free for adoption, and wait significantly longer than other children for an adoptive placement.

According to HHS-VCIS data, nearly 60,000 children in out-of-home care at the end of 1994 had a goal of adoption, of whom around 16,000 were legally free. Of these children, 54% were African American, 42% were white, and 1.3% were Hispanic. Most of these children were over six years of age, but nearly a third were between one and five years of age. Of the total number of children in out-of-home care at the end of fiscal year 1995, estimates are that more than 45% were African American, 36.5% white, 11.3% Hispanic, 1.6% American Indian\Alaskan Native, 1.0% Asian\Pacific Islander and around 4% of unknown racial or ethnic origin. The annual number of finalized adoptions in the 1990s has not exceeded 18,000-19,000, or not quite 4% of the total number of children in out-of-home care.

The striking 72% increase since 1986 in the number of children in the child protective system is not necessarily attributable to the larger numbers of infants under age one who are entering care, but to declines in the rate of children who leave care. In California, for example, 1/4 of all children under age six entering non-kinship foster care are likely to be there six years later, without having been reunified with their birth parents and without being adopted by foster parents or other non-related individuals.

Although very few studies track children's experience within the child protective system from the time they enter care until their cases are closed, Richard Barth and his colleagues now have a thorough account of the experiences over a six year period for the nearly 3,900 children under the age of six who entered non-kinship out-of-home care in California during the first half of 1988. The most significant and independent predictors of how long these children wait for a permanent placement are their age at the time they enter care and their race or ethnicity. Infants who entered care before their first birthday were more likely than older children, regardless of their race or ethnicity, to be returned to their birth parents or adopted within a few years. By contrast, African American children, and to a much lesser extent, Hispanic children, regardless of their age at entry, wait dramatically longer than white children. Six years after entering care, African American children's likelihood of being adopted was only 1/5 of that of white children.

Another way to summarize this sobering data is that, after six years, African American children were more than twice as likely to be in care than to have been adopted. For white children, the ratios are reversed: they were

twice as likely to be adopted as to remain in care. Hispanic children were about as likely to remain in care as to be adopted.

What accounts for these extraordinary differences in outcomes between African American and all other children? No doubt, some of these differences are attributable to the initially large numbers of African Americans who are subject to the child protective system, as well as to factors that cause delay for all children, including bottlenecks in court proceedings, low rates of reunification,and the challenge of providing appropriate care givers for children who have suffered serious neglect or abuse. Nonetheless, much of the difference is probably due to same race matching policies that preclude others from adopting these children and recruitment practices that, however well intended, discourage African American and other minority families from pursuing adoption.

C. Standard Practice Before MEPA-IEP

Before MEPA-IEP became the law, adoption practice throughout the country had for several decades generally favored placing children in racially or ethnically matched families. Transracial placements, which nearly always refer to placements of children of Color, especially African-American children, with Caucasian parents, were considered as a "last resort," acceptable only under unusual circumstances. The states generally required foster care and adoptive placements to meet a best interests standard. Many differences existed, however, in how much discretion caseworkers could exercise in making a best interests assessment and in determining whether and to what extent to consider race, culture, and ethnicity. Some states required that children be placed with families of the same racial, ethnic, or cultural background if consistent with the best interests test; others specified that such matching was preferred or created an order of preference that typically began with relatives and then favored other matched families. Several states prescribed the time period within which agencies had to search for a matched family before widening the search for an unmatched family.

Racial and ethnic matching policies were based on the widely accepted belief that children have significant needs generated by their immutable racial or ethnic characteristics, as well as by their actual cultural experiences, and further, that children have a right to placements that meet these needs. Just as it was assumed that most prospective parents want children who resemble them, it was assumed that children would be uncomfortable in an adoptive family that did not have a similar racial or ethnic heritage. It was alleged that children raised in racially or ethnically matched families would more easily develop self esteem and a strong racial identity, and that minority children would have the best opportunity to learn the skills needed to cope with the racism they were likely to encounter as they grew up in American society.

Unfortunately, during the same decades when racial matching policies became standard practice, efforts to expand the pool of minority foster and adoptive parents faltered. Even when successful, these recruitment efforts did not keep up with the growing demand for appropriate homes for minority children who could not be reunified with their parents or placed with relatives. The unintended consequence of these developments, as well as of other and often inadvertently discriminatory practices throughout the child welfare system, has been the prolonged delays in securing permanent placements for African American, Hispanic, and other minority children.

Both proponents and critics of matching policies became concerned about these delays and about allegations that some children were being removed from stable transracial fost-adopt homes solely in order to prevent a permanent transracial placements. No one doubts the adverse effects on children's emotional and cognitive development if they spend considerable time in their early years in institutional care or in a succession of foster placements. Research conducted from a variety of theoretical perspectives indicates that children who are deprived of an early, continuing, stable relationship with at least one psychological parent may lack the capacity to form deep emotional attachments or close social relationships. This risk is exacerbated if children are subject

to additional neglect or abuse while in out-of-home care. Claims about the harms attributable to delays in achieving permanency gain support from studies that show how much better adopted children do on most outcome measures than do children who remain in foster care. Moreover, being placed at an early age is positively correlated with generally more positive adoption outcomes for all kinds of children.

Proponents of racial and ethnic matching insist that the key to eliminating delays is to do a better job recruiting racially and ethnically diverse foster and adoptive parents and ferreting out traditional screening procedures that have historically discriminated against minority applicants and discouraged them from pursuing adoption. Critics of matching policies fully acknowledge the need for non-discriminatory yet targeted and flexible efforts aimed at screening minority applicants into, rather than out of, the pool of prospective parents. However, many critics also believe that racial and ethnic matching policies are independently harmful to children, even if more successful recruitment of minority parents would eventually reduce delays. These policies are said to be harmful because they are based on unsubstantiated assumptions that children have racial or ethnic needs that outweigh their other needs and that only racially or ethnically matched families can adequately serve these needs.

The critics of racial matching note that no credible evidence supports the claim that transracial adoption is harmful to children's self-esteem, sense of racial identity, or ability to cope with racism. There are consistent positive findings, they assert, regardless of sample size and methodology, concerning the children adopted transracially before the practice was discouraged in the mid-1970s, as well as the smaller numbers of transracially adopted children since then. Whether compared to African American or white adoptees raised in same race adoptive homes, or to African American or white children raised by their biological families, transracial adoptees do as well as other children on standard measures of self-esteem, cognitive development and educational achievement, behavioral difficulties, and relations to peers and other family members. When compared to children who remain in foster care, or are returned to dysfunctional biological parents, both same-race and transracial adoptees do significantly better.

Studies that focus on adolescence, when most children experience doubts about their identity and capacity for autonomy and independence, do not find unusual difficulties among transracial adoptees. The few studies that track children into their twenties indicate that transracial adoptees are doing well, maintain solid relationships with their adoptive families, and may have higher educational attainments than same-race adoptees.

Transracial adoptees develop a positive sense of racial identity. Studies of transracial adoptees conclude that African American children raised by white or mixed race parents are as comfortable with their racial identities as children raised in same-race families. Although some public agencies report adoption disruption rates as high as 10-15%, these rates are no higher for transracial adoptions than for other adoptions. There are some differences that manifest themselves over time between same-race and transracial adoptive families. Among these is that transracial adoptees have a more positive attitude about relations with whites, are more comfortable in integrated and multiethnic settings, and do not consider race as basic to their self-understanding as do most same-race adoptees.

MEPA-IEP addresses the desire of both the proponents and the critics of racial matching to expand the pool of racially and ethnically diverse prospective parents. It also addresses the concerns of the critics of racial matching who claim that the policy is based on unsubstantiated claims about the needs of children and denies minority children an equal opportunity to have a permanent home.

D. The Law Before MEPA-IEP

Discrimination within the child welfare system based on race, color, or national origin was illegal before MEPA or the 1996 amendments were enacted. Under the Constitution's Equal Protection Clause, racial classifications are generally invalidated unless they meet the "strict scrutiny" test. To survive this test, racial and other "suspect classifications" must be justified by a compelling governmental interest and must be necessary to achieve this interest. If the state's interest can be served through a less restrictive, non-discriminatory means, the non-discriminatory means must be used. The strict scrutiny test similarly applies to cases arising under Title VI of the Civil Rights Act which prohibits discrimination based on race, color, or national origin in all federally funded programs.

In the past, some racial classifications were evaluated with less than strict scrutiny if they were intended, along with other factors, to promote diversityor remedy the deleterious effects of historic discrimination. Recently, however, the United States Supreme Court has applied the strict scrutiny standard to all racial classifications, even those that are allegedly benign. Strict scrutiny is warranted "precisely because it is necessary to determine whether [the classifications] are benign ... or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification."

Applying anti-discrimination principles to child welfare decisions demands care. Unlike decisions in other areas, such as housing or credit loans, where general qualifications determine an individual's entitlement to certain goods and services, a child welfare decision requires an individualized determination of whether a specific placement is in the child's best interest. In making these determinations, broad or general assumptions about children's needs or parental suitability are supposed to be put aside in order to place a child with individuals who can love and respond to the child's distinctive characteristics.

Can the "best interests of the child" standard, which is a fundamental principle in child welfare practice, ever be a "compelling reason" to consider the race, color, or national origin of a child or a prospective parent in making a placement decision? In *Palmore v. Sidoti*, the United States Supreme Court did not say that the state has a "compelling reason" to use a best interests test to resolve custody disputes between parents, but acknowledged that the test "indisputably" serves "a substantial governmental interest." The Court then went on to conclude that it was not in a child's best interests to allow private racial biases to justify removing her from the home of her white mother and her Black stepfather.

In foster care and adoption cases, as contrasted with custody disputes between two parents, some lower appeals courts have indicated that a commitment to a child's best interests may be a compelling reason to consider race, color, or national origin, but only if these factors are not used categorically to preclude the possibility of transracial placements. Many courts have allowed race to be one among a number of factors that may appropriately be considered in making placement decisions, especially if sensitivity to the development of the child's racial identity and self-esteem is determined to be important for the well-being of a specific child. Nonetheless, blanket policies favoring same-race placements have generally been disfavored, and in individual cases, courts have held that a child's need for a permanent home may outweigh any considerations based on race or color.

Chapter 2: The Provisions of MEPA-IEP

A. Substantive Provisions

1. What entities are subject to the Act?

MEPA-IEP applies to any state or other entity that receives funds from the federal government and is involved in some aspect of adoptive or foster care placements. All state and county child welfare agencies involved in placements that receive federal title IV-E and title IV-B funds are subject to MEPA-IEP. The Act also applies to other public or private agencies involved in placements that receive federal funds from any source, whether they receive the funds directly or through a subgrant from a state, county, or another agency. This means that a child placement agency that receives no funding from either the federal foster care or child welfare programs under titles IV-E or IV-B, but does receive financial assistance from other federal programs, including the Adoption Opportunities Act, the Child Abuse Prevention and Treatment Act (CAPTA), ot Title XX, is subject to MEPA-IEP.

2. Placements

(a) What is prohibited?

A state or other entity covered by MEPA-IEP may not:

> delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.

(b) What is denial?

Under MEPA-IEP, the race, color, or national origin of a child or of a prospective parent cannot be used to make the child ineligible for foster care or adoption, or to deny a particular foster care or adoptive placement. In addition, an agency's failure to pursue reunification efforts, concurrent planning, or a judicial termination of parental rights because of the race or ethnicity of a child or of groups of children, would violate the law. Thus, a significant disparity between the rate at which certain minority children become legally available for adoption as compared to other children, while not itself direct evidence of a MEPA-IEP violation, may justify further inquiry to determine if the disparity was the result of intentional or inadvertent racial or ethnic bias. Moreover, a refusal to place a child with a particular prospective parent followed by a placement with another parent, would be suspect if these decisions appeared to be based on any of the impermissible factors.

While explicitly prohibiting the use of race, color, or national origin to deny a foster care or adoptive placement, MEPA-IEP does not require that these factors must always be ignored when an agency or caseworker makes an individualized assessment of a particular child to determine the kind of placement that will serve that child's best interests. The 1997 and 1998 HHS Guidances indicate that in exceptional, non-routine, circumstances, a child's best interests may warrant some consideration of needs based on race or ethnicity. The use of these factors in exceptional circumstances as part of an individualized assessment of a child's best interests would not violate the "strict scrutiny" test found in the relevant constitutional and Title VI caselaw.

As stated in the earlier 1995 Guidance, any consideration of race or ethnicity "must be narrowly tailored to advancing the child's interests and must be made as an individualized determination for each child." Although the best interests of some older children may justify limited attention to race or ethnicity, "it is doubtful that infants or young children will have developed such needs." Moreover:

> [a]n adoption agency may not rely on generalizations about the identity needs of children of a particular race or ethnicity, or on generalizations about the abilities of prospective parents of one race or ethnicity to care for, or nurture the sense of identity of a child of another race ... or ethnicity.

The 1997 and 1998 Guidances confirm that any consideration of race or ethnicity is appropriate only when based on specific concerns arising out of the circumstances of an individual case.

HHS gives an example of an older child or adolescent who has the legal right to consent to an adoption and refuses placement with a family of a particular race. Neither the law nor good child welfare practice would require the adoption worker to ignore the child's wishes.

While the adoption worker might wish to counsel the child, the child's ideas of what would make her or him most comfortable should not be dismissed, and the worker should consider the child's willingness to accept the family as an element that is critical to the success of the adoptive placement.

(c) What is delay?

The 1996 IEP amendments to MEPA confirm that any delay in placement based on impermissible factors is illegal. As explicitly stated in the earlier 1995 HHS and OCR Guidance, the widespread pre-MEPA policy and practice of "holding periods" in order to make a same-race adoptive placement of a child in agency custody are impermissible and clearly violate the federal law. Similarly, an agency may not require a certain period of time to search for a same race placement if an appropriate transracial placement is available when the child's need for placement arises. Nor may the agency routinely permit same-race placements while requiring caseworkers to specially justify a transracial placement. If no appropriate placement options are immediately available, the agency may conduct a search, but the search cannot be limited to same-race prospective parents except in those rare circumstances where the child has a specific and demonstrable need for a same-race placement.

Although MEPA-IEP prohibits states and agencies from delaying a child's placement for the purpose of finding a racial or ethnic match, many other factors contribute to delays within the child welfare system. Among these are high caseloads that impede the completion of individualized assessments of children's needs, court delays in scheduling mandatory review or termination hearings, the distinctive physical and emotional needs of children who have been abused or neglected which may make it difficult to secure appropriate out-of-home care, misinformation about the availability of medical and other assistance and subsidies for foster care and adoptive children, and cultural norms that are hostile to formal adoption.

Given the existence of both discriminatory and non-discriminatory barriers to permanency, it is important for states and child welfare agencies to monitor whether minority children as a whole are being disproportionately held back from foster, fost-adopt, or adoptive placements at each stage of the child protection process. Both systemic patterns and the placement histories of particular children should be internally monitored so that marked disparities can be identified, explained, and ultimately reduced or eliminated.

In addition, agencies should monitor whether they are timely in processing transracial or transethnic placements. That is, agencies can check to see whether transracial or interethnic placements and adoptions are taking substantially longer than other cases and, if so, why.

One of the best ways to reduce delays, regardless of their cause, is for agencies to undertake a comprehensive and well-documented assessment of each child's placement needs as promptly as possible once a child is likely to enter out-of-home care. If placement with a relative is an option, the relative should be notified and assisted in completing any requirements for serving as the child's caregiver. If the court determines that reunification efforts are not required for a particular child, a permanency case plan should be prepared and reasonable efforts devoted

to its prompt implementation. Active recruitment and retention of appropriate and diverse foster and adoptive families is also essential to any overall policy aimed at achieving permanency.

Senator Coats made it clear that the prohibition on delay does not relieve agencies from making an aggressive effort to identify families that can meet the needs of the waiting children:

> [MEPA] also prohibits any delay in making an adoption placement. While I have expressed concern about the effect of this prohibition I have determined that it is the best legislative approach we can take at this time. I do however want to reiterate my concern that this not be perceived as an excuse for agencies not to aggressively recruit prospective adoptive parents. Agencies should, on an ongoing basis-consistently, creatively, and vigorously recruit and study families of every race and culture of children needing adoptive families.

3. The opportunity to become an adoptive or foster parent

Entities covered by MEPA-IEP may not:

> deny to any person the opportunity to become an adoptive or a foster parent, on the basis of race, color, or national origin of the person, or of the child involved.

Although the debate surrounding MEPA-IEP has usually focused on discrimination against white parents who wish to adopt African American children, researchers have also pointed out discriminatory practices that keep African American and other minority families from becoming foster and adoptive parents.

The central legal issue in discrimination against white parents is whether same race placement policies unfairly deprive them of the general opportunity to become foster or adoptive parents. However, the controversies usually have arisen in the context of a particular family who wants to adopt or foster a particular child.

The equal protection clause and Title VI prohibit agencies from using race or ethnicity to deprive individuals of the general opportunity to serve as a foster or adoptive parent, assuming they are otherwise qualified to do so. Nonetheless, in individual cases, MEPA-IEP focuses on the specific and distinctive needs of the child and on the capacity and willingness of particular individuals to meet those needs. Because placement decisions are based on the needs of the child, no one is guaranteed the "right" to foster or adopt a particular child.

Agencies should make sure that they are not systematically and inappropriately filtering out transracial or interethnic placements in the process of selecting foster and adoptive parents. For example, agencies can track what happens to all parents willing to adopt white or African American children, and can determine whether parents from different racial or ethnic groups are being screened out or rejected at a far higher than average rate.

Agencies can also use this information to determine whether certain placements are screened out at specific stages of the foster care or adoption process. For example, are prospective parents willing to accept children of other ethnic groups included in lists of eligible applicants for children of all ethnic groups? Are these prospective parents actually matched with children from different racial and ethnic backgrounds? Do all prospective parents have the opportunity to meet and observe children of different racial and ethnic groups? If a very low proportion of transracial or interethnic foster and adoptive placements survive the various steps of screening and placement, the agency should carefully examine its practices to determine why this is happening and whether it is due to discrimination.

The 1995 Guidance makes clear that the prohibition on discrimination includes not only denials overtly based on race, color, or national origin but also using race-neutral policies that have the effect of excluding groups of

prospective parents on the basis of race, color, or national origin, where those standards are arbitrary or unnecessary or where less exclusionary standards are available. Race-neutral policies that may have the effect of discriminating on the basis of race, color, or national origin may include those related to income, age, education, family structure, and size or ownership of housing, where such policies are not shown to be necessary to the program's objectives or there are no less discriminatory alternatives available that will achieve those objectives. Restrictive criteria such as these have been cited as barriers to the inclusion of African American and other minority families in the pool of prospective foster and adoptive parents who can provide homes for children. Other barriers to participation include lack of minority staff and management in placement agencies, lack of recruitment in appropriate communities, lack of communication about the need for families in appropriate communities, fees and costs that make adoption difficult or impossible for low income families, negative perceptions about child welfare agencies in minority communities, and the traditional use of informal rather than formal adoption in certain cultures. Barriers to participation can be addressed in an appropriate recruitment plan.

4. Diligent Recruitment

MEPA-IEP requires states to develop plans that:

> provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.

Experience demonstrates that minority communities respond when they are given information about the need for homes and when they are treated with respect. There are many models for successful recruiting. The 1995 Guidance explains that the recruitment plan must focus on developing a pool of potential foster and adoptive parents willing and able to foster or adopt the children needing placement. Recruitment must seek to provide all children with the opportunity for placement and to provide all qualified members of the community with an opportunity to adopt or foster a child.

The Guidance specifies that an appropriate comprehensive recruitment plan includes:

(1) A description of the characteristics of waiting children.

(2) Specific strategies to reach all parts of the community.

(3) Diverse methods of disseminating both general and child specific information.

(4) Strategies for assuring that all prospective parents have timely access to the home study process, including location and hours of services that facilitate access by all members of the community.

(5) Strategies for training staff to work with diverse cultural, racial and economic communities.

(6) Strategies for dealing with linguistic barriers.

(7) Non-discriminatory fee structures.

(8) Procedures for a timely search for prospective parents for a waiting child, including the use of exchanges and other interagency efforts, provided that such procedures must ensure that placement of a child in an appropriate household is not delayed by the search for a same race or ethnic placement.

The Guidance recognizes that both general and targeted recruitment activities are important. These include use of the general media (radio, television and print), dissemination of information to targeted community

organizations, such as religious groups and neighborhood centers, and the development of partnerships with community groups to make waiting children more visible and to identify and support prospective adoptive and foster parents. Recruitment activities should provide potential foster and adoptive parents with information about the characteristics and needs of the available children, the nature of the foster care and adoption process, and the financial, medical, counseling and other assistance and support available to foster and adoptive families.

5. Interaction with Indian Child Welfare Act

MEPA-IEP specifically provides that it has no effect on the Indian Child Welfare Act (ICWA). ICWA was enacted in 1978 in response to concerns about the large number of Native American children who were being removed from their families and their tribes and the failure of states to recognize the tribal relations of Indian people and the cultural and social standards of Indian communities. ICWA establishes standards and procedures for certain "custody proceedings" that affect Indian children, including voluntary and involuntary terminations of parental rights and foster care, pre-adoptive, and adoptive placements. An "Indian child" for purposes of ICWA is an unmarried individual under the age of 18 who is either a member of a federally recognized Indian tribe or is eligible for membership and is the biological child of a tribal member. ICWA gives tribal courts exclusive jurisdiction over proceedings concerning Indian children whose "domicile" (permanent home) is on a reservation and allows tribes to intervene in state court proceedings concerning non-reservation Indian children. MEPA-IEP does not alter ICWA's recognition of tribal rights, nor does it affect ICWA's preferences for placing Indian children with members of their extended families or other tribal members. Because MEPA-IEP does apply, however, to placement activities not covered by ICWA, Indian adults are protected by MEPA-IEP against discrimination if they want to become foster or adoptive parents of non-Indian children.

The exemption of ICWA from the provisions of MEPA-IEP underscores the importance of early and comprehensive assessments of a child's history and needs upon entering out-of-home care. If a caseworker has reason to know that a child may have some Indian heritage, it is essential to determine whether the child is a member of a federally recognized Indian tribe, or may be eligible for membership by virtue of being the biological child of a member. Delays in determining a child's status as an "Indian child" can have the unfortunate consequence, years later, of disrupting stable placements with non-Indian foster or adoptive parents to rectify an earlier failure to abide by ICWA. If it turns out that a child is of mixed ancestry, including some Indian heritage, but is not an "Indian child" under ICWA, then the child's placement is not subject to ICWA and the child is entitled to the MEPA-IEP protections against discriminatory placement decisions.

6. Implementation

Compliance with the original provisions of MEPA was required by October 21, 1995, and compliance with the 1996 IV-E provisions was required by January 1, 1997. States had to submit their recruitment plans to HHS by October 31, 1995. They had the option of doing so as part of a consolidated state plan that includes the plans submitted under title IV-B subparts 1 and 2 or, for states submitting a separate title IV-B subpart 1 plan, as a separate plan amendment.

The Administration for Children and Families (ACF) and the Office for Civil Rights (OCR) in the Department of Health and Human Services (HHS) joined together to provide legal and social work expertise to assist the states and agencies in implementing MEPA. HHS issued its first MEPA Guidance on April 20, 1995. It issued basic information about the Interethnic Adoption Provisions on November 14, 1996, its Guidance on the Interethnic Adoption Provisions on June 5, 1997, and further Guidance in the form of questions and answers on May 11, 1998. These documents are available from HHS or any HHS Regional Office. They are also available on the Internet along with OCR regulations and information about how to file an OCR complaint. The Internet address of the OCR Home Page is http://www.hhs.gov/progorg/ocr/ocrhmpg.html. The ACF Children's Bureau Internet Home Page address is http://www.acf.dhhs.gov/programs/cb.

In 1995, HHS conducted a systematic review of States' statutes, regulations, and published policies in the area of adoption and foster care to assess their compliance with MEPA's nondiscrimination provisions. At that time, the Interethnic Placement provisions had not been enacted; thus HHS' review focused only on MEPA. Since the passage of the Interethnic Placement provisions, HHS continues to review issues, statutes, regulations and policies that come to its attention and provides technical assistance when needed. However, because such statutes, regulations, and policies may not always come immediately to the attention of HHS, the Department encourages States to review their own statutes and policies to ensure compliance with the Interethnic Placement provisions. As discussed below, HHS will be including compliance with the title IV-E provisions of MEPA-IEP provisions in the child welfare review process.

Staff from ACF and the Office for Civil Rights (OCR), in addition to conducting Compliance Reviews, are available for technical assistance, and teams from ACF and OCR have gone to at least one state in each region to provide technical assistance. They are also available to respond to requests from other states. In addition, states may request the assistance of groups like the American Bar Association Center on Children and the Law and the National Resource Center on Special Needs Adoption and the National Resource Center on Permanency Planning through a request to their regional Administration on Children and Families (ACF) office. For more information on this, please contact the ACF Regional Offices or the Resource Centers listed in the Appendices.

7. Enforcement

MEPA-IEP can be enforced through administrative action by HHS or through litigation by individuals or the Justice Department. Noncompliance may result in loss of federal funds, in injunctive relief, and, in certain cases, in an award of money damages.

(a) Administrative enforcement

(1) Title VI

Failure to comply with MEPA-IEP's prohibitions against discrimination is a violation of Title VI of the Civil Rights Act. The 1995 Guidance suggests that failure to engage in appropriate recruitment efforts could also constitute a violation of Title VI. Title VI prohibits discrimination on the basis of race, color, or national origin in programs receiving federal assistance. Anyone who believes he or she has been subjected to discrimination in a program funded by HHS may file a complaint with the Office for Civil Rights (OCR). Information about how to file a complaint is available from HHS or any of its regional offices.

OCR must investigate promptly whenever it receives a complaint or other information indicating that a violation of Title VI has occurred. OCR can also initiate its own compliance reviews to determine whether any Title VI violations have occurred. OCR staff review the policies and practices of the entity receiving federal funds, the circumstances that led to the complaint, and other information about a possible violation.

If OCR determines that a violation of Title VI has occurred, it will notify the entity involved and seek voluntary compliance. If voluntary compliance is not forthcoming, HHS may bring administrative proceedings to terminate federal assistance. These proceedings provide the state or the agency with a formal due process hearing to determine whether a violation has occurred and whether fiscal sanctions should be imposed. In the alternative, OCR may refer the matter to the Justice Department with a recommendation to initiate judicial proceedings.

HHS is required to seek the cooperation of recipients of federal funds in obtaining compliance with Title VI, and HHS is committed to working closely with covered agencies to promote voluntary compliance. An agency may

agree to come into voluntary compliance at any point during the investigation or any action to terminate funding.

(2) Title IV-B

In order to receive title IV-B funds for child welfare services, promoting safe and stable families, and family preservation and support services, States and Tribes must develop a plan that meets the requirements of IV-B including the requirements for a recruitment plan. States and Tribes are required periodically to submit new plans under title IV-B. Failure to develop a recruitment plan could result in the loss of title IV-B funding. Before granting federal assistance, HHS must determine whether a state plan complies with federal statutes, regulations and guidelines. This determination must be completed within ninety days of the date the state submits the plan. After the initial plan is approved, HHS may withhold future payment of federal funds if the plan no longer complies with federal law, either because of changes in federal requirements or because of plan amendments submitted by the state. Federal funds also may be withheld if the state fails to administer the plan in substantial compliance with federal law. However, HHS is working jointly with States and Tribes to achieve voluntary compliance, and could afford States and Tribes an opportunity for corrective action before withholding funds.

(3) Title IV-E

The 1996 Interethnic Placement Provisions added MEPA-IEP provisions to title IV-E. States found to be in violation of these provisions are subject to graduated financial penalties that will vary depending on the amount of title IV-E funding the state receives and the frequency and duration of violations. States will have the opportunity to avoid a financial penalty through a corrective action process if the violation is cured within six months. HHS estimates that penalties will range from under $1,000 to over $10 million. Other covered entities that violate MEPA-IEP will have to repay the amount of money they received from the state during each quarter in which a violation occurs.

ACF will start screening for indications of MEPA-IEP compliance as part of the child welfare review process starting in 1999. OCR will continue to address compliance by investigating complaints and conducting independent reviews. ACF and OCR are working together to develop common protocols and review standards along with policies and procedures for monitoring compliance, developing corrective action plans, and imposing penalties. The formal review standards and protocols will be published in the Federal Register.

(b) Private law suits

MEPA-IEP expressly provides a federal cause of action for any individual who is aggrieved by a violation of the title IV-E provisions of MEPA-IEP. This gives anyone who is adversely affected by a violation the right to file a lawsuit within two years after the violation occurs. Another provision removes an obstacle to bringing an action for failure to comply with the recruitment plan requirements under title IV-B. In addition, the 1995 Guidance suggests that the failure to implement an appropriate recruitment plan could give rise to a discrimination claim under Title VI. Other violations of MEPA-IEP that constitute discrimination may also give rise to civil rights claims based on the Constitution and Title VI.

Litigation can result in court orders requiring the defendant state or agency to comply with the law and an award of attorneys fees if the person bringing the lawsuit is successful. Monetary compensation, known as "damages", may also be available in certain circumstances to individuals who are harmed by discriminatory policies and practices.

8. Barriers to Implementation

Agency administrators should anticipate barriers to implementation of MEPA-IEP and make plans for reducing those barriers. Some of the potential barriers are discussed below.

(a) Confusion

Confusion about the requirements of MEPA-IEP is likely to exist among child welfare workers and the general public as a result of the public debate about transracial adoption and same race placement policies. Confusion is also likely to result from the changes MEPA-IEP will require in law and policy in some states. It is important that administrators act quickly to say what is and what is not required by the law and to specify which current policies and practices must change and which are not affected. Administrators should develop clear written guidelines that detail mandatory requirements and areas where professional judgment is appropriate.

Agency staff must be given an opportunity to clarify issues and to discuss and understand how the law applies to their daily practice. Training sessions and meetings in which the law and policies are applied to facts of real or simulated cases can be helpful in translating the provisions of MEPA-IEP into actual practice. Supervisory staff should encourage review and discussion by all staff members of placement practices and decisions.

Administrators should also develop ways of informing the general public and prospective foster and adoptive parents about the law and the policy and practices of the agency. Recruitment materials, communications between workers and individual parents, and information distributed to the general public should provide a consistent message about what the law requires and what the agency is doing. Information about the reasons for the law and the way that the agency plans to meet the best interest of the children will help the public and prospective parents understand the agencies' policies and practices.

(b) Lack of resources

Child welfare agencies have faced increased responsibilities and decreasing resources in recent years. Implementation of MEPA-IEP may be viewed as another unfunded mandate that will take time away from other issues that affect the lives of children.

Since MEPA-IEP incorporates good social work practice, much of the implementation should be consistent with the work administrators, supervisors, and caseworkers are doing on a regular basis. Administrators should look for ways to incorporate MEPA-IEP implementation into ongoing activities, such as supervision, training, and case reviews.

It is clear however, that some additional resources will be needed for implementation. Administrators should identify all potential sources of support and make use of them. In addition to title IV-E administrative funds and Adoption Opportunities Grants, administrators should make use of HHS technical assistance and the services available from the federal resource centers listed in the appendix.

They should also explore the resources available from nongovernmental sources, such as private foundations. Permanence, the problems of children in foster care, and the effects of discrimination are among the priorities of many foundations, and agencies should be able to develop fundable projects that include MEPA-IEP implementation. Agencies should also be creative in using free community resources, such as churches and community groups in collaborative implementation activities.

(c) Resistance

Agencies may also encounter resistance from individual workers either because of their personal views or a perception that the federal law is dictating decisions in individual cases where professional discretion should be

exercised. Administrators can overcome this resistance by discussing with workers the basic goals and underlying values of the law in addition to its specific provisions. Staff meetings or discussion groups can provide an opportunity for value clarification that will promote consistent decision making in individual cases. Open discussion is particularly important because implementation of MEPA-IEP can raise explosive and emotional issues concerning the needs of children and the meaning of racism and discrimination.

(d) Fear of litigation

Fear of litigation can create a climate in which social workers or supervisors are fearful of exercising their discretion in the best interest of the children. Administrators should provide their staff with competent legal advice about what is and what is not legal, and agencies should be prepared to back up appropriate worker decisions when they create difficulties or result in litigation. Workers must clearly understand what the law requires of them, but must be free to exercise their professional judgment within the requirements of the law. Workers will want to maintain the necessary documentation to describe the bases for child placement decisions.

Chapter 3: Common Questions About MEPA-IEP

1. Since the Constitution and Title VI already prohibit discrimination, what difference will MEPA-IEP make?

Although the Constitution and Title VI bar discriminatory practices by states and publicly funded entities, many states and child welfare agencies nonetheless assumed that it was lawful to prefer racially and ethnically-matched foster care and adoptive placements for children. MEPA-IEP has made it clear that such preferences are illegal.

In enacting MEPA-IEP, Congress was concerned about widespread reports that children were being harmed by being removed from stable foster placements simply in order to be placed with someone else of the same race or national origin whom they had never met.

Reports also suggested that growing numbers of children were being denied a permanent adoptive placement because of efforts, often futile, to find a racially or ethnically matching adoptive home. For example, some agencies required specific waiting periods to search for a same race placement or required social workers to justify a transracial placement.

Minority children, particularly African-American children, were the most likely to experience lengthy delays in placement and to have fewer opportunities to be adopted as they grew older. Despite differences of opinion about whether these delays were caused primarily by unfair exclusion of minority individuals from being considered as foster or adoptive parents, or by unfair exclusion of whites who sought transracial placements, or by some combination of these and other factors, child welfare experts agreed that something had to be done to prevent the adverse effects on minority children of placement delays and "foster care drift."

MEPA-IEP can assist states and agencies to remove the vestiges of unlawful discriminatory practices by providing technical assistance through OCR and ACF staff. This assistance will continue to be available to help states review their statutes and administrative codes and to help agencies develop procedures that reflect good social work principles and promote the best interests of children in out-of-home care.

By requiring diligent recruitment of foster and adoptive parents who reflect the ethnic and racial diversity of children in state care, MEPA-IEP also aims to expand the pool of qualified parents who can meet the needs of children awaiting homes, including those whose specific and well-documented needs may justify an effort to achieve a same-race placement.

2. What are the differences between MEPA, as originally enacted, and the 1996 Interethnic Adoption Provisions?

The Interethnic Adoption Provisions (IEP) make several important changes to MEPA which clarify the kinds of discriminatory placement activities that are prohibited and, as explained in Chapter 2(7)(a)(3), add sanctions under title IV-E for violations of MEPA-IEP.

To clarify that the routine consideration of a child's or prospective parents's race color, or national origin is impermissible, the IEP amends the basic MEPA prohibitions as follows:

> ...neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may--
>
> > (a) deny to any person the opportunity to become an adoptive or foster parent, on the basis of the race, color, or national origin of the person, or of the child involved or (b) delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.

In addition, the IEP repeals a section of MEPA that permitted agencies to determine a child's best interests by considering, as one of a number of factors, "the child's cultural, ethnic, and racial background and the capacity of the prospective foster or adoptive parents to meet the needs of a child from this background." The deletion of the words "categorically" and "solely" from the Act's prohibitions and the repeal of the permissible considerations make it clear that the standard for the use of race, color, national origin in foster care and adoptive placements is strict scrutiny. Even where a placement decision is not based on a prohibited categorical consideration, other actions that delay or deny placements on the basis of race, color, or national origin are prohibited. According to the 1997 and 1998 Guidance, agencies may not routinely assume that children have needs related to their race, color, or national origin. Nor may agencies routinely evaluate the ability of prospective foster and adoptive parents to meet such needs.

As amended by IEP, MEPA does not prohibit agencies from the nondiscriminatory consideration of a child's cultural background and experience in making an individualized placement decision. However, the 1998 Guidance warns against the use of "culture as a proxy for race, color, or national origin." Any routine use of "cultural assessments" of children's needs or prospective parent's capacities would be suspect if it had the effect of circumventing the law's prohibition against the routine consideration of race, color, national origin.

3. Can race ever be taken into consideration in making placements? When?

On rare occasions, the distinctive needs of an individual child may warrant consideration of the child's race, color, or national origin. Any consideration of these factors must pass the strict scrutiny test: Is it necessary to take into account the child's needs related to race, color, or national origin in order to make a placment that serves this particular child's best interest? If it appears that the child does have these distinctive needs, caseworkers should document their response to the following questions:

- What are the child's special or distinctive needs based on race, color, or national origin? Why is it in the child's best interests to take these needs into account?

- Can the child's needs related to race, color, or national origin be taken into account without delaying placement and placing the child at risk of other harms?

- Can these needs be met by a prospective foster or adoptive parent who does not share the child's racial or ethnic background?

- Can these needs be met only by a same race/ethnic placement? If so, is some delay justified in order to search for a parent of the same race or ethnicity, if an appropriate person is not available in the agency's current files?

- In a foster care placement, can the child's special needs be taken into account without denying the child an opportunity to be cared for in a readily available foster home?

- What are the child's other important needs?

Even when the facts of the particular case allow some consideration related to race, color, or national origin, this consideration should not predominate. Among other needs to be considered and typically to be given the most weight are: the child's age, ties to siblings and other relatives, health or physical condition, educational, cognitive, and psychological needs, and cultural needs, including religious, linguistic, dietary, musical, or athletic needs. In addition, the child may have personal preferences that he or she can articulate and discuss.

MEPA-IEP encourages child welfare workers to make decisions on the basis of the individualized needs of each child, and renders suspect any placement decision based on stereotypical thinking or untested generalizations about what children need. From now on, it should be clear that any use of race, color, or ethnicity is subject to the strict scrutiny standard of review, and that the use of racial or ethnic factors is permitted, only in exceptional circumstances where the special or distinctive needs of a child require it and where those needs can be documented or substantiated.

Consider the following example: A six year old girl in foster care has been attending a school where she is regularly teased because of her race. She is deeply distressed about this and cries inconsolably whenever the teasing occurs. This child needs a foster parent who can enroll her in another school where the teasing is less likely to occur or can work with staff and other parents at her current school to improve the situation there. The foster parent has to help the child understand that the teasing is inappropriate and not a reaction to anything she did that was objectionable.

While this child has a specific race-based need, the caseworker cannot assume that the only way to meet this need is through a same-race placement. It is an issue to discuss with the foster parent (or a prospective foster parent), regardless of their race. Simply being from the same racial background does not ensure that a particular individual will do any better in helping the child cope with the atmosphere in school than an individual from a different racial background.

Consider another example: A three year old boy born in Honduras and present in this country for less than six months is suddenly removed from his parents who have allegedly beaten him. His verbal skills are age appropriate but he only speaks and understands Spanish. He needs immediate foster care, preferably in a home where Spanish is spoken. He should not be further traumatized by placing him with caregivers who cannot speak Spanish. Although this child will eventually need to learn English, his immediate needs call for finding a foster parent who speaks Spanish. It would not be appropriate to limit the search to someone from Honduras or some other Latin American country. The placement should be made on the basis of the child's demonstrable cultural needs, and not on the basis of the child's national origin.

4. Can state law or policy include a preference for racial or ethnic matching so long as no child or prospective parent is precluded from being considered for placement on the basis of their race, color, or national origin?

MEPA-IEP does not allow state laws or policies to be based on blanket preferences for racial or ethnic matching. General or categorical policies that do not derive from the needs of a specific child are not consistent with the kinds of individualized decisions required by MEPA-IEP. Statutes or policies that establish orders of preference based on race, color, or ethnicity or that require caseworkers to justify departures from these preferences violate MEPA-IEP and Title VI.

5. Can agencies honor the preferences of a birth parent based on race, color, or national origin?

Because agencies subject to MEPA-IEP may not deny or delay placements on the basis of race, color, or national origin, they cannot honor a biological parent's preferences for placing the child in a family with a similar racial or ethnic background.

6. Does MEPA-IEP prevent States from having a preference for placing a child with a relative?

MEPA-IEP does not prohibit a preference for placing a child with relatives, if the placement is in the best interest of the child and not in conflict with the requirement that the child's health and safety be the paramount concern in child placement decisions.

In 1996, Congress added a section to the title IV-E State Plan requirements that States are to consider giving preference to an adult relative over a non-related foster or adoptive parent, provided that the relative meets all relevant state child protection standards. Many states include preferences for relatives in their foster care or adoptive placement statutes or administrative regulations. Nonetheless, caseworkers should not use general preferences for placing children with relatives as a device for evading MEPA-IEP. All placement decisions should be specific to the needs of the individual child.

Generalizations about the wisdom of placing with a relative, even when a relative has not yet been located or evaluated should not necessarily result in removing a child from the child's current placement. For example, caseworkers should exercise caution before removing a child from a stable, long-term, transracial fost-adopt home in order to make a racially-matched placement with a relative the child may have never met. To avoid this situation, caseworkers should attempt to locate all relatives who might serve as a child's caregiver as promptly as possible whenever a child is likely to require out-of-home care.

7. Does MEPA-IEP apply to white children?

MEPA-IEP applies to all children regardless of race or ethnicity. For example, if a worker determines an African American family can best meet the needs of a white child, denying the child that placement on account of race would be illegal.

8. How does MEPA-IEP apply to infants?

MEPA-IEP applies regardless of the age of the child. The 1995 and 1997 Guidances suggest that the age of the child may be a factor in determining the effect of race or ethnicity on the best interest of the child. For example, an older child may have a strong sense of identity with a particular racial or ethnic community; an infant may not have developed such needs. However, the Guidances emphasize that each decision must be individualized. Further, the 1998 Guidance notes that, regardless of age, racial or ethnic factors can seldom determine where a child will be placed.

9. How should biracial/bicultural and multiracial/multicultural children be treated?

MEPA-IEP requires that all children be treated equally, without regard to their racial or ethnic characteristics. If a child has a mixed racial ethnic heritage, that heritage does not have to be ignored when assessing the child's needs, but it cannot become the basis for a placement decision except in those exceptional or distinctive circumstances that would apply to making a placement decision for any other child based on race, color, or national origin.

Nevertheless, in order to comply with the Indian Child Welfare Act (ICWA), children entering the child welfare system who may have some Native American heritage should have their existing or potential tribal affiliations ascertained immediately so that ICWA notice, jurisdictional, and placement requirements can be followed. Because ICWA is not based on a child's race as such, but on the child's cultural and political ties to a quasi-sovereign federally recognized Indian tribe, ICWA is not affected by MEPA-IEP. This means that a child with a certain quantum of "Indian blood" may or may not be subject to ICWA. Caseworkers generally have to rely on tribal determinations whether or not the child is a tribal member or eligible for membership.

10. Does MEPA-IEP apply to private agencies and independent adoptions?

MEPA-IEP applies to all agencies and entities receiving federal assistance directly or as a subrecipient from another entity. Agencies or entities that do not receive federal assistance are not covered by MEPA-IEP unless a federally assisted agency is also involved in their placement decisions. However, these entities may be covered by other statutes or policies prohibiting discrimination.

11. Can agencies conduct targeted recruitment?

MEPA-IEP requires diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of the children who need homes. Therefore, states must develop strategies that reach the communities of these families. At the same time, states and other entities must ensure that they do not deny anyone the opportunity to adopt or foster a child on the basis of race, color or national origin.

The 1995 federal Guidance discussed targeted recruitment efforts as part of a comprehensive strategy aimed at reaching all segments of the community. The 1995 Guidance provides that information should be disseminated to targeted communities through organizations such as churches and neighborhood centers. It further suggests agencies develop partnerships with community groups that can help spread the word about waiting children and identify and support prospective adoptive and foster parents.

In addition, the 1998 Guidance states that targeted recruiting cannot be the exclusive means for a state to identify families for particular categories of children. For example, while a state may contract with a private agency to make public announcements in Spanish to recruit Hispanic foster and adoptive parents, the state may not rely exclusively on that private agency to place Hispanic children. Rather, in identifying a potential pool of foster or adoptive parents for a child, the state must consider individuals listed with agencies that recruit parents from all ethnic groups.

12. Do prospective adoptive parents have the right to adopt a particular child?

Under MEPA-IEP, individuals cannot be denied an opportunity to be considered as a potential adoptive parent. They have a right to an assessment of their suitability as adoptive parents which is not based on discriminatory criteria. If accepted into the pool of qualified applicants for an agency, a state, or an interstate exchange, they have a right to be considered as a possible adoptive parent for children for whom they have expressed an

interest, and whose needs they believe they can meet. However, neither they nor anyone else has an absolute right to adopt a particular child.

When foster parents seek to adopt a child who has been in their care for a significant period of time, the child's attachment to them and the child's need for permanence may suggest that they are the most appropriate parents for the child. Nonetheless, this decision must be based on the agency's and the court's assessment of the child's best interests and not on an alleged "right" of the foster parents to adopt this child.

13. What funds are available to implement MEPA-IEP?

Implementation of MEPA-IEP is an administrative cost of implementing federal foster care mandates. States are entitled to claim MEPA-IEP implementation expenses as part of their administrative costs under title IV-E. Discretionary funds for innovative projects, such as recruitment programs, are also available under the Adoption Opportunities Program authorized by the Child Abuse Prevention and Treatment Act.

Chapter 4: Checklists for Implementation of MEPA-IEP

A. What Agencies Can Do

1. Promote good child welfare practice

MEPA-IEP is consistent with good child welfare practice. Both MEPA-IEP and good practice require: individual decisionmaking; consideration of all of the child's needs from the time the child first comes into contact with the child welfare system; consistent attention to all those needs throughout the child's relationship with the agency and in each placement decision; active recruitment of potential foster and adoptive parents from all segments of the community; development of a pool of foster and adoptive parents that respond to the needs of the children in care; eligibility criteria for foster and adoptive parents that are related to their ability to care for a child; and support and respectful treatment of all prospective parents. Good practice will improve permanence for children and decrease the chances that MEPA-IEP will be violated.

2. Decrease delays in permanence caused by other factors

A number of the controversies concerning transracial placements arise because the child has been in foster care for too long. Frequently the delay in obtaining a permanent placement for the child is due to other factors such as inadequate reunification efforts, failure to search for relatives who are willing and able to care for the child, high social worker caseloads, bureaucratic inertia, and court delays. Decreasing these delays in permanence will serve the best interests of children and will decrease the chances that the agency will be accused of delaying a child's placement for any reason including racial discrimination.

3. Review current state law and agency policies for compliance with MEPA-IEP

HHS has reviewed the statutes and policies that are readily available, but state agencies should conduct their own review of all state laws and written policies as well as informal policies and practices to ensure violations of MEPA-IEP do not occur in written policy or in practice.

Other public and private agencies are also required to comply with MEPA-IEP. All covered agencies should thoroughly review policies and practices to ensure compliance. When state statutes or policies appear to be in conflict with MEPA-IEP, agencies should seek clarification from the state child welfare agency or HHS or both.

4. Monitor agency compliance with MEPA-IEP

To assess whether their practices comply with MEPA-IEP, agencies should consider systematically monitoring their own practices regarding all foster care and adoptive placements. Specifically, agencies should make sure that children are not moved from one foster placement to another simply in order to achieve a racial or ethnic match, that adoptive placements of minority children are not processed at much slower rates than placements of caucasian children, and that transracial or interethnic placements are not arbitrarily filtered out at different stages of the placement process.

A successful outcome measure for MEPA-IEP compliance is a reduction in current disparities between rates of placement of minority and non-minority children, and an increase in permanency for all children as the pool of suitable and diverse parents expands. By contrast, evidence that transracial or interethnic placements are not occurring, or are being "filtered" out of agency practice, could raise concerns about the persistence of at least inadvertent discrimination against children as well as against prospective parents when the pool of waiting children is predominately of one race.

Except for purposes of reviewing their own compliance with MEPA-IEP, agencies should no longer follow any procedures that routinely classify or divide children awaiting placement by racial or ethnic groups. Similarly, individuals seeking approval, or already approved, as foster or prospective adoptive parents should not be routinely classified by race or ethnicity, but can be classified according to the general characteristics of the kinds of children they prefer or are willing to consider. Any "matching" of a child to a prospective parent should be responsive to the particular needs of a child and the capacities of the parent, without regard to general assumptions about the risks or benefits of same-race or transracial adoption.

To evaluate their compliance with MEPA-IEP, as well as the effects of non-discriminatory practices on the number, rate, and permanency of placements for all children, agencies should keep internal records of the racial and ethnic backgrounds of the children and foster and adoptive parents in their case files. Agencies should track the experience of children under their supervision from the time of entry into out-of-home care through the time the cases are closed. Significant differences in the experience of minority children should be recorded and efforts made to account for these differences. Was there a reluctance to seek termination of parental rights because of concerns that a same-race adoptive placement would be difficult to justify? Are children being held in long-term foster care in order to keep them in a racially-matched custodial environment, even though potential transracial adoptive placements are available? How are decisions about "adoptability" being made? Are the criteria for minority children different than the criteria used for white children? Which lists and exchanges within and outside the state were used to locate an adoptive parent? How much time elapsed until each child's permanency goals were met?

Because the central goal of MEPA-IEP is to reduce placement delays and denials based on discriminatory factors, it is important for agencies to monitor and document the rates at which minority children leave care and the kinds of placements they experience. Are minority children's rates of adoption becoming comparable to the rates of white children? Are minority children waiting about the same time as white children?

5. Implement a comprehensive recruitment plan

States were required to submit an appropriate comprehensive recruitment plan to HHS no later than October 31, 1995. States should take into consideration both the mechanisms they will use to reach all segments of the community and the protections they will implement to ensure compliance with the nondiscrimination provisions

of MEPA-IEP. For example, the state may choose to use targeted efforts to reach minority communities, but these efforts may not exclude whites who wish to become foster or adoptive parents.

Public and private agencies should assist the state in developing an appropriate recruitment plan that meets the needs of the children they serve. Agencies should ensure state plans include creative and affirmative efforts to reach communities that reflect the ethnic and racial diversity of children who need homes. The diversity and cultural competency of the recruitment staff should be reviewed as should any written or audiovisual materials used. Recruitment efforts should also address how parents are treated in the home study and placement process. Recruitment is wasted if the system does not make appropriate use of interested parents who respond, or if such efforts are not timely.

Agencies should also collaborate in developing comprehensive community services to ensure that prospective parents are not denied the opportunity to become foster or adoptive parents. Cooperation among different organizations is necessary to ensure that all individuals who are interested in foster care and adoption are encouraged and supported.

Submission of the plan does not end the responsibility of the state or the other agencies involved in recruitment. Implementation, evaluation, and appropriate adjustment are necessary to serve the best interests of children and families and to avoid violations of law. HHS has made clear that the failure to conduct adequate recruitment may be a violation of Title VI as well as a violation of the IV-B state plan requirements.

6. Issue clear policies and standards for placement

All agencies should develop clear written policies and standards that implement MEPA-IEP. These policies and standards should define prohibited practices to the extent possible making it clear that such a list is not all inclusive. These policies and standards also should identify the areas where professional judgment is appropriate. Vague or ambiguous policies invite confusion and create barriers to implementation. Agencies can use the federal Guidance in formulating these policies. Additional assistance is available from the resource centers listed in the appendix.

7. Provide training for workers

Training on the provisions of MEPA-IEP and discussion of how those provisions apply in individual situations is important to ensure that workers understand and implement the law properly. Appropriate training will also help protect agencies from claims they have engaged in discriminatory practices.

Training should also include practice issues that increase the competency of staff to make individualized assessments of children's needs.

8. Develop a system for supervision and technical assistance for workers to promote compliance that meets the best interests of the children

Ongoing attention will be necessary not only to ensure that MEPA-IEP is followed but also to ensure that misunderstandings about what MEPA-IEP requires do not interfere with fulfulling the best interests of children. As with adequate training, appropriate supervision will help protect agencies from claims they have engaged in discriminatory patterns of practice.

9. Provide opportunities for discussion and value clarification

Discussing the goals of the agency, of MEPA-IEP, and of child welfare services will be helpful in reducing misunderstanding of MEPA-IEP requirements and resistance to implementing them. It will also promote more child-centered decisionmaking. Workers who understand the reasons for policies are more likely to implement them correctly and will be more confident in exercising their professional judgment.

Agencies should encourage caseworkers to meet with each other to review hypothetical and actual cases in order to improve their ability to distinguish between general or untested assumptions about children's needs and specific, distinctive needs related to race or ethnicity. Hypothetical and actual cases should also be used to illustrate the difference between having a need related to race and ethnicity and requiring a same race/ethnic placement to address that need. Even children who have documented racial or ethnically related needs may have those needs met in a transracial as well as in a same-race placement.

10. Get good legal advice

Given the controversial nature of these issues, agencies can anticipate litigation if difficult cases arise. However, the fear of litigation should not prevent workers from making appropriate decisions. Workers can best exercise their professional judgment if agency policies and practices have been reviewed for compliance with the law. A good review will also prepare the agency to defend their practices if litigation should occur. If the attorneys who usually work with the agency are not familiar with civil rights issues, they may wish to arrange for a consultation with experts.

11. Get help

Assistance is available from ACF, OCR, HHS Regional Offices, and the Resource Centers. States should take advantage of the resources listed in the Appendix.

B. What Workers Should Do

1. Make individual decisions based on sound child welfare practice and the best interest of the child

MEPA-IEP makes it clear that concerns about race, color, or national origin are not to be the predominant or sole basis of child placement decisions. Indeed, they are not to be taken into account in any foster care or adoptive placement decision except in those rare circumstances where the caseworker can document a specific, distinctive need of a particular child arising from the child's race or ethnicity. This does not require caseworkers to be "colorblind," but to understand the difference between acknowledging a child's race, color, or national origin as an element of that child's whole being and using general assumptions about those factors as a shortcut for preferring certain placement options over others. Caseworkers should understand that in every case, the available prospective parents should be considered, regardless of their race or ethnicity, as eligible to adopt waiting children.

Same-race placements are not required, nor are they prohibited. Similarly, transracial placements are not required, nor are they prohibited. What *is* required are decisions based on careful individualized assessments of the characteristics and needs of each child and non-stereotypical assessments of individuals who are potential parents of the child.

Agencies should give caseworkers the opportunity to read and discuss the social science research findings that substantiate the claims that children are not harmed by transracial adoption, and indeed, are significantly better off than being left in foster care or returned to dysfunctional biological parents.

The focus of MEPA-IEP is the best interests of children. Workers should keep in mind that the primary concern of child welfare services, including adoption, is the well-being of children. MEPA-IEP emphasizes the use of professional judgment in making individualized decisions in the best interest of each child. Workers who base their decisions on sound child welfare practice and the needs of the individual child will be unlikely to run afoul of the law.

2. If a child has specific or distinctive needs related to race or ethnicity that require consideration, address them as soon as the child comes into the child protective system

In the great majority of cases, agencies can assume that a child has no special needs based on race, color, or national origin which should be taken into account in selecting a foster or adoptive parent. However, where such needs exist, they should be identified and assessed early in the case. These needs should then be considered in providing services and in making every placement decision. All too often these needs are not addressed until a decision has to be made about adoption or another permanent plan. Waiting this long is problematic for two reasons. First, it means the child's needs are not met for a significant period of time. Second, it creates difficulties in balancing interests at the time of adoption or other permanent placement if the child's current caregivers cannot meet the child's identified needs.

3. Consider permanence from the first contact with the child

Early attention to permanence is especially important. All too often emergency placements or other temporary arrangements become long term. Even when race or ethnicity is not an issue, these placements can create difficulties if the foster parents are not willing to make a long term commitment to the child or are not appropriate adoptive parents. Appropriate planning and action can ensure that children do not remain in foster care drift and can reduce the controversies that arise when children are moved from one placement to another. Early identification of relatives, including absent parents, comprehensive reunification efforts, attention to all of the child's needs in making placement decisions, and other good child welfare practices will reduce the time a child waits for permanence and the chance that problems will arise in making an appropriate permanent placement for children who cannot return home.

4. Read the statute and the federal guidance

A lot of questions can be resolved by referring to the 1995, 1997, and 1998 Guidances or the language of the Act itself. Workers should read the federal law and policy for themselves and not rely on written or oral summaries provided by others. When in doubt, workers and their supervisors should review the language of the federal law, the Guidances, and state laws and policies before making a decision. If questions remain, staff should get legal advice.

5. Review state law and agency policy and ask for clarification

Where state law or agency policies are unclear or appear to conflict with the federal law, workers should ask for clarification. It may take some time for the states and agencies to resolve all of the issues that MEPA-IEP presents. However, workers need to be able to make decisions for children while this process is going on. Workers should insist upon clarification to the extent possible. Questions from workers can also assist the states and the agencies in identifying issues that need to be resolved.

6. Document the reasons for decisions

MEPA-IEP emphasizes individualized decision making based on the needs of the child. Workers should document the basis for their decisions including all the factors they considered in reaching that decision.

Documentation will help workers clarify for themselves the factors taken into consideration and the reasons for the decision. It will provide a record a supervisor or another worker can refer to in understanding the case, and it will provide evidence of appropriate action in the event the worker is charged with violation of the law.

7. Be honest with prospective adoption and foster parents and treat them with respect

Good communication and respectful treatment will decrease misunderstandings and improve recruitment and retention of prospective parents. Open discussion can also help the agency learn about potential problems and ways to address them.

Conclusion

The overriding goals of MEPA-IEP are to reduce the length of time children spend in out-of-home care, and to prevent discrimination in placement decisions. However, we should have realistic expectations about what MEPA-IEP can accomplish. The waiting children in the child welfare system have multiple needs, and the child welfare system faces multiple challenges in achieving permanence for these children. MEPA-IEP is only one part of the comprehensive effort that is needed to improve the lives of children who are waiting for permanent homes.

Implementation of MEPA-IEP provides an opportunity for states and agencies to improve permanency for children. Agencies and social workers will need to have a clear understanding of the requirements of MEPA-IEP and Title VI and of good social work practice to avoid the problems and controversies that can arise. Attention to the goals of MEPA-IEP and the best interest of the individual children being served are the keys to successful implementation.

§ 11.17 Turning Law into Practice: A National Snapshot of MEPA/IAP*

CLP caught up with Margaret Burt, JD, to discuss how states are implementing the six-year old Multiethnic Placement Act of 1994, as amended by the Interethnic Adoption Provisions of 1996. MEPA/IAP prohibits the use of a child's or prospective parent's race, color or national origin to delay or deny the child's placement. MEPA/IAP also requires diligent efforts to expand the number of racially and ethically diverse foster and adoptive parents. This interview reflects the often-difficult process of applying law in practice.

Drawing on her 20 years of practice as a child welfare agency attorney, public defender and law guardian in Monroe County, NY, Margaret earns lots of frequent flier miles giving child welfare training and technical assistance to judges, lawyers, and social workers around the country.

In the past several years Margaret has provided MEPA/IAP training and technical assistance to "many urban and rural areas with very diverse foster care populations," in 13 states, several regional conferences, and Washington, D.C. Through this work, she has found MEPA/IAP poses many challenges for practitioners in the field.

Q&A Margaret, what part of MEPA/IAP provokes the most questions?

I get the most questions about when or under what circumstances it's permissible to consider the racial background of a child in making a placement decision. I hear many questions from foster/adoptive parents and agency staff about what questions are permissible and what violates the statute. Parents want to know if they can request a child of a certain background or race. (For a discussion of these questions and examples, see the federal policy guidance and information memoranda in the appendices of *A Guide to the Multiethnic Placement Act of 1994* cited in the *Resources* sidebar below.)

Agency personnel ask about birth parents who express preferences in placing their child. I tell them: if the birth parent asks, you have to say the agency can't guarantee the birth parent's preference. Agencies cannot do racial matching.

Q&A What do *you* think are the biggest problems or barriers state agencies face in implementing the Act?

Clashing Philosophies. I think many front-line caseworkers do not agree with the philosophy behind the Act. There are essentially three mandates to MEPA/IAP for state agencies. One of them--the mandate for recruiting a diverse group of foster and adoptive parents--makes sense to agencies. They want to do it and are anxious to learn ways to do it better. The other two mandates: (1) no discrimination in placement or (2) delays in placement based on race are appropriate on their face. However, the practical implementation of those mandates is a significant problem for agencies.

So some of my training and education deals with the fact that some may not agree with the law, but the *law has to be followed.* In my experience, agency personnel, lawyers, judges--everybody--is extremely uncomfortable discussing difficulties they see inherent in MEPA/IAP. No one wants to appear culturally insensitive, or hurt

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Sally Small Inada, MA, is Director of Marketing and Information Design at the ABA Center for Children and the Law.

anyone. Having said that, it is clear when I lead discussions of the Act, there is anger and frustration in the room. People are afraid to say that what the Act requires doesn't make sense to them. This is a challenge for all of us, because if people won't admit their problems with the Act, we can't get to the next step of solving those problems.

I feel it is important for agency personnel to be able to express disagreements or opinions while we're training. We need to recognize how difficult it can be to implement a law or policy a worker may not agree with.

Judicial Training Needed. Another barrier is judges who are unfamiliar with the Act and don't follow its requirements. When I'm training, I'm often told of instances of court-ordered placements that directly violate MEPA/IAP. So it's not just caseworkers and lawyers who need to be trained.

Practical Guidance Is Hard to Find. A big problem is that a plain reading of the statute does not prepare agencies for some of the complicated practical areas that are discussed in the federal guidance. The Act is more complicated to put into practice than it seems on its face. I usually try to wrap up training on the Act by saying that as it is written, we have to comply with it. And I emphasize that working out the practical applications of the Act presents challenges even for people who agree with it. (For more information see *A Guide to the Multiethnic Placement Act of 1994* cited in the *Resources* sidebar)

Q&A What, in your experience, has been the biggest motivation/help in getting states to enforce MEPA/IAP?

Even agency personnel disagreeing with MEPA/IAP recognize there are powerful sanctions backing this Act. These include upcoming federal audits, which could result in penalties and loss of federal funds to agencies in violation (for more information on penalties, see "New Federal Regulations on ASFA," cited under *Resources*, previous page). The statute also provides that private lawsuits could be filed against agencies that violate the Act. Obviously, the most important motivator is to find children permanent placements, although some caseworkers do not believe MEPA/IAP enhances permanency.

Q&A What steps can states take to improve how they implement MEPA/IAP?

Look at your forms, especially your adoption and foster care/parent forms. Do they comply with the Act? Review and, if necessary, rewrite your forms. Training workers to use the new forms is a good way to educate them on what the Act requires.

Are your front-line staff returning adoption and foster care phone calls with accurate information? For example, if someone calls saying they are interested in adopting or fostering a child, are they discouraged because they are not the same race as the majority of kids in care?

Judges and attorneys need to understand what are appropriate and inappropriate requests. Judges must be educated to not issue placement decisions or court orders that violate MEPA/IAP. If your judge issues a placement order that appears to violate the Act, *tactfully--very tactfully* --point out that his order could violate the federal law.

Bottom Line
MEPA/IAP can be difficult to implement because it touches upon sensitive issues surrounding race, placement and children. The law being the law, each state, locality, agency and court must grapple with practical ways to make MEPA/IAP work.

Selected Answers to GAO Questions about MEPA/IAP

Q: May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with foster parents of a specific racial, national origin, ethnic and/or cultural group?

A: No.

Q: May public agencies assess the racial, national origin, ethnic and/or cultural capacity of all adoptive parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?

A: No. The factors discussed above concerning the routine assessment of race, color, or national origin needs of children would also apply to the routine assessment of the racial, national origin, or ethnic capacity of all foster or adoptive parents.

Q: How does HHS define "culture" in the context of MEPA guidance?

A: HHS does not define culture. Section 1808 addresses only race, color, or national origin, and does not directly address the consideration of culture in placement decisions. A public agency is not prohibited from the nondiscriminatory consideration of culture in making placement decisions. However, a public agency's consideration of culture must comply with Section 1808 in that it may not use culture as a replacement for the prohibited consideration of race, color or national origin.

§ 11.18 The Multiethnic Placement Act and Amendments to MEPA by the Provisions for Removal of Barriers to Interethnic Adoption Included in the Small Business Job Protection Act

The Multiethnic Placement Act (MEPA) of 1994

PART E. MULTIETHNIC PLACEMENT
Subpart 1. Multiethnic Placement

SEC. 551. SHORT TITLE.

This subpart may be cited as the "Howard M. Metzenbaum Multiethnic Placement Act of 1994".

SEC. 552. FINDINGS AND PURPOSE.

(a) FINDINGS.--The Congress finds that--

(1) Nearly 500,000 children are in foster care in the United States;

(2) tens of thousands of children in foster care are waiting for adoption;

(3) 2 years and 8 months is the median length of time that children wait to be adopted;

(4) child welfare agencies should work to eliminate racial, ethnic, and national origin discrimination and bias in adoption and foster care recruitment, selection, and placement procedures; and

(5) active, creative, and diligent efforts are needed to recruit foster and adoptive parents of every race, ethnicity, and culture in order to facilitate the placement of children in foster and adoptive homes which will best meet each child's needs.

(b) PURPOSE.--It is the purpose of this subpart to promote the best interests of the children by--

(1) decreasing the length of time that children wait to be adopted;

(2) preventing discrimination in the placement of children on the basis of race, color, or national origin; and

(3) facilitating the identification and recruitment of foster and adoptive families that can meet children's needs.

SEC. 553. MULTIETHNIC PLACEMENTS. [This section was repealed in 1996—see IEP, below.]

(a) ACTIVITIES.--

(1) PROHIBITION.*--An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not--*

(A) categorically deny to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) PERMISSIBLE CONSIDERATION.*--An agency or entity to which paragraph (1) applies may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child.*

(3) DEFINITION.*--As used in this subsection, the term "placement decision" means the decision to place, or to delay or deny the placement of, a child in a foster care or an adoptive home, and includes the decision of the agency or entity involved *4057 to seek the termination of birth parent rights or otherwise make a child legally available for adoptive placement.*

(b) EQUITABLE RELIEF.*--Any individual who is aggrieved by an action in violation of subsection (a), taken by an agency or entity described in subsection (a), shall have the right to bring an action seeking relief in a United States district court of appropriate jurisdiction.*

(c) FEDERAL GUIDANCE.*--Not later than 6 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall publish guidance to concerned public and private agencies and entities with respect to compliance with this subpart.*

(d) DEADLINE FOR COMPLIANCE.--

***(1) IN GENERAL**.--Except as provided in paragraph (2), an agency or entity that receives Federal assistance and is involved with adoption or foster care placements shall comply with this subpart not later than six months after publication of the guidance referred to in subsection (c), or one year after the date of enactment of this Act, whichever occurs first.*

***(2) AUTHORITY TO EXTEND DEADLINE**.--If a State demonstrates to the satisfaction of the Secretary that it is necessary to amend State statutory law in order to change a particular practice that is inconsistent with this subpart, the Secretary may extend the compliance date for the State a reasonable number of days after the close of the first State legislative session beginning after the date the guidance referred to in subsection (c) is published.*

***(e) NONCOMPLIANCE DEEMED A CIVIL RIGHTS VIOLATION**.--Noncompliance with this subpart is deemed a violation of title VI of the Civil Rights Act of 1964.*

***(f) NO EFFECT ON INDIAN CHILD WELFARE ACT OF 1978**.--Nothing in this section shall be construed to affect the application of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).*

SEC. 554. REQUIRED RECRUITMENT EFFORTS FOR CHILD WELFARE SERVICES PROGRAMS.

Section 422(b) of the Social Security Act (42 U.S.C. 622(b)) is amended--

(1) by striking "and" at the end of paragraph (7);

(2) by striking the period at the end of paragraph (8) and inserting "; and"; and

(3) by adding at the end the following:

"(9) provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.".

Subpart 2--Other Provision

SEC. 555. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.

(a) IN GENERAL.--Part A of title XI of the Social Security Act (42 U.S.C. 1301-1320b-13) is amended by inserting after section 1122 the following:

"SEC. 1123. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.

"In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan *4058 or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 471(a)(15) of the Act is not enforceable in a private right of action.

(b) APPLICABILITY.--The amendment made by subsection (a) shall apply to actions pending on the date of the enactment of this Act and to actions brought on or after such date of enactment.

Amendments to MEPA by the Provisions for Removal of Barriers to Interethnic Adoption (IEP) Included in the Small Business Job Protection Act, P.L. 104-188, 110 Stat. 1755 sec. 1808, 1996

SEC. 1808. REMOVAL OF BARRIERS TO INTERETHNIC ADOPTION.

(a) STATE PLAN REQUIREMENTS.--Section 471(a) of the Social Security Act (42 U.S.C. 671(a)) is amended--

(1) by striking "and" at the end of paragraph (16);

(2) by striking the period at the end of paragraph (17) and inserting "; and"; and

(3) by adding at the end the following:

"(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may--

"(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or

"(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.".

(b) ENFORCEMENT.--Section 474 of such Act (42 U.S.C. 674) is amended by adding at the end the following:

"(d)(1) If, during any quarter of a fiscal year, a State's program operated under this part is found, as a result of a review conducted under section 1123A, or otherwise, to have violated section 471(a)(18) with respect to a person or to have failed to implement a corrective action plan within a period of time not to exceed 6 months with respect to such violation, then, notwithstanding subsection (a) of this section and any regulations promulgated under section 1123A(b)(3), the Secretary shall reduce the amount otherwise payable to the State under this part, for that fiscal year quarter and for any subsequent quarter of such fiscal year, until the State program is found, as a result of a subsequent review under section 1123A, to have implemented a corrective action plan with respect to such violation, by--

"(A) 2 percent of such otherwise payable amount, in the case of the 1st such finding for the fiscal year with respect to the State;

"(B) 3 percent of such otherwise payable amount, in the case of the 2nd such finding for the fiscal year with respect to the State; or

"(C) 5 percent of such otherwise payable amount, in the case of the 3rd or subsequent such finding for the fiscal year with respect to the State.

In imposing the penalties described in this paragraph, the Secretary shall not reduce any fiscal year payment to a State by more than 5 percent.

"(2) Any other entity which is in a State that receives funds under this part and which violates section 471(a)(18) during a *1904 fiscal year quarter with respect to any person shall remit to the Secretary all funds that were paid by the State to the entity during the quarter from such funds.

"(3)(A) Any individual who is aggrieved by a violation of section 471(a)(18) by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.

"(B) An action under this paragraph may not be brought more than 2 years after the date the alleged violation occurred.

"(4) This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.".

(c) CIVIL RIGHTS.--

(1) *PROHIBITED CONDUCT*.--A person or government that is involved in adoption or foster care placements may not--

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) *ENFORCEMENT*.--Noncompliance with paragraph (1) is deemed a violation of title VI of the Civil Rights Act of 1964.

(3) *NO EFFECT ON THE INDIAN CHILD WELFARE ACT OF 1978*.--This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.

(d) CONFORMING AMENDMENT.--Section 553 of the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (42 U.S.C. 5115a) is repealed.

V. THE INDIAN CHILD WELFARE ACT (ICWA) [25 U.S.C. § 1901 - 1963]

§ 11.19 The Indian Child Welfare Act: A Primer*

In cases involving Indian children, tribes must receive notice and are subject to transfer to tribal court. You must make special findings in dependency and termination trials. You must follow special consent procedures in voluntary placement and relinquishment cases.

GOALS

The Indian Child Welfare Act (ICWA) protects tribal ties of Indian children. Congress passed ICWA in 1978 to address the misuse of state child protection power to remove Indian children and place them in non-Indian homes. Before the Act was passed, Indian children were placed in foster care at two to three times the rate of non-Indian children. 25 U.S.C.A. §1901

ICWA seeks to preserve Indian families. It mandates preventive services before removal. An Indian child who must be removed should be placed in a home that
reflects the unique values of Native American culture.

25 U.S.C.A. §1902

WHEN ICWA APPLIES

ICWA controls child custody proceedings involving Indian children. "Child custody proceedings" include:

- Foster care placement
- Termination of the parent-child legal relationship
- Preadoptive placement
- Adoption
- Any transfers of placement.

It does *not* include custody disputes in dissolution cases or juvenile delinquency cases. 25 U.S.C.A. §1903(1); 25 U.S.C.A. §1916(b)

An Indian child is, or is eligible to be, a tribal member. An "Indian child" is any unmarried person under age 18 who is a member of an Indian tribe or is an Alaskan native. Also included are children eligible for tribal membership if one of their [biological] parents is a member. 25 U.S.C.A. §1903

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* This article was written by Debra Ratterman Baker, JD, who is Knowledge Management Director at the ABA Center on Children and the Law, Washington, D.C.

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Does ICWA apply if a child is not in an "existing Indian family?" Although the statute is silent on this issue, some state courts have held ICWA does not apply to children raised by a non-Indian parent with no tribal contact. However, other state courts have rejected this exception as inconsistent with ICWA's goal to encourage tribal ties. *Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982); *Adoption of Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *C.C.G.*, 942 P.2d 1380 (Colo. App. 1997).

Questions on Applying ICWA

- Is the child a tribal member?
- Is the parent a tribal member and the child eligible for membership?
- Is the child being placed in foster care or for adoption or are parental rights being terminated or relinquished?

JURISDICTION

Tribal court has exclusive jurisdiction over children living on its reservation. This includes children who reside or are domiciled on the reservation and any wards of tribal court regardless of where they live. A "tribal court" means a Court of Indian Offenses, a court established under a tribe's code or custom, or any tribal administrative body vested with child custody jurisdiction. 25 U.S.C.A. §1911(a); 25 U.S.C.A. §1903(12)

Parent's actions cannot defeat the tribal court's jurisdiction. The U.S. Supreme Court held that the state did not have jurisdiction over a child whose Indian parents lived on the reservation but gave birth and relinquished custody off the reservation. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

You have jurisdiction for emergency protection of Indian children. You may order emergency removal of an Indian child temporarily off the reservation to prevent imminent physical danger or harm. The placement must terminate as soon as the danger has passed. If you do not return the Indian child home, you must swiftly transfer the case to tribal court or file a dependency action and comply with ICWA requirements. 25 U.S.C.A. §1922

Any Indian child's case is subject to transfer to tribal court. For an Indian child living off the reservation, a parent, Indian custodian, or the tribe may petition for transfer to tribal court. You must grant the transfer to tribal court unless:

- Either parent opposes it.
- The tribe declines jurisdiction.
- There is good cause to retain state jurisdiction.

25 U.S.C.A. §1911(b)

The BIA guidelines state good cause to deny transfer exists if:

- The request for transfer was not timely.
- An Indian child over age 12 objects to transfer.

- Evidence necessary could not be presented in tribal court without undue hardship on the parties or witnesses.

- Parents of a child over age five have had little or no contact with the tribe or tribal members.

44 Fed. Reg. 67, 591.

State courts must give "full faith and credit" to tribal court decisions. The tribal court must have proper jurisdiction over the child custody proceeding. Tribal courts must give full faith and credit to other tribal court orders. 25 U.S.C.A. §1911(d)

NOTICE

The child's tribe must be notified of any involuntary foster care or termination proceeding. You must give the tribe notice if you know or *have reason to know* the child is Indian. If the child is a member or eligible to be member in more than one tribe, you only need to notify the tribe with which the child has more significant contacts. 25 U.S.C.A. §1912(a); 25 U.S.C.A. §1903(5)

What about voluntary proceedings? The Indian Child Welfare Act allows tribes to intervene in both involuntary placements and terminations and voluntary placements and relinquishments. However, the tribal notice provisions mention only involuntary proceedings. If parents domiciled on the reservation are consenting to voluntary placement or relinquishment, you should notify the tribe because of jurisdictional issues. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). It may be simpler to give tribes notice in all voluntary proceedings to avoid risking the finality of these orders.

Parents must be given notice. "Parent" is defined as the natural parent or adoptive Indian parent of an Indian child. The definition excludes nonmarital fathers who have not acknowledged or established paternity. Note that the definition includes a non-Indian natural parent of an Indian child. 25 U.S.C.A. §1912(a); 25 U.S.C.A. §1903(9)

Any Indian custodians must be given notice. An "Indian custodian" is any Indian person with legal custody of an Indian child under tribal law or custom, under state law, or by agreement of the parents. 25 U.S.C.A. §1912(a); 25 U.S.C.A. §1903(6)

Notice must be by registered mail. It must include the petition and a notice of the tribe's right to intervene. If you don't know the identity or location of a parent or Indian custodian and the tribe, you must notify the Secretary of the Interior. The Secretary has 15 days after receipt to provide notice to the parent or Indian custodian and the tribe. 25 U.S.C.A. §1912(a)

No foster care or termination proceeding may be held until notice is made. You cannot hold a hearing until at least 10 days after the parent or Indian custodian and the tribe (or the Secretary) receive notice. You must grant another 20 days to prepare if they request it. 25 U.S.C.A. §1912(a)

Questions on ICWA Notice

- Has the tribe been notified by registered mail?

- Have the parents been notified by registered mail?

- Does the child have an Indian custodian?
- Has the Indian custodian been notified by registered mail?
- If any of these are unknown, has the Secretary of the Interior been notified by registered mail?
- Has it been at least 10 days since notice was received?

PROCEDURAL RIGHTS

The tribe and Indian custodian have a right to intervene. This right applies to any foster care or termination proceeding (both voluntary and involuntary). They may request to intervene at any point in the proceeding. 25 U.S.C.A. §1911(c)

Parents and Indian custodian have a right to counsel. The court must appoint them attorneys if they are indigent. 25 U.S.C.A. §1912(b)

The tribe and Indian custodian may access court records. Once they intervene as parties, they are entitled to all reports and other documents filed with the court upon which any decision will be based. 25 U.S.C.A. §1912(c)

Higher state or federal standards apply. If federal or state law provides a higher standard of protection for a parent, Indian child or Indian custodian's rights than ICWA, those rights apply.

INVOLUNTARY PROCEEDINGS

Proof of harm must be shown in addition to state grounds. An Indian child cannot be placed in foster care and a parent cannot have their rights terminated unless continuing custody with the parent or Indian custodian would result in serious emotional or physical damage to the child. A qualified expert witness must testify to this. Proof must be made by clear and convincing evidence for foster care placement. It must be beyond a reasonable doubt for termination. 25 U.S.C.A. §1912(e) & (f)

The child welfare agency must show "active efforts" to prevent placement or termination. Before removing Indian children to foster care or terminating their parent's rights, the state must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of Indian families and that these efforts have proved unsuccessful. 25 U.S.C.A. §1912(d)

VOLUNTARY PROCEEDINGS

Voluntary placement and relinquishments require judicial safeguards. For an Indian child:

- The parent or Indian custodian's consent must be in writing.
- It must be signed before a judge.
- The judge must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.
- This certificate must note whether the instrument was explained in English or was interpreted into another language the parent or Indian custodian understood.

RELEVANT FEDERAL LAWS

Any consent given before or within 10 days of the Indian child's birth is invalid. 25 U.S.C.A. §1913

A parent or Indian custodian may revoke consent to voluntary placement at any time. Once consent is withdrawn, the child must be returned. Revocation of consent to adoption is summarized in the box [below]. 25 U.S.C.A. §1913

PLACEMENT PREFERENCES

There is a preference for placing Indian children in Indian homes. Indian children must be placed in the least restrictive setting and within a reasonable proximity to their home, taking into account their special needs. Every time a child leaves a placement, except when returned home, the ICWA placement preferences apply. 25 U.S.C.A. §1915

For foster care or preadoptive homes, preference must be given in the absence of good cause to the contrary to:

- Extended family members
- Foster homes approved by the tribes
- Licensed Indian foster homes
- Indian-approved institutions.

25 U.S.C.A. §1915(b)

For adoptive homes, preference must be given in the absence of good cause to the contrary to:

- Extended family members
- Tribal members
- Other Indian families.

25 U.S.C.A. §1915(a)

The tribe's law or custom defines an "extended family member." If there is no law or custom, it includes any adult grandparent, aunt, uncle, sister, brother, sister-in-law, brother-in-law, niece, nephew, first or second cousin, or stepparent. 25 U.S.C.A. §1903(2)

The tribe may also establish its own placement preferences. If it does, the state must follow them as long as the placement is the least restrictive setting appropriate to the child's needs. You may also consider the parent and child's preferences where appropriate. If a parent wishes anonymity, you must give weight to this in applying the preferences. 25 U.S.C.A. §1915(c)

Prevailing Indian social and cultural standards apply. In meeting the preference requirement, you must follow the standards of the Indian community where the parent or extended family member resides or maintains social and cultural ties. 25 U.S.C.A. §1915(d)

The state must maintain records of its compliance with the placement preferences. The tribe or Secretary of the Interior may request these records at any time. 25 U.S.C.A. §1915(e)

Adult adoptees are entitled to information on their Indian heritage. An adopted Indian child who reaches age 18 may petition the court that entered the adoption decree for information on their Indian heritage. The court must inform them of their tribal affiliation and give them any other information necessary to protect any rights flowing from the tribal relationship. 25 U.S.C.A. §1917

SANCTIONS

If the state fails to comply with ICWA, court orders are voidable. The parent, Indian custodian, or tribe may petition to invalidate a foster care placement or termination of parental rights. 25 U.S.C.A. §1914

You must dismiss a petition of anyone with improper custody of an Indian child because of lack of jurisdiction. You must return the child to the parent or Indian custodian unless it would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C.A. §1920

PERMANENCY PLANNING FOR INDIAN CHILDREN

The Indian Child Welfare Act does not prevent you from protecting Indian children or freeing them for adoption. Most of its requirements, such as efforts to prevent placement, are similar to state requirements for all children. It does require you consider Indian children's cultural heritage as part of any "best interests" determination, which is good practice for all children.

REVOCATION OF RELINQUISHMENT

If an Indian child's adoption:	Then the parent or Indian custodian may:	And the court must:
Is not yet final	Revoke the consent at any time.	Return the child to the parent or Indian custodian.
Has been final less than two years	Revoke the consent if it was obtained through fraud or duress.	Return the child to the parent or Indian custodian.
Has been final for two years	Never revoke the consent.	Reject requests to revoke.
Is set aside or vacated	Petition for return of the child.	Grant the petition unless there is a showing that it would not be in the child's best interests.

ICWA CHECKLISTS

Removing an Indian child in dependency proceedings:

- Tribe notified of right to intervene.
- Proof by clear and convincing evidence by a qualified expert that the child will suffer emotional or physical harm if returned home.
- Proof DSS made active efforts to prevent the placement.

- Preference to placement with extended family members, approved tribal home, Indian foster home or Indian approved institution.

Approving the voluntary placement of an Indian child:

- Parent signs written consent before judge.
- Consent is signed more than 10 days after child's birth.
- Certify you explained terms and consequences and parent understood.
- Certify if explanation was in English or translated into another language the parent understands.
- Preference to placement with extended family members, approved tribal home, Indian foster home or Indian approved institution.

Terminating parental rights to an Indian child:

- Tribe notified of right to intervene.
- Proof beyond a reasonable doubt by a qualified expert that the child will suffer emotional or physical harm if returned home.
- Proof DSS made active efforts to reunify the family.
- Preference to placement with extended family members, tribal members, or other Indian families.

Accepting relinquishment of an Indian child:

- Parent signs written consent before judge.
- Consent is signed more than 10 days after child's birth.
- Certify you explained terms and consequences and parent understood.
- Certify if explanation was in English or translated into another language the parent understands.
- Preference to placement with extended family members, tribal members, or other Indian families.

For more information on ICWA, refer to B.J. Jones, *The Indian Child Welfare Act Handbook* (American Bar Association 1995). This book summarizes case law nationally, includes the BIA guidelines, and lists the addresses of all federally recognized tribes. To order it, call 800/285-2221.

§ 11.20 The Indian Child Welfare Act

TITLE 25. INDIANS

Chapter 21. Indian Child Welfare

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

(Pub.L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

1. So in original. Probably should be capitalized.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

(Pub.L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or

individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

(Pub.L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

Subchapter I. Child Custody Proceedings

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

(Pub.L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, 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.

(f) Parental rights termination orders; evidence; determination of damage to child

No 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.

(Pub.L. 95-608, Title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

(Pub.L. 95-608, Title I, § 103, Nov. 8, 1978, 92 Stat. 3072.)

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

(Pub.L. 95-608, Title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

(Pub.L. 95-608, Title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

(Pub.L. 95-608, Title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

(Pub.L. 95-608, Title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

(Pub.L. 95-608, Title I, § 108, Nov. 8, 1978, 92 Stat. 3074).

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

(Pub.L. 95-608, Title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

(Pub.L. 95-608, Title I, § 110, Nov. 8, 1978, 92 Stat. 3075.)

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

(Pub.L. 95-608, Title I, § 111, Nov. 8, 1978, 92 Stat. 3075.)

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

(Pub.L. 95-608, Title I, § 112, Nov. 8, 1978, 92 Stat. 3075).

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

(Pub.L. 95-608, Title I, § 113, Nov. 8, 1978, 92 Stat. 3075.)

Subchapter II. Indian Child and Family Programs

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to--

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act [42 U.S.C.A. §§ 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

(Pub.L. 95-608, Title II, § 201, Nov. 8, 1978, 92 Stat. 3075.)

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

(Pub.L. 95-608, Title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

(Pub.L. 95-608, Title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub.L. 96- 88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

(Pub.L. 95-608, Title II, § 204, Nov. 8, 1978, 92 Stat. 3077.)

Subchapter III. Recordkeeping, Information Availability, and Timetables

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from

the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

(Pub.L. 95-608, Title III, § 301, Nov. 8, 1978, 92 Stat. 3077.)

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

(Pub.L. 95-608, Title III, § 302, Nov. 8, 1978, 92 Stat. 3077.)

Subchapter IV. Miscellaneous Provisions

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

(Pub.L. 95-608, Title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub.L. 96- 88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

§ 1962. Omitted

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

(Pub.L. 95-608, Title IV, § 403, Nov. 8, 1978, 92 Stat. 3078.)

VI. THE FOSTER CARE INDEPENDENCE ACT OF 1999 [48] AND THE NORTH CAROLINA LINKS PROGRAM

§ 11.21 Introduction and Explanation of the Act

The Foster Care Independence Act of 1999 (H.R. 3443) provides important help to young people transitioning from foster care. The Act provides incentives for states and communities to reform independent living programs. The North Carolina LINKS program is the new Independent Living Program in North Carolina and was created to effectively implement the Chafee Foster Care Independence Program which was part of the Foster Care Independence Act.

Title I of the Act, which contains the most relevant provisions for young people transitioning from foster care, does the following:[49]

- Establishes the John H. Chafee Foster Care Independence Program, which totally replaces the former Independent Living Initiative authorized under Title IV-E of the Social Security Act
- Allows states to provide Medicaid coverage to young people between the ages of 18 and 21 who were in foster care on their 18th birthday
- Increases from $1,000 to $10,000 the assets that a young person in foster care can have and still maintain his or her eligibility for Title IV-E-funded foster care
- Requires states to ensure that foster parents are adequately prepared, both initially and on a continuing basis, to care for the children placed with them
- Authorizes additional funding for adoption incentive payments to the states to assist in finding permanent homes for children in foster care

The Chafee Foster Care Independence Program improves upon the former Independent Living Initiative by:[50]

- Increasing funding for independent living activities
- Offering increased assistance, including room and board, for young people ages 18 to 21 who are leaving foster care
- Emphasizing the importance of securing permanent families for young people in foster care
- Expanding the opportunity for states to offer Medicaid to young people transitioning from care
- Increasing state accountability for outcomes for young people transitioning from foster care

§ 11.22 North Carolina's LINKS Program [51]

[48] P.L. 106-169, amending Section 477 of the Social Security Act (Part E of Title IV of the Social Security Act).
[49] The following information was obtained from "Frequently Asked Questions about the Foster Care Independence Act of 1999 and the John H. Chafee Foster Care Independence Program," prepared by members of the National Foster Care Awareness Project (NFCAP), February, 2000. This document can be found online at www.casey.org and www.abanet.org In addition, the NFCAP has published a follow-up document called Frequently Asked Questions II which can be found at the same website.
[50] *Id*.

The Independent Living Program has a brand new name, a broadened range of services, and a strong commitment to offering real assistance to adolescents and young adults leaving the foster care system. The name "LINKS" doesn't stand for anything in itself. Rather, it expresses in one word what the program is intended to do- to provide, nurture, and create connections for youth:

- connections with people who care: family, mentors, and friends who make up a personal support system that can last a lifetime;
- connections with the home community- opportunities for jobs, recreation, spiritual fellowship, and for developing interests;
- connections with educational and vocational training that is affordable and relevant;
- connections with mentors who can help youth learn life skills;
- connections with agencies that can provide services during the rough times; and
- connections with financial resources to pay for needed goods and services.

Who is eligible for the LINKS program?

Youth and young adults ages 13 through 20 who are or were in the foster care system after age 13 are eligible for LINKS services if they need them. Eligibility does not automatically end with adoption or emancipation. The funds can be used for both IV-E and non IV-E children. The purpose of these funds and the implementation program is to help youth and young adults who have been in the foster care system to successfully transition to be self-sufficient adults.

While eligibility for the service is very broad, the primary focus of the LINKS program is on those youth who are at highest risk:

- Young people who are living in foster care and who are likely to remain in care until their eighteenth birthday;
- Young adults who aged out of foster care at age 18, who are not yet 21, and who need transitional services; and
- Youth and young adults who have already been discharged from the foster care system, are between the ages of 18 and 21, and who need assistance.

  NOTE on Illegal and Undocumented Alien Youth: No federal funds can be applied to assistance or services for illegal and undocumented aliens. If an otherwise eligible youth is disqualified from LINKS because of residency status, the agency can serve him or her so long as no Federal funds are used to provide those services and if no eligible youth is denied services because of participation by the ineligible youth. Once legal residency is established, LINKS funds may be used to provide services.

Youth are not eligible for LINKS funds if they have personal reserves of more than $10,000.

What is required of the youth/young adult participant?

[51] This section was originally written by Joan McAllister, North Carolina LINKS Coordinator. Note that procedures and amounts can vary over time. It is best to access the DHHS Online Manual for up to date information.

Youth/young adult participants must participate directly in designing their program activities and must accept personal responsibility for doing their share in achieving self-sufficiency.
On a practical level, this means that youth/young adults must be "at the table" at every phase of assessment, resource development, and planning and plan implementation. These young people have ideas and resources that, when used in partnership with the agency, are likely to lead to successful outcomes.

How does LINKS fit in with the State's push toward permanence for every child?

Every good parent wants his or her child to be as self-sufficient as possible and begins teaching necessary skills early. As the child develops, the parent provides more and more opportunities for the child to develop the skills he or she will need as an adult. This does not mean that the child does not need emotional support offered by the family or will be cut off from that support as an adult.

Similarly, young people in foster care need and deserve permanent connections with family and with other adults that they will continue to enjoy throughout their lives. They also need skills and knowledge to be self-sufficient adults. When a child knows how to take care of himself, he has more positive options in his life choices. LINKS programs are not an alternative to permanency efforts, but are offered concurrently.

What kind of services are available through the LINKS program?

1. Each county receives funding to operate its LINKS program, based on a per capita allocation for eligible children. These funds are used to provide basic services to youth 16-21 and, at county option children 13-15. Activities include:

    - A thorough assessment by the youth and caregiver, discussion of goals, and development of a plan.
    - skill-building activities and real-life learning experiences,
    - exposure to community and state resources for educational and vocational training,
    - assistance in strengthening the young person's personal support system;
    - transitional services for youth, including voluntary placement agreements, and
    - out-reach services to young adults who have left foster care and may need further assistance.

2. Additional funding called "LINKS Special Funds" is available by reimbursement through the state LINKS coordinator on behalf of specific youth and young adults. LINKS Special Funds are reimbursed to the county for expenditures made on behalf of eligible foster teens and young adults up to age 21 who are or were in foster care as teens. LINKS Special Funds are available to promptly reimburse counties for additional expenditures on behalf of eligible youth and young adults. These funds are in addition to the county LINKS. Eligibility can be cumulative: one young adult may be eligible for both categories of funding, for a total of as much as $3250 per year.

3. **Purpose of Special Funds**. The purpose of LINKS Special Funds, as with all LINKS funds, is to help youth successfully transition to self-sufficiency by reducing barriers to achieving that goal. LINKS Special Funds were created to help to assure that every eligible youth or young adult will have timely, equal access to financial resources regardless of county of residence. There are two categories of Special Funds:

    - **Housing Funds** are **only** available to young adults who aged out of foster care at 18 but are not yet 21 years of age. Up to $1000 per individual per year is available to help with transitional housing costs, which is defined as rent, rent deposits, or room and board arrangements that include meals as a part of a rental agreement. Utility costs are not included in this fund, but those types of costs may be paid from LINKS Transitional Funds. Funding is intended to help youth get moved into a permanent home, not to prolong unnecessary dependency nor to pay for continued residential treatment. An eligible young

adult who is participating in a CARS Arrangement may use these funds to transition to their independent living arrangement.

A youth "ages out" of foster care if he/she is in foster care on his or her 18th birthday. To be eligible, the young adult must have been in DSS custody on his or her 18th birthday and must have been living in a licensed foster care facility or with a relative that was not the removal home or in other court-approved placement. Youth who are in secure facilities specifically designed for correctional purposes on their 18th birthdays are specifically excluded from receiving transitional housing assistance but are eligible for other LINKS funds and services.

Youth who are under the age of 18 and young adults who did not age out of foster care are not eligible for Transitional Housing Funds, and no other LINKS funds can be used to procure housing for them. The Chafee Act is very specific on this point, and until the law is changed, there is no LINKS money to pay for rent, rent deposits, or down payments on dwellings for youth who did not age out of care.

- **LINKS Transitional Funds (up to $2250)** are available to help any youth or young adult ages 13 through 20 who, because of life circumstances, behaviors, or lack of needed resources is evaluated by the county DSS to be at risk of not making a successful transition to self-sufficiency unless appropriate intervention is initiated. LINKS Transitional Funds may not be used for rent, rent deposits, room and board, or down payments on housing.

  LINKS Special Funds may only be used to assist the youth or young adult to achieve one or more of the seven following outcomes: 1) economic self-sufficiency; 2) safe and stable housing; 3) academic or vocational achievement; 4) connections to a personal support network; 5) postponed parenthood; 6) avoidance of high risk behaviors and/or 7) access to needed health care not covered by Medicaid or public health insurance.

If a youth is in DSS custody but is placed in a residential program, how do they get access to these services?

The county that has custody is responsible for coordinating with the program staff to assure that the assessment and plan is developed. The custodial county would apply for any state administered LINKS funds on behalf of the child, and would be responsible for advancing the funds to be reimbursed. A portion of the county funds allocated through the LINKS program should be made available to the residential program providing the services unless the cost of care includes provision of these services.

The new LINKS program has great potential for providing timely assistance to young people to help them at critical junctures in their transition to self-sufficient adulthood.

§ 11.23 Chart Describing Eligibility for LINKS Funds

RELEVANT FEDERAL LAWS

SITUATIONAL ELIGIBILITY FOR LINKS FUNDS					
Situation	**Base county allocation**	**Trust Funds (up to $500)**	**Transitional Housing Funds**	**Scholarship/Conference Funds ($500)**	**Funds for Very High Risk Youth**
Youth in custody under the age of 13 or discharged prior to age 13	NO Incorporate into IV-E Foster Care Services	NO	NO	NO	NO
Youth 13-15 in DSS custody	X	NO	NO	NO-schol X-conferences	X
Youth 16-20 in DSS custody or placement responsibility	X	X 17 through 20 and is being discharged w/in 3 months	NO	X	X
Youth discharged from custody between age 13 and 18 or emancipated before 18th birthday	X	X 17 through 20	NO	X	X
Young adults who were discharged from custody/PR on or after their 18th birthday	X	X	X	X	X
Youth who are or were in DSS custody/PR after age 13+ who are now homeless or are are facing discharge within 3 months from a correctional, mental health, substance abuse treatment facilities, etc. and need	X	X If 17 through 20 years of age	X **Only if in custody at age 18**	X	X

ACCESS AND APPROPRIATE USE OF FUNDING SOURCES FOR LINKS SERVICES		
LINKS funding resource	**How accessed**	**Permissible Uses**

Base county allocation	Reimbursement via 1571	Costs for program: may be used for worker time; expenses for group activities; expenses specific to youth and/or young adult participants in program ages 13-21. Should be used to reimburse agencies that provide residential care for child under contract, e.g. CCI's, for providing **LINKS** assessments and services to youth in county custody or placement authority.
County Salary Supplement	Reimbursement via 1571	May only to be used for salary and/or contracted services to eligible youth and young adults for **LINKS** services/aftercare case management.
LINKS Trust Fund	Youth and young adults must be authorized via certification to the State **LINKS** coordinator. See Administrative Letter C.S. #1-100. Once authorized, request for reimbursement sent to LINKS Coordinator who will arrange for reimbursement.	May be used for any expense allowable under the former Independent Living Program: see policy manual.
Scholarship/conference Fund ▪ Scholarships for college or vocational training	Determination of eligibility for scholarships is done on county level. Eligible youth are listed on the authorization form. Reimbursement is handled the same as other funds, through the LINKS Program Coordinator.	$500 scholarships may be provided to youth/young adults eligible for LINKS program and who have finished high school or received their GED. For students who are not capable of finishing high school or receiving their GED, scholarships may be used to help them get vocational training after they are 18. Exceptions must be approved through the LINKS coordinator.
▪ Financial assistance for youth	Request for funding assistance for conferences should be submitted to the LINKS	Limited financial assistance with registration, conference

participation in national conferences	Program Coordinator in advance of the conference. Reimbursement is provided to the counties via EFT upon receipt of certification of expenses.	housing and/or transportation costs for youth participation in national Independent Living conferences.
Transitional Housing Funds	Counties must pre-register eligible young adults with the State LINKS Coordinator. For the next Federal Fiscal year (Oct. 1-Sept 30) authorized funds will be reimbursed to counties by EFT (or included on the county's allocation for the month if that can be arranged through County Administration). These funds are only available to young adults ages 18-21 who aged out of foster care, i.e. were in agency custody on their 18th birthday and are no longer in agency custody or placement authority. Young adults who are on a VPA are eligible for Transitional Housing Funds when they are within one month of discharge. This fund is only accessible if the youth is receiving concurrent LINKS Transitional Services from the agency that are in line with assessed needs of the young adult. This could include skill training, conflict management, job skills, etc.	Funds may be used for transitional housing costs, including rent, required utilities, and deposits. Transitional Housing Funds may only be used in conjunction with appropriate supportive services. Funds may only be used to supplement and may not be used to supplant other federal funding sources.

Funds for Extremely High Risk Youth	Counties must pre-register eligible youth with the State LINKS Coordinator. These funds are available to supplement other funding sources for youth who are at extremely high risk of homelessness, dropping out of school, drug/alcohol abuse, pregnancy, criminal behaviors, or other negative outcomes as indicated by their prior behavior.	These funds are available to supplement other programmatic funds for eligible youth and young adults 13-21. These funds should be accessed when other funding sources are inadequate to meet critical needs. These funds are limited to $1500 per year per individual and are not, therefore appropriate for long-term treatment needs. Funds may only be used to supplement and may not be used to supplant other federal funding sources.

§ 11.24 Educational Training Vouchers [52]

Legislation authorizing Education Training Vouchers was a separate section of the Chafee Act, authorized effective October of 2003. Use of these funds has no impact on LINKS county allocations or LINKS Special Funds except that young adults receiving ETV's may not access other Chafee Funds for expenses covered by the ETV, even after the $5000 limit is exhausted.

A. Qualifying schools

1. The term "institution of higher education" is defined in Sections 101 and 102 of the Higher Education Act (HEA) of 1965, as amended. The U.S. Department of Education, Office of Postsecondary Education, can help States determine which institutions meet the law's criteria. In general, the term includes three different types of institutions: public and nonprofit institutions of higher education; proprietary institutions of higher education; and postsecondary vocational institutions. A public or nonprofit institution of higher education must meet the following criteria (section 101(a) and (b) of HEA):

    a. admits as regular students only persons with a high school diploma or General Equivalency Degree (GED), OR students above the age of compulsory school attendance in the State where the institution is located;
    b. is authorized by the State to provide postsecondary education;
    c. provides an educational program for which the institution awards a bachelor's degree or at least a two-year program (e.g., an associate's degree) that is acceptable for full credit toward such a degree OR provides at least a one-year training program to prepare students for gainful employment in a recognized occupation; and
    d. is accredited by a nationally recognized accrediting agency or association, recognized by the Department of Education, or has been granted pre-accreditation status by the agency or association, and the Secretary has determined that there is a satisfactory assurance that the

[52] The following information on ETV's is excerpted from the DHHS Family Services Manual, Chapter XIII, October 2006.

institution will meet the accreditation standards of the agency or association within a reasonable time.

A proprietary (for-profit) institution of higher education must provide a training program to prepare students for gainful employment in a recognized occupation and meet the same criteria as described in (1) and (2) above for public or nonprofit schools. In addition, the institution must: be accredited by an agency or association recognized by the Department of Education; be in existence for at least two years; and, have at least 10 percent of its funding come from sources other than title IV of HEA (section 102(a)(1)(A) and 102(b) of HEA).

A postsecondary vocational institution must be a public or nonprofit school in existence for at least two years, which provides a training program to prepare students for gainful employment in a recognized occupation. The school must also meet the criteria described in (1), (2) and (4) above (section 102(a)(1)(B)) and 102(c) of HEA). Certain institutions may not be considered an "institution of higher education" without obtaining special Secretarial approval if they have a high percentage of distance learning classes or students, incarcerated students and students without a high school degree, or have previously filed for bankruptcy or have been convicted of fraud using HEA funds (section 102(a)(3) and (a)(4) of HEA). Schools outside of the United States cannot be considered institutions of higher education for the purposes of the Educational and Training Voucher program (section 102(a)(1)(C) of HEA).

B. Eligibility of Students

- The student must be eligible for the NC LINKS program.
- Students younger than 18 may be approved for ETV if they were in foster care after their 17th birthday and have finished high school or their GED and**/or** have been accepted into a qualifying college or vocational training program.
- A student adopted from foster care after his/her 16th birthday (date of finalization) is also eligible for ETV.
- Adult students who are attending GED/Adult High School at the same time that they are participating in postsecondary classes may qualify for an ETV for the costs of the postsecondary classes if the postsecondary school qualifies.
- Eligibility can continue until age 23 for students who were receiving vouchers on 21st birthday if they are making satisfactory progress toward completion of their certificate or degree.

C. Eligible costs

The amount of the ETV grant is based on the Cost of Attendance, which is the total amount it will cost a student to go to school, usually expressed as a yearly figure. Includes:

- Tuition, fees and other equipment or materials required of all students in the same course of study;
- Books, supplies and an allowance for transportation costs and miscellaneous personal expenses, including computers;
- Room and board (which may vary depending on whether the student lives at home, in student-housing or an apartment);
- Child care expenses for a student who is a parent;
- Accommodations related to the student's disability, such as a personal assistant or specialized equipment that is not paid for by another source;

- Expenses related to the youth's work experience in a cooperative education program; and
- Student loan fees or insurance premiums on the student loan.

The student's cost of attendance is determined and evaluated with their existing Federal financial awards in order to determine how much money they can get. A student may receive both the Pell Grant and the ETV, if, when combined, are equal to or less than the cost of attendance.

Note: A student is not required to be participating in a CARS/VPA to qualify for assistance through the ETV.

D. Procedures

1. Student Application: The student applies on line over the internet. The web address is www.statevoucher.org. Once into the web site, the student should click on the North Carolina state outline to get to the home page and the application form. The student is required to fill out the application, to submit a brief essay about their future plans, and to send a copy of their financial award letter to the contracting agency, Orphan Foundation of America (OFA). The application requires a budget, contact information for the DSS and information about the student's interests. This web site has a number of links to other valuable information that can be accessed from the site. Information on other scholarships, study habits, time management, budgeting, and supports for former foster youth, etc. is available.

Note: the college student will need his or her own email account while in college, since contact from the ETV administrator and volunteer mentors will be primarily over the internet. If necessary LINKS Special Funds can be used to help purchase basic internet services.

E. Referral from agency

1. The county refers their eligible young adults using the state voucher web site. The referral is completed by clicking on the Social Worker Student Referral form (left column) The user ID is nc- and the referring county's name (e.g. nc-Dare); the password is a unique 4 digit number, available from either OFA or the state LINKS coordinator. The referral is the agency's certification that the student meets eligibility criteria. This referral also prompts contact from OFA to the student. Agency codes should never be given to unauthorized users, including students. The data base has been constructed to provide access to the authorized county worker regarding the application status, funds distributed, and frequency of contact between the ETV administrator and the student.
It is important that social workers in foster care and adoptions be aware of this resource and be assisted to complete these referrals and to use the database for case management purposes.

2. Administration: Currently, all North Carolina ETV vouchers are being administered by Orphan Foundation of America. The Foundation will send checks directly to third party providers or, in some circumstances, directly to the youth for approved budgeted expenses. If the DSS incurs ETV expenses prior to the student's approval for a training voucher, the student should be instructed to include that amount in their budget and to request reimbursement from OFA to the DSS.

VII. THE ADOPTION AND SAFE FAMILIES ACT OF 1997 [P.L. 105-89]

§ 11.25 Introduction

The federal Adoption and Safe Families Act of 1997 called upon states to make some significant changes to child protection laws in order to improve systems for getting children into safe, permanent homes within a reasonable amount of time. This Act began as H.R. 867 and can be found at the following website: http://thomas.loc.gov/ or by accessing the U.S. Code in 42 U.S.C.

Since 1997, the North Carolina General Assembly has made a number of changes and additions to the North Carolina Juvenile Code in order to comply with ASFA. Some of the changes are minor, but many are quite significant. The first and most significant piece of North Carolina legislation addressing ASFA was House Bill 1720 introduced in 1997.
The Children's Services Division of the N.C. Department of Health and Human Services, the Guardian ad Litem Program, the Court Improvement Project, and other organizations have worked together to attempt to educate all of the players in North Carolina child protection proceedings about ASFA and the resulting changes to North Carolina law.

ASFA regulations became effective in January of 2000 and served to clarify and expand upon the language contained in ASFA. These regulations emphasize the loss in federal funding that states can suffer if their courts do not comply with ASFA. In addition, the "[North Carolina] General Assembly added the thirty day filing requirement to these statutes [7B-807(b), 7B-905(a), 7B-1110] in 2001…logic and common sense lea us to the conclusion that the General Assembly's intent was to provide parties with a speedy resolution of cases where juvenile custody is at issue." *In re E.N.S.*, 164 N.C. App. 146, 155 (2004).

The following two articles, both from the American Bar Association, should provide the reader of this manual with an understanding of the most significant requirements of ASFA, the impact of ASFA, and the ASFA regulations. The ASFA provisions and regulations themselves should be consulted if more detail is desired.

§ 11.26 Impact of the Adoption and Safe Families Act (ASFA) on Judicial Resources and Procedures*

The Adoption and Safe Families Act of 1997, Public Law 105-89 (ASFA) presents a number of major challenges for state courts. State compliance with the law is a condition of state eligibility for funding to public child welfare agencies. The law, which is designed to achieve more timely decisions and stronger safety guarantees for abused and neglected children, includes the following new provisions that affect courts:

- In certain extreme cases of child abuse and neglect, courts are authorized to decide that states need not provide services to reunify families. ASFA §101(a), 42 U.S.C. §671(a)(15)(D).

- Once it is decided that the plan for a foster child is no longer reunification, agencies are required to make reasonable efforts to secure a new permanent home for the child. Courts are to monitor these efforts. ASFA §101(a), 42 U.S.C. §671(a)(15)(C).

- After a child enters foster care, earlier and more decisive hearings are required to determine a permanent plan (e.g., return home, adoption) for the child. ASFA §302, 42 U.S.C. §675(5)(C).

* This section is based on an article by Mark Hardin, ABA Center on Children and the Law, titled "New Requirements for State Courts in Child Abuse and Neglect Cases," © 1998 by the American Bar Association. The article is reprinted with permission from the American Bar Association and the author.

Any recommendations set forth in this section have not been adopted by the American Bar Association House of Delegates or Board of Governors and therefore do not represent official policy of the American Bar Association.

- After a child has been in foster care for 15 of the last 22 months, the state must -- subject to certain exceptions -- petition for the termination of parental rights. ASFA §103(a)(3), 42 U.S.C. §675(5)(E).

- Foster parents, preadoptive parents, and relative caretakers must be given notice and the opportunity to speak in court hearings, but need not be made parties to the proceedings. ASFA §104. 42 U.S.C. §675(5)(G).

New Demands on State Court Resources

The new requirements make new demands on state court resources in a number of specific ways. First, courts are expected to decide, early in the case, whether reunification services are required. Requests for court decisions that such services are not required will require more, earlier, contested hearings. It will also trigger earlier permanency hearings and, in turn, earlier termination of parental rights hearings.

Second, permanency hearings are required at 12 months, several months earlier than in the past. Further, permanency hearings are to be more decisive and comprehensive hearings than before. For example, in the absence of compelling circumstances to the contrary, the court is to order the initiation of termination proceedings. The court is also expected to thoroughly review all permanency options. Additional court and attorney time is required.

Third, there are now deadlines for filing or joining in termination petitions. As a result, petitions will be filed earlier in each case, causing a temporary bulge in termination hearings and a higher proportion of termination proceedings will be contested. There will be additional appeals of termination decisions.

Fourth, foster parents, preadoptive parents, and relative caretakers now must receive notice and have the opportunity to participate in court hearings in child abuse and neglect cases. This will require both additional court time and additional time and costs for court staff.

To meet these new resource demands, courts may need to reconsider their internal budgets, allocations of judges, and budget requests to state legislatures. Besides needing additional judge time, they may also need more specialized court staff, further funding for court appointed attorneys, and automated systems to monitor, among other things, the timeliness of judicial decisions.

New Procedural Issues for State Courts

There are a number of important procedural issues for state courts to resolve in implementing the new federal requirements. Depending on the state, these procedural issues might be addressed through legislation, court rules, case law, and court forms. The following is a list of some of the key procedural areas presented by ASFA.

First, states must adopt procedures for determining, early in the case, whether to require the state to provide services to reunify a family with a child in foster care. For example, the state must decide:

- At what precise stage of the court process is this decision to be made?

- Who initiates this decision? Can the judge inquire about whether reunification services should be required?

- Are there ways of ensuring that the agency and court will have enough information, early in the case, to make an informed decision about providing reunification services? For example, such information might include parents' criminal records, mental health histories, and past substance abuse treatment records.

- What procedural protections should apply in connection with the decision? Should the rules of evidence apply? What should be the burden of proof?

- Must there be repeated and duplicative hearings concerning whether reunification services are required? ASFA seems to call for the following sequence of hearings: an initial decision that reunification services are not required, a permanency hearing within 30 days (in which the decision may be reexamined), and a termination of parental rights hearing. Can these proceedings be consolidated or at least the early hearings be conducted as preliminary proceedings?

- What are the grounds for deciding, early in the case, that reunification services will not be provided? Note that legislatures must enact such grounds. The grounds may or may not be similar to grounds for terminating parental rights.

Second, states must adopt procedures for earlier and more decisive permanency hearings. For example, the state will need to consider:

- What notice and reports should be provided prior to the hearing? When should they be required?

- Will court oversight of agency efforts to preserve the family need to occur earlier and more rigorously to make it possible for courts to decide upon permanent plans at permanency hearings?

- Should judicial findings be required at permanency hearings? If so, should agency reports be formatted to address issues for inclusion in judges' findings?

- If judicial findings should be required, how should they be organized to encourage more decisive permanency hearings?

- Can permanency hearings be designed to help ensure that states meet their 15 month deadlines for either filing termination of parental rights proceedings or providing written explanations why termination proceedings are not appropriate?

Third, states must adopt procedures to ensure the participation of foster parents, preadoptive parents, and relative caretakers of abused and neglected children. For example, they will need to decide:

- Who should provide the notice to the foster parents, preadoptive parents, and relative caretakers and what should be the courts' role in overseeing such notice?

- What should be the procedures to allow foster parents, preadoptive parents, and relative caretakers to speak at hearings?

- Should foster parents, preadoptive parents, and relative caretakers be able to be present throughout the court hearings? Should they be permitted to become parties under specific conditions?

ASFA cannot succeed without effective judicial leadership. Individual judges must follow both the letter and the spirit of ASFA. They must have high expectations of the parties and develop an efficient and fair court process.

In turn, state supreme courts and state court administrators must communicate to the courts that they expect full implementation of ASFA and that they will do their best to provide the resources to make it possible.

§ 11.27 The New Federal Regulations on ASFA*

Overview

The U.S. Department of Health and Human Services (HHS) published final regulations on the Adoption and Safe Families Act (ASFA) on January 25, 2000. While these regulations, for the most part, reiterate the federal statute, they do clarify and expand on certain issues. The 74 pages in the *Federal Register* also have extensive commentary to guide state compliance. 65 Fed. Reg. 4020 (2000) (to be codified at 45 C.F.R. §§ 1355, 1356 & 1357)

Time Periods

The regulations use two different starting points in defining requirement time periods: actual removal and foster care entry. Actual removal is the date the child is removed from the home. A child "enters foster care" the earlier of:

- The date the court found the child neglected or abused.
- Sixty days after the child's actual removal. **[45 C.F.R. § 1355.20(a)]**

Requirement	Deadline	Starting Date
Case Plan	60 days	Actual Removal
Reasonable Efforts to Prevent Removal	60 days	Actual Removal
Six-Month Periodic Review	6 months	Foster Care Entry
Permanency Hearing	12 months	Foster Care Entry
Reasonable Efforts to Finalize Permanency Plan	12 months	Foster Care Entry
Mandatory Termination Petition Filing	15 of the last 22 months[53]	Foster Care Entry

The commentary clarifies that states are free to choose to hold these hearings earlier. For example, a state may run all time periods from actual removal.

A child may already be living with a relative when the state intervenes. The agency may decide the child should remain with the relative with that relative as the child's foster parent. In this situation, the child is "constructively removed" for time period requirements even though the child does not change homes. The date of constructive removal by court order is used as the date of actual removal. 45 C.F.R. § 1356.21(k)

* This section is based on an article written by Debra Ratterman Baker that originally appeared in the June 2000 issue of ABA Child Law Practice (Volume 19, No. 4), published by the ABA Center on Children and the Law. For more information about this publication, contact Lisa Waxler, Publications Coordinator, at (202) 662-1743.

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[53] N.C.G.S. § 7B-907(d) requires mandatory filing for TPR if the child has been placed out of the home **12 of the 22** months.

"Contrary to Welfare" Findings

A court finding that "continuation in the home is contrary to the welfare of the child" must be made at the *first* court ruling on the child's removal, even if temporary. If it is not made at this hearing, the child's "stay in care" is ineligible for Title IV-E. In other words, it cannot be remedied by a finding at a later hearing, unless the child has returned home and a new placement in foster care is necessary. 45 C.F.R. § 1356.21(c)

Contrary to welfare findings must be "detailed" and be in the court order or hearing transcript. Affidavits, *nunc pro tunc* orders, or orders simply referring to a state law requiring such findings for removal do not meet this requirement. 45 C.F.R. § 1356.21(d) The finding does not have to follow the exact wording of the federal statute. For example, a finding that placement is in the child's best interests is okay.

Reasonable Efforts

A court finding that "reasonable efforts have been made to prevent the child's removal from home" must be made within 60 days of the child actual removal from home. If it is not made within this period, the child's entire "stay in care" is ineligible for Title IV-E. 45 C.F.R. § 1356.21(b)

The court must also make a finding that the agency has made reasonable efforts to finalize a permanency plan. The permanency plan may be to reunify the family or secure the child a new permanent home. In other words, the regulations have consolidated these two reasonable efforts findings into one. The finding is based on the agency's permanency plan at the time of the hearing, not on a prior plan the agency has abandoned.

This finding must be made within 12 months from when the child "enters foster care," presumably at the permanency hearing. It must then be made every 12 months to retain Title IV-E for the child. A negative, insufficient, late, or missing finding means the child is ineligible for Title IV-E until the court makes a positive finding.

The court may find that a lack of efforts is reasonable, such as when there is no safe way to make efforts to prevent removal. Reasonable efforts findings must be detailed-they must include relevant case facts. These findings must be in the court order or hearing transcript. Affidavits, *nunc pro tunc* orders, and orders simply referring to state laws requiring reasonable efforts for removal do not meet the requirement. 45 C.F.R. § 1356.21(d)

The exact wording of the federal statute does not have to be used as long as the findings make clear that the agency made reasonable efforts.

Aggravated Circumstances

The court may waive reasonable efforts to reunify if it finds aggravated circumstances. If reasonable efforts are waived, a separate reasonable efforts finding is not required.

The regulations clarify that the court must waive reasonable efforts if a parent has been convicted of an enumerated felony. However, if criminal proceedings are pending or under appeal, the court has discretion to determine if it is reasonable to proceed with reunification. This decision is based on the child's developmental needs and the length of time before the criminal proceedings or appeal will be resolved. 45 C.F.R. § 1356.21(i)

Permanency Hearings

The permanency hearing is a state plan requirement. It is not a Title IV-E eligibility requirement. If the state fails to hold a permanency hearing for a child, it is out of compliance with the state plan. However, the child remains eligible for Title IV-E. 45 C.F.R. § 1356.21(h) The permanency hearings must be held by a court or a court-approved administrative body that is not under the supervision or direction of the state agency. 45 C.F.R. § 1355.20(a)

A full hearing is required. Paper reviews, *ex parte* hearings, agreed orders, and hearings not open to parental participation are *not* permanency hearings.

The regulations clarify that the court may order reunification as the permanent plan at this hearing if:

- The parents have been diligently working toward reunification.
- Reunification is expected in a time frame consistent with the child's developmental needs.

The agency may change the child's permanency plan at any time. It does not have to wait for the permanency hearing to do so. It does not need to get court approval of the change. 45 C.F.R. § 1356.21(b)(2)

Guardianship

Like ASFA, the regulations define a "legal guardianship" as a judicially-created relationship between the child and caretaker that is permanent and self-sustaining. It must transfer the child's protection, education, care and control, custody, and decision-making to the caretaker. The caretaker does not have to be a relative. States are not required to adopt the statutory definition into their law. 45 C.F.R. § 1355.20(a)

Guardianship subsidies may not be paid out of Title IV-E monies unless the state has received a federal waiver. However, this does not preclude states from funding guardianship subsidies.

Trial Home Visits

Child welfare agencies may continue to receive Title IV-E for children with parents on "trial home visits." These visits can be for no more than six months unless the court authorizes them for a longer period. The court order must explicitly extend the trial home visit-a court hearing continuance is not sufficient. 45 C.F.R. § 1356.21(e)

If the trial home visit exceeds six months without court authorization, then the child's return to care is considered a new placement. To establish Title IV-E, new "contrary to the welfare" and "reasonable efforts to prevent removal" findings must be made.

Termination of Parental Rights

While the child is on a trial home visit, the "clock stops" for the mandatory termination petition filing deadline ("15 of the last 22 months"). For example, if the child is in foster care for 10 months, then goes home for a trial home visit, the deadline for filing a termination will be *five* months after the child returns to foster care. However, if the trial home visit is over seven months long, the clock starts over. Runaway episodes also stop the clock. 45 C.F.R. § 1356.21(i)

The state has discretion to file a termination petition whenever it is in the child's best interests. The "15 of the last 22 months" is a maximum, not a minimum. States have the option of making the child's length of stay a termination ground, but are not required to do so. The agency must file a termination within 60 days of a judicial determination that:

- The child is an abandoned infant.
- Reasonable efforts are not required because the parent's felony conviction.

The agency must begin the adoptive family search and approval process when it files the termination petition.

Compelling Reasons

The term "compelling reasons" is used in two different provisions in ASFA:

- The agency may determine it has a "compelling reason" not to file a termination petition within the "15 of the last 22 months" time period.
- The court may determine at a permanency hearing that there is a "compelling reason" that reunification, adoption, guardianship, and relative placement are not the child's best interests. If it makes such a finding, it may order "another planned permanent living arrangement" for the child.

45 C.F.R. § 1356.21(i)

"Compelling reasons" not to file a termination petition must be considered on a case-by-case basis considering the individual circumstances of the child and family.

The commentary gives examples of "compelling reasons:"

- Adoption is not the appropriate permanency plan for the child.
- There are no grounds to file a termination petition.
- The child is an unaccompanied refugee minor.
- An international legal obligation or compelling foreign policy reasons would preclude termination.

These examples are just illustrations. The state may not specify categories of children for whom filing a termination petition is not appropriate.

The compelling reason must be documented in the case plan. This is an agency decision-court approval is not required. The agency does not lose federal funding even if the court disagrees.

This decision is only required to be made once. Review at subsequent hearings is recommended, not required.

The commentary also gives examples of "compelling reasons" for a court to order "another permanent planned living arrangement:"

- An older teen who specifically requests emancipation as his or her permanency plan.
- A child who has a significant bond to a parent unable to care for the child because of an emotional or physical disability. The foster parents are willing to raise the child and facilitate visitation with the parent.

- An Indian child for whom the tribe has identified another planned permanent living arrangement.

The state may not identify a specific category of children who are excluded from one or more permanency options. For example, it cannot categorically exclude delinquents from being considered for adoption. 45 C.F.R. § 1356.21(h)

Responsibility for Placement

For Title IV-E eligibility, the public child welfare agency must have "responsibility for the child's placement and care." This means that the agency decides the child's specific placement, not the court. If the court orders the child into a specific placement, the child is ineligible for federal matching funds. 45 C.F.R. § 1356.21(g)

Foster Family Home

All foster family homes, including relative homes, must meet the same licensing standards. Any state that has separate standards for relative homes will have six months to come into compliance with this requirement. The commentary does allow states to waive some non-safety standards, such as square footage requirements, for relatives. 45 C.F.R. § 1355.20(a)

The regulations allow states to claim Title IV-E from the date the foster parent satisfies all licensing requirements, even if the actual license has not yet been issued. However, the license must be issued within 60 days.

Criminal Records Checks

ASFA requires states to run criminal records checks on potential foster and adoptive parents. States may opt out of this requirement. 45 C.F.R. § 1356.30

To opt out, the state must adopt legislation or the governor must send HHS a letter. States who opt out must still document they considered safety issues in licensing a foster or adoptive parent.

States who do not opt out must document they made criminal records checks for all foster and adoptive parents licensed after November 19, 1997 (the effective date for ASFA). States do not have to go back and make these checks on those approved before this date. Checks are required for foster and adoptive parents only, not on other household members.

The state cannot license anyone convicted of a violent felony. It also cannot license anyone convicted of a drug-related felony in the last five years. "Drug-related felonies" include alcohol-related felonies.

This is both a Title IV-E state plan and child eligibility requirement. The state cannot claim Title IV-E funds for a child placed with a foster parent with any of the enumerated convictions.

Foster Parent Rights

ASFA gives the child's caregiver a right to notice and an opportunity at any hearing on the child. It does not require states give foster parents "party" status. 45 C.F.R. § 1356.21(o); 45 C.F.R. § 1355.34(b)(2)(v)

The regulations require this notice to be "timely" and to be given for permanency hearings and six-month periodic reviews. They do not prescribe how to notify the foster parents, but recommends the same procedure as for parties.

The regulations do not define "opportunity to be heard." However, the commentary states that foster parents do not have a right to appear at the hearing as long as they can give input to the court, such as through a written submission.

Delinquents in Foster Care

The regulations clarify that delinquents and status offenders placed in Title IV-E eligible placement must meet the same requirements as dependent children. The child welfare agency does have flexibility to do appropriate individual case planning. 45 C.F.R. § 1356.21

A delinquent or status offender "enters foster care" 60 days after the child is removed from home. The only exception is when a child is first placed in detention and then moved to foster care: the time period runs from the date the child is placed in a Title IV-E eligible placement.

There must be a "contrary to the welfare" finding at the first hearing on the actual removal. However, a finding that "continuation in the home is contrary to the interests of society" is not acceptable for Title IV-E eligibility.

Voluntary Placements

The same requirements apply whether the child's placement is involuntary or voluntary. A child in voluntary placement "enters foster care" 60 days after actual removal. The agency has no affirmative duty to notify parents who voluntarily place a child of ASFA requirements. 45 C.F.R. § 1356.22

Indian Child Welfare Act

The regulations clarify that Indian children must meet the same requirements as other dependent children. States must still meet Indian Child Welfare Act (ICWA) and nothing in the regulations supercedes ICWA.

The definition of "foster family home" includes foster parents living on or near an Indian reservation who are licensed or approved by the tribe. "Child care institutions" also includes those facilities licensed by the tribe. 45 C.F.R. § 1355.20(a)

One example of a "compelling reason" mentioned in the commentary is an Indian child for whom the tribe has identified another planned permanent living arrangement. 45 C.F.R. § 1356.21(h)

Tribes are encouraged to form agreements with states to receive Title IV-E monies. However, all Title IV-E funds must go through state agencies, not directly to tribes. Under such agreements, a tribe may have "responsibility for a child's placement and care."

Tribes do not have authority to adopt their own definitions of "aggravated circumstances." However, if a tribe has responsibility for the child's placement and care, it could determine there is a "compelling reason" not to file a termination petition. However, it may not categorically exempt children-it must make the determination on a case-by-case basis.

Multiethnic Placement Act

The Multiethnic Placement Act (MEPA) prohibits discrimination based on race, color, or national origin in foster care or adoptive licensing and child placement. States may not routinely consider ethnicity in placement decisions. 45 C.F.R. § 1355.38

HHS will impose penalties on a state for individual violations determined by a court finding or Justice Department investigation. States may lose from two to five percent of fiscal year Title IV----E funds based on the number of violations.

If a state agency has a statute, regulation, policy, procedure, or practice that, on its face, violates MEPA, it has six months after HHS notification to remedy this violation before penalties are imposed. It must submit a corrective action plan which must be approved by HHS. Private agencies that violate MEPA must return all federal foster care and adoption funds to HHS.

States do not violate MEPA by:

- Making special recruitment efforts for minority foster and adoptive parents.
- Using a relative placement preference.
- Following Indian Child Welfare Act requirements.

Effective Date

The final rule went into effect March 27, 2000. These include:

- The consolidation of the finding on reasonable efforts to reunify the family and the finding on reasonable efforts to secure the child another permanent home into a single finding on reasonable efforts to "finalize a permanency plan."
- The permanency hearing requirement for children who were formerly exempt-children in long-term foster care and preadoptive homes.

CHAPTER 12
ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

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§ 12.1 Summary

Being an attorney advocate (AA) for the Guardian ad Litem Program puts an attorney in a unique situation. Instead of simply representing a client's wishes, as most attorneys do, an attorney advocate represents the best interests of a child. This type of representation is also unique because the attorney typically is representing the child as part of a team, which consists of the attorney, the volunteer, and, to a lesser degree, the GAL staff member. Another unique element is that the AA is working on a contractual basis with the GAL Program, typically juggling GAL contract responsibilities with those of an active law practice. These unique aspects of Guardian ad Litem representation give rise to unique ethical issues. This chapter of the Manual addresses ethical issues specifically applicable to GAL representation and does not attempt to cover general ethical issues. Please note, however, that there are not always clear-cut answers to these ethical dilemmas. Many of them have never been formally addressed by the State Bar or mentioned in case law or anywhere else. Consequently, there are times when the most we can do to resolve an ethical dilemma is to examine all aspects of an issue and approach it with logic, fairness, and care. However, this section is titled "Ethics *and Policy* Issues. . ." because for many of the issues that cases and the State Bar have failed to address, the GAL Program may have informal policies or formal "Guidelines" addressing these issues.

§ 12.2 Who Is the AA's Client?

A. The Complexity of Best Interest Representation

An AA represents the best interests, not necessarily the wishes, of a child, and does so via the recommendations of a GAL volunteer, with support and direction from the District Administrator of the local Guardian ad Litem office, pursuant to a contract with the Guardian ad Litem Services Division for the Administrative Office of the Courts. Does this sound confusing? It should. The AA seems to have obligations to all people or entities mentioned above, yet who is the AA's client? Some child advocates describe the GAL/AA joint enterprise as the AA representing the child through the GAL. [1] That statement would aptly describe this particular division of authority under Rule 1.2 of the Revised Rules of Professional Conduct of the North Carolina State Bar.[2]

B. The Child Is the Client

The definition of the GAL Attorney Advocate's client has not been resolved by the North Carolina State Bar or in North Carolina cases. The best guidance in resolving this dilemma is to examine the language of 7B-601, which states that ". . . an attorney shall be appointed in the case in order to assure protection of the child's legal rights . . ." This language specifically refers to protecting the child's rights and not to representation of the GAL volunteer or the program. Thus, it is reasonable to infer that the attorney advocate represents the child, not the volunteer. However, the representation is unconventional in that it is done as a team, in cooperation with the volunteer, and is of the child's best interests, not wishes.

[1] Ilene Nelson, "Ethical Dilemmas in Juvenile Court," revised 2/2000, page 8.
[2] The Revised Rules of Professional Conduct can be viewed at www.ncbar.com/rules.

§ 12.3 Dilemmas Arising from Team Representation

A. Conflicts of Opinion Between AA and GAL

1. Conflicts should be resolved outside the courtroom

If the AA, GAL and/or staff member disagree as to any aspect of the case, such a conflict must be identified and should be resolved prior to any court proceedings. Ideally, the GAL, AA, and staff member will agree on what to present to the court prior to any proceedings (although it is important to remember that the volunteer and the attorney are the appointed representatives of the child, not the staff member). If, however, the attempt at resolution (see the rest of the discussion in this subsection) yields more than one option to recommend to the court, than the attorney could present more than one option to the court under certain circumstances. First, the attorney must be mindful of his or her ethical obligation of competent and zealous representation.[3] Thus, the attorney must be able to present each option with equal zeal. In addition, there should be no "ownership" given to either option – the attorney should not state that the attorney has one recommendation and the GAL another. If the attorney is unable to present the options in this manner, then presenting more than one option would not be appropriate.

2. Insuring that everyone has the same information

Conflicts of opinion often result when one person lacks information that another person has. It is important to ensure that the AA, GAL, and staff member all have the same information from which to form an opinion on any issues surrounding the case.

3. Deferring to volunteer on issues of fact; deferring to attorney on issues of law; deferring to staff on issues of policy

The volunteer is the member of the team who is closest to the facts of the case. When a conflict arises as to an issue of fact, the team should typically defer to the volunteer, assuming the volunteer knows more about the facts than the attorney or staff member. When a conflict arises as to an issue of law, the team should defer to the attorney. When a conflict arises as to an issue of GAL policy, the team should defer to the GAL staff member who may choose to consult with a Regional Administrator.

4. When the conflict cannot be resolved

When the AA and GAL have attempted to resolve a conflict but simply cannot agree, the matter should be handed over to the District Administrator for resolution. As long as the resolution is something that both AA and GAL can live with, the team should move forward with it.

[3] See Rule 1.1, REV. RULES PROF. COND. and comments to Rule 1.3, REV. RULES PROF. COND., addressing competency and zeal in representation at the end of this chapter.

However, attorneys should not be expected to go to court and advocate for anything they oppose strongly or believe is not in the child's best interest. And of course, attorneys cannot put themselves in a situation that they feel would compromise ethical standards. If there is a conflict in opinion that cannot be resolved, one member of the team may have to resign from the case. If an attorney seeks to withdraw, the attorney can do so only within the bounds of professional responsibility and must be released by the judge.[4]

B. More Than Just a "Mouthpiece"? [5]

With heavy caseloads and a volunteer to do the legwork of investigation and make recommendations, it is easy for the AA to go to court feeling like a mere mouthpiece for the volunteer and/or program. But can the AA meet the ethical obligations of representation if merely acting as a "mouthpiece"?

The comments to Rule 1.3 of the Revised Rules of Professional Conduct state "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Since the AA is acting as a member of a team, the AA is not expected to take on all aspects of representation as could be expected in many typical attorney-client situations. The volunteer an GAL staff will do much of the work that lays a foundation for good representation. But there is a big difference between offering good team representation to a client and simply offering "mouthpiece" representation. Engaging in "mouthpiece" representation is not meeting ethical obligations to a client. Consider the following examples:

Good Team Representation	**Mouthpiece Representation**
Learns and analyzes all information the GAL volunteer has gathered; asks that gaps in investigation be filled in	Is exposed to information GAL volunteer has gathered and considers it complete
Reviews GAL report for clarity and substance; ensures that facts in GAL report support recommendations; talks to GAL about case	Receives GAL report and looks at it; considers it complete
Develops strategy for presenting GAL's case: talks to other attorneys; determines what evidence should be presented and the manner in which it should be presented; subpoenas and prepares necessary witnesses; researches legal issues; files necessary motions, etc. (Active/initiating approach)	Plans to present whatever GAL volunteer pushes; plans to question any witness put on by other parties and respond to motions by other parties. (Passive/responsive approach)

[4] Guardian ad Litem Guidelines for Best Practice (2000), IV.E.4.a.5.
[5] This section also relates to § 12.6.E.

C. Action Only With Knowledge and Agreement of GAL

Because the AA acts as part of a team, the AA must be careful not to take actions that the GAL has no knowledge of or is not in agreement with unless the action is so legalistic in nature that it would be unrealistic for the GAL to have any input whatsoever. Even so, it is always best to inform the GAL to avoid the potential for surprise, confusion, and mistrust.

D. Being a Team Member

One important aspect of being a team member is an understanding of the division of responsibilities among team members. Chapter 8 of this manual discusses the role and responsibilities of the attorney advocate in relation to staff and volunteers. Please see Chapter 8 for this information.

E. Unauthorized Practice of Law

Rule 5.5(d) of the Revised Rules of Professional Conduct states that "A lawyer shall not assist a another person in the unauthorized practice of law." As such, the attorney advocate needs to be careful not to aid or allow a GAL volunteer or staff member to engage in activities that are considered practicing law. In other words, when dividing responsibilities in team representation, the attorney advocate should ensure that the attorney advocate takes on anything that could be considered practicing law.

Respondent parents, relatives, witnesses, social workers and others sometimes ask the GAL's opinion about what they should do, and at times they are actually asking for legal advice without realizing it. Through training and assistance, the GAL should be coached to avoid inadvertently giving legal advice.[6]

§ 12.4 Making Sense of "Best Interest" Representation

A. What Does "In the Best Interest of the Child" Mean?

Section B-5 of the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases and the comments that follow speak well to the meaning of best interest:[7]

B-5. Child's Interests.

The determination of the child's interests should be based on objective criteria addressing the child's specific needs and preferences, the goal of expeditious resolution of the case so the child can remain or return home or be placed in a safe, nurturing, and permanent environment, and the use of the least restrictive/detrimental alternatives available.[8]

Commentary

A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should

[6] *Nelson*, "Ethical Dilemmas in Juvenile Court," pp. 8, 9.
[7] ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases, Approved February, 1996. The standards can be accessed at the following link: http://www.abanet.org/child/resources.shtml
[8] *Id*., page 7.

base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. The child's various needs and interests may be in conflict and must be weighed against each other. Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels. See generally James Garbarino & Frances M. Stjott, What Children Can Tell Us: Eliciting, Interpreting, and Evaluating Critical Information from Children (1992). The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.

A child has basic physical and emotional needs, such as safety, shelter, food, and clothing. Such needs should be assessed in light of the child's vulnerability, dependence upon others, available external resources, and the degree of risk. A child needs family affiliation and stability of placement. The child's developmental level, including his or her sense of time, is relevant to an assessment of need. For example, a very young child may be less able to tolerate separation from a primary caretaker than an older child, and if separation is necessary, more frequent visitation than is ordinarily provided may be necessary.

In general, a child prefers to live with known people, to continue normal activities, and to avoid moving. To that end, the child's attorney should determine whether relatives, friends, neighbors, or other people known to the child are appropriate and available as placement resources. The lawyer must determine the child's feelings about the proposed caretaker, however, because familiarity does not automatically confer positive regard. Further, the lawyer may need to balance competing stability interests, such as living with a relative in another town versus living in a foster home in the same neighborhood. The individual child's needs will influence this balancing task.

In general, a child needs decisions about the custodial environment to be made quickly. Therefore, if the child must be removed from the home, it is generally in the child's best interests to have rehabilitative or reunification services offered to the family quickly. On the other hand, if it appears that reunification will be unlikely, it is generally in the child's best interests to move quickly toward an alternative permanent plan. Delay and indecision are rarely in a child's best interests.

In addition to the general needs and interests of children, individual children have particular needs, and the lawyer must determine the child client's individual needs. There are few rules which apply across the board to all children under all circumstances.[9]

B. Wishes Are Part of Best Interest

Rule 1.2 of the Revised Rules of Professional Conduct discusses abiding by a client's decisions concerning the objectives of a client's representation. Yet, in being obligated by statute to represent the best interests of the child and not the child's wishes, an AA cannot be bound by this rule. Nevertheless, a child's wishes should be an important factor in determining what is in the child's best interest. While the AA is obligated to represent the child's best interests and not the child's wishes, the GAL and AA must make an effort to determine what the child wants. While children often want what is best for them, there are times when the child's wishes and the GAL's determination of best interest conflict.

[9] Id., page 8.

Consider this example of the importance of ascertaining the child's wishes: the GAL believes that an adolescent should be placed in a specific therapeutic group home but learns that the child doesn't want to go there and has threatened to run away if placed there. While the GAL feels that this group home can offer the kind of care the child needs, the GAL is concerned that the child will in fact run away and be difficult or impossible to find. The GAL therefore decides to recommend another group home, which will not be as good at addressing the child's problem but where the child is willing to remain, along with additional outside services to address the child's needs. Had she not taken the child's wishes into consideration in her determination of best interests, this GAL may well have found herself searching for a missing child.

Both the GAL volunteer and the AA should make sure that the child client's wishes are presented to the court. GAL court reports should include a separate section dealing specifically with the child client's wishes. If a child client is too young to express his or her wishes, then the section addresses wishes should state so. *See* § 12.4 (C)(2)(b) below.

C. Dealing with Conflicts Between Wishes and Best Interest

What if the child's wishes conflict with what the GAL has determined to be the child's best interests and the GAL is not able or willing to reconcile the child's wishes with her recommendations to the court? The GAL Program's Guidelines for Best Practice set out expectations for the attorney advocate that include "Wishes expressed by the child are communicated to the court."[10] But what is the best way to do this when there is a conflict? A number of issues should be considered.

1. Determining whether there is middle ground

Every attempt should be made to arrive at a middle ground. The GAL, the AA, and the case supervisor should ask themselves once again whether there is any way to reconcile the wishes of the child with the GAL's recommendations to the court. Does the child fully understand the GAL's reasoning, and is it possible that if he did, he might agree with the GAL's recommendations? Is there something more the GAL can do to illustrate the reasoning behind the recommendations? Does the GAL fully understand the child's reasons for feeling the way he does, and the impact of recommending something that conflicts with those feelings? Might there be a way to modify the recommendations so that they still protect and promote the best interests of the child without conflicting with his wishes?

2. The child's voice in court concerning the child's wishes [11]

a. Allowing the child to speak

Even if the GAL cannot recommend what the child wants, the GAL should make sure the court *knows* what the child wants. The method in which the court is informed will depend on the child's age and the situation. For children 12 years old and older, the statute even requires that they be given notice of certain proceedings including reviews, permanency planning hearings, and post-termination of parental rights placement court reviews. **[7B-906; 7B-907; 7B-908]** As such, children twelve and older should be given the opportunity to talk to the judge if they so desire or if the GAL believes that such testimony would further the child's best interest. Younger children can also be given the opportunity to talk to the judge unless there is a good reason not to. If the

[10] Guidelines for Best Practice, I.E.1.d.
[11] See § 2.7.H, for more information on determining whether the child should be present and/or testify.

child does not wish to formally address the court, the AA may arrange for the judge to meet with the child in chambers or submit a letter to the judge. Alternatively, some districts utilize "Youth Court Reports" that specifically have a section written by the child-client. Allowing the child to speak can be empowering for children uprooted from their families.

b. Having the GAL or AA inform the court of the child's wishes

If the child does not inform the court of his or her wishes, someone must. It is reasonable for the child to expect that the GAL or AA will be that person since the GAL represents the child and must take wishes into account in determining best interest. The GAL or AA can simply tell the court what it is that the child wants even if the GAL's recommendations differ.

§ 12.5 Obligations to the Child and the Child's Role in Court

A. Contact with the Child and Preparation for Court

Is an attorney advocate expected to have contact with the child when a GAL volunteer is appointed in the case? The Guardian ad Litem Program's Guidelines for Best Practice set out expectations of at least monthly contact for the volunteer.[12] These Guidelines for Best Practice, however, only indirectly address expectations for contact with children by attorneys. The Guidelines state that the attorney is to advocate for and further the best interests and protect the legal rights of the child-client by "interviewing witnesses, including the child, when appropriate and preparing witnesses for court."[13] This guideline therefore suggests that there are no specific time expectations for contact but that contact should be made when appropriate for court preparation.

Although the volunteer maintains the primary connection with the child, and there is no automatic expectation of such a connection between child and attorney, at times the volunteer's connection is not enough for quality representation and the attorney must also have a connection for adequate court preparation. There are many situations in which the AA would be remiss in having no contact with the child: for example, when the child is expected either to testify in court or to informally address the judge. Whenever a child will speak to a judge, the AA must adequately prepare the child. The attorney must establish that the child is willing and able to speak and to prepare him to speak, as well as attempt to prepare him for any potential trauma and ease his fear of the unknown. There are other situations in which an attorney cannot adequately prepare his or her case without having contact with the child, and it is incumbent upon the attorney to determine when such contact is necessary.

B. Making Sure the Child Is Informed

Rule 1.4 of the Revised Rules of Professional Conduct emphasizes the importance of keeping a client informed and of explaining matters to a reasonable extent. While this rule refers to the client whose wishes are being represented, the fact that the AA represents best interests and not wishes should not diminish the importance of making sure the child and the GAL are informed and understand, to the extent that they should understand, what is going on. Obviously, the extent to which a child should be informed will depend on the age of the child and circumstances. In fact, the comments to Rule 1.4 state

[12] GAL Guidelines for Best Practice, III.G.1.a.1.
[13] Id. at IV.E.1.F.2.

as follows: "Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable; for example, where the client is a child or suffers from "diminished capacity."

Not knowing what is going on is one of the most difficult things for a child who is the subject of a petition. Imagine what it would be like to be taken out of your home, sent to live elsewhere, to be forced into changing schools and friends, going to see counselors, being interviewed by strangers and having no idea what will happen next. Ideally, social workers, counselors, foster parents, and other people who have become involved in this child's life are talking to him on his level about what is happening to him, what he can or cannot expect, and what their role in the process is to be. But as the child's representative, the GAL and also the AA should ensure that there are no gaps in the information that the child is receiving. They should make sure that the child has been informed of everything that is appropriate for his level of age and understanding, that the child is given an opportunity to ask questions about what is going on, and that the child has been given answers when answers exist. Even the Juvenile Code formally recognizes the importance of informing the child and allowing the child to be involved in certain child protection statute provisions. Such provisions require notice to the child, if age 12 or over, and/or information from the child in the hearing.[14]

C. The Child's Opportunity to Be in Court

The ABA Standards address the issue of the child's opportunity to be in court as follows:
D-5. Child at Hearing.

> *In most circumstances, the child should be present at significant court hearings, regardless of whether the child will testify.*[15]

Commentary

> *A child has the right to meaningful participation in the case, which generally includes the child's presence at significant court hearings. Further, the child's presence underscores for the judge that the child is a real party in interest in the case. It may be necessary to obtain a court order or writ of habeas corpus ad testificandum to secure the child's attendance at the hearing.*
>
> *A decision to exclude the child from the hearing should be made based on a particularized determination that the child does not want to attend, is too young to sit through the hearing, would be severely traumatized by such attendance, or for other good reason would be better served by nonattendance. There may be other extraordinary reasons for the child's non-attendance. The lawyer should consult the child, therapist, caretaker, or any other knowledgeable person in determining the effect on the child of being present at the hearing. In some jurisdictions the court requires an affirmative waiver of the child's presence if the child will not attend. Even a child who is too young to sit through the hearing may benefit from seeing the courtroom and meeting, or at least seeing, the judge who will be making the decisions. The lawyer should provide the court with any required notice that the child will be present. Concerns about the child being exposed to certain parts of the evidence may be addressed by the child's temporary exclusion from the courtroom during the taking of that evidence, rather than by excluding the child from the entire hearing.*

[14] See, e.g., N.C.G.S. 7B-506, 7B-901, 7B-906.
[15] American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, approved February, 1996.

The lawyer should ensure that the state/custodian meets its obligation to transport the child to and from the hearing. Similarly, the lawyer should ensure the presence of someone to accompany the child any time the child is temporarily absent from the hearing.[16]

§ 12.6 The Attorney Advocate's Role Without the Burden of Proof

A. Introduction

The Attorney Advocate is often in the unique position of representing one who has full party status[17] in a case without being officially labeled as either the petitioner or the respondent. Thus the AA often has no burden of proof and no need to put on a defensive case. Yet the AA is still charged with the responsibility of putting on evidence, examining witnesses, and making arguments that support the best interests of the child.

B. Establishing a Goal

Even though the AA's client, the child, is neither petitioner nor respondent, the results of the case have more of an effect on the child than on anyone else. As a result, the AA must have a goal with regards to what should be achieved in each and every hearing. The attorney must have a goal in order to have a strategy. In adjudication, the AA's goal is likely to be the same as that of either the DSS attorney or the parents' attorney(s). In disposition, the goal may be the same or similar to that of the DSS attorney or the parents' attorney(s)--or it may be entirely different. In any event, the AA's strategy will revolve around making sure that all evidence surrounding the case that supports the GAL's goal is in fact presented in court.

Consider the commentary to Part I, subsection B-1 in the ABA Standards:

The child's attorney should not be merely a fact-finder, but rather, should zealously advocate a position on behalf of the child. (The same is true for the guardian ad litem, although the position to be advocated may be different). In furtherance of that advocacy, the child's attorney must be adequately prepared prior to hearings. The lawyer's presence at and active participation in all hearings is absolutely critical. See, Resource Guidelines, at 23.

Although the child's position may overlap with the position of one or both parents, third-party caretakers, or a state agency, the child's attorney should be prepared to participate fully in any proceedings and not merely defer to the other parties. Any identity of position should be based on the merits of the position, and not a mere endorsement of another party's position. . ..[18]

C. Communicating with Other Attorneys about Their Intentions

Communicating with DSS and parents' attorneys about their intentions in the case is the best way for the AA to prepare his or her case. If the AA knows or has a general idea regarding the other attorneys' goals and plans for presenting evidence, the AA will be able to develop a strategy that complements but does not duplicate their evidence. In fact, when the GAL's goals are essentially the same as one of the other attorneys, it may be beneficial to strategize with the other attorney in an attempt to maximize the effectiveness and efficiency of the presentation of evidence in the case. Conversations with another

[16] *Id*. at 13.
[17] N.C.G.S. 7B-601 states, "The juvenile is a party in all actions under this Subchapter."
[18] ABA Standards, page 3.

attorney who has the same goal can also help ensure that each party is not doing anything that would be detrimental to the other, since they are both pursuing the same goal.

D. Strategizing the Case According to the Goal and the Intentions of Other Parties

Once the AA has a goal and some idea of the other parties' intentions, the AA can determine what evidence he or she will need to prepare and present and the arguments that should be made in support of the goal.

E. Zealous Advocacy

1. What is zealous advocacy?

a. Rules of ethics

Rule 1.3 of the Revised Rules of Professional Conduct states "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The comments to that Rule go on to say "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued."

b. "Painting a picture" for the court and quality representation

The dictionary definition of the word **"zeal" is "enthusiastic and diligent devotion in pursuit of a cause, ideal, or goal."** Zealous advocacy, therefore, is really all about being devoted to accomplishing goals on behalf of your client, which means providing the best possible quality representation. Law school teaches about the basics of quality representation regarding how and what to address in court according to the requirements of the law. But painting a picture takes representation a step further to ensure that evidence and arguments bring the case to life in the courtroom. Painting a picture for the court means utilizing evidence and arguments to convey to the court the detailed circumstances surrounding the client or other parties such that the judge can picture the situation a person is in and what this person's life is like. Details include tangible circumstances such as living arrangements, childcare, employment, mental and physical health as well as intangible ones such as a person's apparent capabilities or feelings about his or her situation. Time limitations, circumstances, local practice, and individual habits can present a host of impediments to putting to use the basics of quality representation. By overcoming the impediments and covering the basics, an attorney has all the tools needed to paint a picture of the lives of the people in the case for the court.

c. Some basic elements of quality representation [19]

- Deciding on what you need to accomplish for your client (goals)
- Having conversations with other parties to determine their perspective and intentions
- Developing a strategy to accomplish your goals
- Familiarizing yourself with all relevant information in the case
- Filling in gaps in information via investigation or delegation of investigation
- Determining what evidence you should presentaccording to your strategy as well as the anticipated strategy of other parties and evidence you expect them to present
- Knowing all statutory and case law relevant to your case and identifying cases you might use to support your position
- Having solid knowledge regarding local and state resources to address situations encountered
- Preparing evidence and witnesses
- Issuing subpoenas
- Preparing to get the most out of other parties' evidence via cross-examination
- Preparing for the unexpected
- Being an active participant in the proceedings
- Arguing your case to support your goal and "painting a picture" for the court

2. Getting help when you cannot do it all

Rule 1.1 of the Revised Rules of Professional Conduct addresses competence, stating:

> A lawyer shall not handle a legal matter which the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

If an AA becomes aware that he or she cannot give a case the time and attention it deserves, or that the case involves issues that the AA does not feel comfortable handling, the AA should get help. The AA can contact the GAL Pro Bono Program to inquire about getting an attorney to take on the entire case or simply assist with a particular issue in the case. AAs may also call the GAL State Office and consult with theGAL Associate Counsel or the Administrator.[20] The GAL Associate Counsel is available to research specific issues, to assist attorneys in strategizing their cases, to locate legal resources, and generally to offer any type of legal assistance that is within the scope of their abilities. RPC 199, set out at the end of this section, addresses the issue of lacking competence and experience to handle a case.

[19] The reader should also consult Chapter 8 of this manual for more information on expectations of representation by GAL attorney advocates.

[20] Deana Fleming is the GAL Associate Counsel and may be reached at (919) 890-1255 or by email: deana.k.fleming@nccourts.org. Jane Volland is the GAL Administrator and may be reached at (919) 890-1251 or by email: jane.volland@nccourts.org.

§ 12.7 Conflicts

A. Defining Conflict

Conflicts of interest do occur in GAL representation, and when they do, they are often not simple. The toughest issue in dealing with conflicts is in identifying them in the first place. The North Carolina Revised Rules of Professional Conduct ("the Rules") specifically address conflict in a number of rules. While these rules help to identify situations that could be defined as problematic legal conflicts, any situation still requires good judgment. There are also conflicts of interest in GAL representation that may or may not involve attorneys and do not fit the definition of a legal conflict within the Rules of Professional Conduct but that are, in fact, conflicts. In such cases, the conflict could be with the entire GAL Program, the GAL program in a particular district, or with a GAL staff member or volunteer. The Juvenile Code itself, in G.S. 7B-1202, refers to GAL conflicts of interest but does not define them. This statute states "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."

Thus there are no hard and fast rules for identifying potential conflicts, and it is best to deal with them on a case-by-case basis. **This subsection in the manual sets out scenarios and addresses the issue of conflict in each. It is important to note, however, that a slight change in the circumstances of a given situation could dramatically change the advice given on the best way to handle it.** Once it is established that a situation does in fact present a conflict, the issue then becomes the best way to deal with the conflict, which is usually less complicated.

1. Revised Rules of Professional Conduct on general conflicts and former clients

It is worth the time it takes to read over these rules again before tackling a potential conflict situation. The comments following these Rules (set out at the end of this chapter) are also valuable. Note that these are not the only Rules relating to conflict, but these are the ones that would apply most frequently to GAL representation.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.7, NC REV. RULES PROF. COND.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.9, NC REV. RULES PROF. COND.

2. Conflicts in GAL representation cannot be removed by consent of the child client

One of the difficulties in applying the Rules involving conflicts to GAL representation is the fact that the Rules allow certain conflicts to be waived by the client. In GAL representation, however, the client is a child and child clients are presumed incapable of certain decisions and actions, depending upon the child's age and maturity. However, a child of any age is not likely to be considered capable of making an appropriate decision about choosing to consent to representation in a situation with a potential conflict. For this reason, situations presenting conflicts that would be prohibited by the rules unless consent by the client can be obtained are situations that should be conflicted out by the GAL.

However, it is necessary to determine who actually has the conflict. If the conflict exists because the AA formerly represented a parent, then the client lays with the former client—not the child. As a result, the former adult client may give informed consent and waive the conflict.

B. Conflict Examples

1. Conflict within a sibling group

Example 1: When the GAL represents a group of siblings and the siblings are then split up and their interests divide, who should represent whom? For example, three little boys were in foster care together, and the two older boys were then moved to a new home. Now the foster family with the two older boys wants to adopt them but not their younger brother, who wants to be with his brothers. The GAL thinks it is not in the youngest boy's best interest to be split from his siblings, but it is also not in the oldest two boys' best interest to be moved from the family that wants to adopt them.

Advice: This conflict is prohibited by Rule 1.7, as the interests of the boys have become adverse to one another. Neither the AA nor the GAL program/volunteer can represent any of the boys. Representation must be given to conflict attorneys.

Example 2: The GAL program has been appointed to represent two children. One child confesses to molesting the other.

Advice: Again, this is a conflict prohibited by Rule 1.7 when the interests of the two children are adverse to one another. If the case is brand new, and there has been no GAL work on it yet, the AA and the GAL program/volunteer can represent one of the children; a conflict attorney must handle the other child. If there has been any work at all on the case, the AA and the GAL program/volunteer can no longer represent either child; conflict attorneys must handle their cases.

2. Baby with teenage mother

Example 1: The GAL program is appointed to a new case involving a baby who has a teenage mom. There are neglect petitions on both baby and the teenage mother.

Advice: The program may represent the baby or the mother but not both. If the mother has ever been a GAL client, the GAL program should represent the mother. If the program has never represented the mother, the GAL program should represent one but not both. The mother will need both a parents' attorney and a guardian ad litem (a Rule 17 GAL in one case and a 7B-601 GAL in the other). One attorney cannot act as both parents attorney and guardian ad litem because one involves representation of wishes and one involves representation of best interests.

Example 2: The GAL program currently represents a teenager. The teenager has a baby. A neglect petition is filed on the baby.

Advice: The GAL program cannot represent the baby and the case must be handled as a conflict. The mother will also now need a parent's attorney in addition to a GAL.

3. Program or attorney have represented parent years before as child client

This situation is addressed in Rule 1.9. When a petition is taken out on a child and the parent or caretaker named in the petition is or has been a GAL child client, the GAL program cannot represent the child named in the petition unless the former client gives informed consent to allow the representation. Note that GAL program district practice varies with respect to "program conflicts" and the appropriate course of action should be discussed with GAL staff. If

the case is still considered a conflict, an attorney who acts independently of the GAL program must handle the case.

4. Attorney advocate has represented child in a delinquency matter

a. Simultaneous representation in child protection proceedings and delinquency proceedings

An attorney advocate, as part of her private practice, is currently representing a child in a delinquency matter. The court wants to appoint her to be either the attorney or simply the GAL for this same child in a child protection proceeding while the delinquency matter is still open.

Advice:
The fact that the attorney has a very different duty of representation in each type of case could present a problem. These different duties could materially limit her representation pursuant to Rule 1.7(a) in that the attorney has "responsibilities to another client, a former client, or to a third person" since the attorney or GAL has responsibilities to the GAL Program and to the court to represent the best interests of the child and not necessarily the child's expressed wishes. In delinquency proceedings, however, she must represent the expressed wishes of the child in a traditional attorney-client relationship. It would be difficult for the attorney, and especially the child, to deal with the different roles the attorney must play in the different proceedings.

The attorney's "personal interests," referred to in Rule 1.7(b) may also present a problem if, for example, she finds herself arguing from very different perspectives in each case in front of the same judge, which might diminish her credibility; or if she finds that her involvement in one case would cause her to be biased so that she could not provide adequate representation in the other case.

Another problem might occur where the attorney, in the role of GAL or AA, would get access to confidential information that, as a delinquency attorney, she would not normally be able to access and which places her in an unfair position in the delinquency matter. In addition, there is the need to ensure that the actions of an attorney in one proceeding are not influenced to the detriment of the child by the other proceeding or in contradiction with the specific role the attorney is to play in each type of proceeding. Due to the number of potential problems outlined above, simultaneous representation although not prohibited, is not necessarily advisable.

b. GAL representation subsequent to delinquency representation

An attorney represented child in a delinquency matter in the past and the case is closed. The court now wants to appoint this attorney to represent the child in child protective proceedings either as the attorney or the GAL.

Advice: Because the proceedings are not simultaneous, as in the example above, some of the problems in that example are not present, and it may be possible for the attorney to represent the child. The attorney would still have to be sure the child understands the difference between the role she is playing in representing the child from the one she played in delinquency court. There should be no problem of access to information

since the GAL would be entitled to all confidential information. There should also be no potential for one case adversely affecting the other because the delinquency case is closed. However, the attorney should make certain that she has no bias resulting from her prior representation of the child ("personal interests" referred to in Rule 1.7(b)) that would adversely affect her ability to represent the child's best interest in a GAL matter.

c. Delinquency representation subsequent to GAL representation

Attorney advocate represented a child in abuse and neglect proceedings, and the case is now closed. Later the attorney advocate, who is in private practice, is appointed to represent the child in a delinquency matter.

Advice: Though this is not a good idea, it does not necessarily violate the Rules of Ethics. One difficulty with this situation is the problem of going from best interest representation for a client to wishes representation. Consider this example: an attorney knows detailed information about a child being sexually abused as a result of her GAL representation of that child. In that child's delinquency proceeding for sexual abuse, she wants to use that information as part of her defense and in her recommendations for disposition, but her client objects to that information coming out and in fact denies that he was sexually abused, plus he objects to her treatment recommendations. An attorney considering this would have to be sure that there was nothing about her representation in the abuse and neglect proceedings that would limit her ability to represent the child in the delinquency proceedings.

5. Attorney Advocate represents or has represented parent outside of the GAL program

Example 1: An attorney advocate currently represents a parent in a non-GAL case and is appointed to represent this parent's child in a GAL matter. Whom can she represent? Does it make a difference if the matter is related to the GAL case?

Advice: In representing the child, the AA may very well be in a position to be advocating for something that is adverse to the parent's interests, regardless of whether those interests are related to the other matter for which the attorney is representing the parent. As such, the attorney would not be able to fulfill her obligations to the parent or the Program by representing both. Another attorney would need to be appointed to handle the case. The Program itself, however, has no conflict in this matter and can remain involved.

Example 2: An attorney advocate has represented a parent in the past. The AA is now appointed to represent a child of this parent in a GAL matter. Can she represent the child? Does it make a difference if the matter is related to the GAL case?

Advice: In this situation, the attorney no longer has an attorney-client relationship with the parent, but does have a duty to a former client. Once again, however, the AA may well be in a position to be advocating for something that is adverse to the parent's interests, regardless of whether those interests are related to the other matter for which the attorney was representing the parent**.** The attorney advocate cannot take the case if she has ever represented the parent, unless the former client parent gives informed consent to allow the representation.

6. Attorney Advocate has represented DSS before

An attorney has previously represented the county and wants to become the attorney advocate for the GAL Program in the same county.

Question 1: Can she become the attorney advocate in the same county and district? Does it matter that her representation of the county never caused her to be involved in DSS abuse and neglect cases?

Advice: She can become the AA, as long as she is not currently representing DSS or the county in any capacity, whether or not she has been involved in DSS cases in her capacity as county attorney. RPC 14 (set out at the end of this chapter) makes it clear, however, that one cannot act as county attorney and GAL attorney simultaneously, regardless of the amount of contact the county attorney has had with abuse and neglect cases. Once her role as county attorney has ended, however, she can consider becoming a GAL Attorney Advocate.

Question 2: If she becomes a GAL Attorney Advocate, what should she do about GAL cases that involve one or more of the same parties as a case she handled for the county or for DSS?

Advice: Such cases must be handled by a conflict attorney, though the GAL Program itself has no conflict and may remain involved. Note, however, that if there is the potential for conflict in a substantial number of cases, the advantage of having an experienced DSS attorney in the position of AA may not outweigh the disadvantages of having to find an attorney to handle many of the cases.

7. Personal conflicts

Some personal conflict situations are specifically prohibited by the Revised Rules of Professional Conduct (*see* Rule 1.7 and Rule 1.8 for specifics), and some are not specifically addressed by the Rules but are problematic because of their potential for damaging the child's case.

a. Personal conflicts that could potentially damage the child's case

Some personal conflicts are not specifically addressed by the Rules of Professional Conduct either because they don not fit within the language of those rules or the conflict does not involve an attorney. Such potential conflict situations must be handled by evaluating each one with a focus on the best interests of the child. If an evaluation results in the conclusion that there is the potential for damage to the child's case, then the damage resulting from the conflict itself must be weighed against the detriments of handing over the case to another program and/or attorney. The following are some considerations in evaluating such conflicts and whether the case should be handled by someone else:

i. Could the potential conflict damage the child's case as the result of a claim of bias? For example, if a volunteer or staff member has any kind of relationship with or knowledge of a party or witness in the case, is there a possibility that the GAL's position will be compromised, attacked, or impeached by the existence of such knowledge or relationship in the case?

(Note that an attorney's relationship with a party or witness is discussed in § 7.B.7.a)

ii. Could the potential conflict interfere with the ability of a GAL staff member, attorney, or volunteer to zealously, effectively, and fairly represent a child client with an unyielding focus on the child's best interest?

iv. Could the child's safety be in jeopardy if the GAL program and/or AA, who may have already invested a great deal of time and effort in the case, are removed, requiring the child's representation to start from scratch with someone new? For example, the GAL finds out that there is a potential conflict right before a nonsecure hearing. The GAL fears that at this hearing, the judge may send the child back to an unsafe home and the GAL team has done extensive investigation and preparation for the hearing-- work that cannot be duplicated or carried out by a conflict attorney – which will be necessary in order to prevail at nonsecure. Here the child's safety (keeping the child from going home) may be more important than steering clear of the potential, but not yet existing, conflict.

v. When a case is conflicted out, will the child's case suffer due to:

- the difficulty of securing a conflict attorney in the district in general?
- the difficulty of securing an experienced and/or competent conflict attorney?
- the diminished level of representation the child will receive if the case is handled without a volunteer GAL?

8. Adoption of child by GAL or GAL attorney advocate

Question 1: Can a GAL or attorney advocate adopt a child who is currently involved with DSS?
Advice: Yes.

Question 2: If so, can the attorney advocate or volunteer who adopts still be an attorney advocate or a volunteer?

Advice: Yes, just not in his or her own adoption case. If the child to be adopted was or is a direct client of the GAL or attorney advocate who wants to adopt, then the GAL, attorney advocate, and entire program must withdraw immediately from the case and have a conflict attorney handle it.

Question 3: If the child to be adopted is actually a child-client of the GAL program but not directly represented by the GAL or attorney advocate who wants to adopt, what should the program do?

Advice: It may be possible for the program to handle the case, but it would have to be assigned to another district (obviously the attorney advocate or GAL wanting to adopt cannot be involved). Several factors should be considered to determine whether there is the potential for conflict and whether the case can be handled by another district or, instead, by an attorney

completely outside the GAL program. Some of these factors are described above in the subsection on personal conflicts in 7.b. and should be examined on a case-by-case basis.

C. Who Can and Should Handle Conflict Cases?

1. Whose conflict is it, anyway?

The first step in determining who should handle a conflict is determining who has the conflict. In other words, is the conflict with the GAL volunteer, the GAL program, the attorney advocate, or all three? If there is a conflict with the GAL program, then there is also a conflict for the GAL volunteer and for the attorney advocate. But if the conflict is strictly with the volunteer or strictly with the attorney, it may be possible for another volunteer or another attorney to handle the case while the program remains involved. If the program has a conflict, it may or may not be possible for a program in another district to handle the case. The type of conflict and its source will determine who is eligible to handle the case.

2. Imputed disqualification

a. The Revised Rules of Professional Conduct, under Rule 1.10, disqualifies a lawyer from representing a client when he or she has a certain type of relationship or association with a lawyer who has a conflict with that client.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. , unless the prohibition is based on a personal interest of the prohibited lawyer, including a prohibition under Rule 6.6, and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1. 6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 1.10, NC REV. RULES PROF. COND.

b. Are Attorney Advocates considered part of a "firm" for the purposes of Rule 1.10?

Most of the Attorney Advocates in our program who are one of two or three attorneys in a district have little, if any, interaction with the other attorney advocate(s) in the district, do not share office space or information, and could not be considered members of the same "firm." Whether Attorney Advocates can be considered members of the same "firm" for the purpose of ethical conflicts depends upon their level of interaction and sharing of information. If their case work does not overlap, that is, they handle separate cases and do not discuss them with one another, do not share an office, do not share information with one another, they are not going to be considered a firm. If, however, they typically discuss their cases with each other, share information, and share an office, they would likely be considered a "firm" and could therefore not take a case when the other attorney has a conflict. Determining whether one attorney has a conflict just because the other one does simply depends on the circumstances and the level of interaction between the two attorneys.

c. Specific examples

i. Different attorney advocates in the same district handling conflict cases for each other. With some types of conflicts, it is appropriate to allow another attorney advocate in the same district to handle the case. The only types of conflicts that can be handled this way would be those in which the attorney advocate, and not the program, has the conflict. For example, if the attorney has a conflict because she has represented the parent named in the petition in the past, it may be appropriate for the other attorney advocate to take the case, provided she has no conflict either. This would be appropriate as long as the attorneys within the district do not operate so closely together as to be considered part of the same "firm." (See subsection 2.b. above.)

ii. Having attorney advocates in different districts handle conflict cases for one another can be a good solution to a conflict, albeit an inconvenient one. It is often preferable to having a local conflict attorney handle a case when the attorney advocate has more experience and knowledge than any potential local conflict attorney. Logistics, however, can be the deciding factor.

iii. An attorney formerly affiliated with DSS or a GAL program may be an appropriate conflict attorney, unless he or she has had previous involvement with people in the present case that would cause another conflict. Such attorneys are experienced with child protection proceedings.

3. The best one for the job

Sometimes there are no options in determining who will handle a conflict case. The GAL program informs the court of the conflict, and the judge appoints the next attorney on the juvenile list. It may not be appropriate for the GAL to suggest to the court a specific attorney for a specific conflict case, because it might perpetuate the conflict if the conflict is a program conflict as well as an attorney conflict. However, it is wise for the program to always be aware of those attorneys in the district who may be potential conflict attorneys with sufficient experience and knowledge so that the GAL can assist the court in having a conflict "list" of sorts to fall back on in such situations. Such attorneys may not have an interest in being on the regular juvenile appointment list but may have an interest in doing GAL conflict cases from time to time. If the conflict is an attorney conflict but not a program conflict, it may be appropriate for the program, not the attorney, to suggest specific attorneys to the court.

§ 12.8 Who Can Talk to Whom and Confidentiality

A. Lawyers Talking to Represented People

Rule 4.2(a) of the Revised Rules of Professional Conduct states:

> During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

REV. R. PROF. COND., RULE 4.2(A).

Under this Rule, Attorney Advocates must be careful not to speak with parents and caretakers who are represented by attorneys without first obtaining permission from their attorneys. Remember that the DSS attorney represents social workers; and here it is best to reach an understanding with the DSS attorney about how to handle this situation in general so that the attorney advocate does not have to start from scratch on this issue with each case. The DSS attorney may say that he or she has no problem with the attorney advocate talking to social workers in general, at any given time, on any given case and that it is not necessary to ask permission with each case. Or, the DSS attorney may make it clear that he or she expects the attorney advocate to get permission on a case-by-case or even conversation-by-conversation basis. In any event, having an understanding from the beginning can save time and trouble.

B. GAL Volunteers Talking to Represented People

Nonattorney GALs and GAL staff are not bound by the Rules of Professional Conduct, which apply to all attorneys. It is good policy, however, to say that in general, it is best for volunteers and staff not to engage in activities that would be considered a breach of the Rules of Professional Conduct by an attorney because like the attorney, they represent the best interests of the child and should adhere to such standards of conduct. Still, the volunteer does not have to obtain permission to talk to a represented person.[21] As a courtesy, it is recommended that the volunteer tell the DSS attorney and any parent's or caretaker's attorneys at the beginning of the case that they would like to talk to their client throughout the course of the case and ask if they have anything they would like the GAL to know in advance. Note also that if the GAL can be said to be acting as an agent of the attorney advocate in a particular situation (e.g., acting pursuant to attorney advocate's instructions), the Rules would definitely apply to the actions of the volunteer even though it might be the attorney advocate who suffers the consequences of such actions.[22] Only lawyers are actually bound by the Rules of Professional Conduct, however, so only lawyers can be punished for breaching them. Of course conduct that is also considered illegal will have implications for any party. *See 2006 Formal Ethics Opinion 19 at the end of this chapter.*

[21] An advisory ethics opinion received by the GAL state office in November, 1996, EA 2073 (set out at the end of this section), made it clear that such permission was not required because the volunteer is not a lawyer and the prohibition on communications with a represented opposing party only applies to lawyers. This EA has been revised to become 2006 Formal Ethics Opinion 19.

[22] See RPC 249, inquiries #3 and #4, which refer to a law enforcement officer acting as an agent of the DA and prohibits that officer from talking to the represented child without permission from the child's attorney.

C. Others Talking to Child

State Bar ethics opinions RPC 249 and RPC 61 (set out at the end of this chapter) make it clear that attorneys are prohibited from talking to a child who is represented by an attorney, including a GAL attorney advocate, without authorization from the child's attorney.

Many attorneys do not realize that they should not talk to the child about the case without the authorization of the GAL attorney advocate. Some attorneys, like criminal defense attorneys, may not even realize the child has an attorney. Parents' attorneys, DSS attorneys, law enforcement officers (when acting as agents of prosecutors), criminal defense attorneys and prosecutors have all been known to have such unauthorized conversations. Moreover, parents and caretakers with physical custody of the child often do not realize that they cannot give consent for the child to talk to an attorney.

Parents and other caretakers who have physical custody of the child can be informed by their own attorney (at the suggestion of the attorney advocate) that the child should not be talking to an attorney without the child's attorney's authorization. The parent or caretaker could also be so informed in the courtroom, on the record, if the judge allows it.

Attorneys, parents, and law enforcement personnel can be informed by way of a routine letter, sent out at the beginning of a case, simply explaining that the attorney advocate represents the child and must be contacted if they want to talk to the child. (See sample letters in appendix of this manual.) RPC 249 and RPC 61 address these issues directly and can be cited in a letter to attorneys, as can the statutory authority for the attorney advocate's representation of the child. **[7B-601]**

D. Confidentiality and Authorized Sharing of Information [23]

1. Disclosure of information concerning the child is prohibited

Rule 1.6 of the Revised Rules of Professional Conduct prohibits the attorney from disclosing confidential information about the child or the case. In addition, juvenile information is protected well beyond the scope of the attorney-client relationship and is vital to the protection of the child. Sections 7B-2901 to 7B-2902 of the Juvenile Code emphasize the strict confidentiality of juvenile records. Also, Section 7B-601 allows the GAL access to confidential information but states that "[t]he 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 judge or unless otherwise provided by law."

2. Disclosure in child fatality or near-fatality cases

It is important to note that the rules of disclosure are different when there is a child fatality or near fatality. Such disclosure is governed by G.S. 7B-2902.

3. Agency sharing of information

a. "In the case of a child victim, the court may order the sharing of information among such public agencies as the court deems necessary to reduce the trauma to the victim." [7B-2901(c)] This statute is contained in the section of the Juvenile Code relating to records in abuse, neglect, and dependency cases. It is very general and can be interpreted to mean that agencies with a

[23] For more discussion on confidentiality, see § 1.9 of this manual.

specific court order to share information can do so – when such orders are made for the purpose of reducing trauma to the victim.

b. In addition to 7B-2901(c), 7B-3100 specifically addresses the sharing of juvenile information among certain agencies. This provision applies in cases of abuse, neglect, dependency, undisciplined, and delinquent behavior. Under section 7B-3100, the Office of Juvenile Justice, after consultation with the Conference of Chief District Court Judges, shall adopt rules designating certain local agencies that are authorized to share information concerning juveniles in accordance with the provisions of 7B-3100. [24] Such agencies shall share with one another, upon request, information in their possession that is *relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent,* undisciplined, or delinquent and shall continue to do so until the juvenile is no longer subject to the jurisdiction of juvenile court. Any information shared pursuant to 7B-3100 *must remain confidential, shall be withheld from public inspection, and shall be used only for the protection of the juvenile and others or to improve the educational opportunities of the juvenile.* The Family Educational and Privacy Rights Act still applies to such information. Disclosure of information concerning any such juvenile that would reveal the identity of that juvenile is prohibited – except the publication of pictures of runaways with parental permission.

Agencies that may be designated include

- local mental health facilities
- local health departments
- local departments of social services
- local law enforcement agencies
- local school administrative units
- district attorney's office (but statute says DA is not required to release any information)
- Office of Juvenile Justice
- GAL Office

4. Access to information by the GAL

a. GAL's entitlement to confidential information: A GAL has the authority, by way of court order typically contained in the GAL's appointment order, to have access to any information or reports that he or she believes is relevant to the case, even if such information is confidential. [7B-601] Both the GAL and GAL attorney need one or more certified true copies of the appointment order. Some record custodians require a certified true copy for their records before allowing access or copies; others will accept a copy of a certified true copy or simply look at the appointment form to verify appointment before allowing access to records.

b. Privileges are not available: The physician-patient privilege and the husband-wife privilege are not available to persons from whom the information is sought. [7B-601]

c. Exception: Substance abuse records, educational records, military records, and video rental records are not necessarily inaccessible, but the GAL appointment order may not be the only thing required in order to access such records. See Chapter 11 in this manual for more information on substance abuse and education records.

[24] See the rules set out in 28 NCAC 01A.0301 and 28 NCAC 01A.0301 located at the end of this chapter.

5. Access to information from the GAL [25]

1. The GAL must keep all information regarding the case confidential, and no disclosure may be made except by court order or unless provided by law in Chapter 7B. [7B-601]

> In the case of *In re Guynn*, 113 N.C. App. 114 (1993), a father claimed he was prejudiced by the GAL's refusal to give him information that the GAL considered confidential. The court disagreed, saying he was not prejudiced by the GAL's refusal to provide a list of services offered to him, because he obtained that information from DSS.

2. Exception: the GAL can share information only if authorized by court order or by the administrative code provisions discussed above in subsection D.3. that relate to agency sharing.

E. Ex Parte Communication

Rule 3.5 of the Revised Rules of Professional Conduct states, in part:

> (a) A lawyer shall not:
> . . . (3) communicate ex parte with a judge or other official except:
> (i) in the course of official proceedings;
> (ii) in writing, if a copy of the writing is furnished simultaneously to the opposing party;
> (iii) orally, upon adequate notice to opposing party; or
> (iv) as otherwise permitted by law. . .

REV. R. PROF. COND., Rule 3.5(a)(3).

Given that the child is a party to the case, it would be inappropriate for a volunteer, attorney, or GAL staff member, acting as the child's representative, to have any communication with the judge that violates this Rule. The volunteer and the program would not be subject to all of the potential consequences for violation of this Rule as an attorney, but it is still a rule that they should adhere to.

At times, a GAL staff member may desire to communicate with a judge either orally or in writing about a general issue. This rule does not prohibit communication that is not about a particular case, since there would be no other "parties" to be placed at a disadvantage by the communication. However, communication that is of a general nature but that addresses an issue in a particular case that is still open may be construed to be about a particular case and could therefore cause problems under this Rule.

F. Attorney-Client Privilege [26]

1. Overview

Laws have not clearly defined the issue of attorney-client privilege in the context of guardians ad litem and attorney advocates working to represent child clients under North Carolina laws. Attorneys are therefore cautioned to be aware that hard and fast rules may not apply to this subject; perhaps the best

[25] For a discussion of appropriate action when a GAL is asked to share information about a juvenile or receives a subpoena, see § 1.9.E. of this manual.

[26] Much of this subsection on attorney-client privilege was adapted or extracted from "Ethical Dilemmas in Juvenile Court," by Ilene Nelson, 2000, pp. 10 – 14.

thing an attorney can do is to be educated concerning various viewpoints on this issue and make decisions relating to attorney-client privilege on a case-by-case basis. In general, it may be safest to assume that the attorney-client privilege is applicable in cases where an attorney acts only in the role of attorney advocate, but that the privilege is perhaps not fully applicable in cases where the attorney is acting as the guardian ad litem and the attorney. The following discussion may assist the reader in having a better understanding of the attorney-client privilege in the context of guardian ad litem representation.

The attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients; it thereby encourages observance of the law and aids in the administration of justice. *Commodity Futures Trading Commission v. Weintraub*, 471 US 343 (1985). Yet attorney-client privilege in best interest representation is anything but simple. Several different theories of privilege must be considered in order to adequately address this issue.

2. Wishes vs. best interest and the attorney-client privilege

If an attorney represents the wishes of a child then the traditional "attorney-client relationship" rules apply. The questions of confidentiality are governed primarily by Rule 1.6 of the North Carolina Revised Rules of Professional Conduct. In most states, there is no specific provision in the evidence code that defines the attorney-client privilege. It is a common law doctrine.

Does the child have a privilege when the attorney is representing the child's best interest? There are very few cases that speak directly to privilege when the attorney represents the best interest of the child. The attorney's role may determine whether a child's communications are confidential. Haralambie, Ann M., The Child's Attorney, ABA Section on Family Law (1993). When the attorney is appointed as the guardian ad litem, the privilege may not apply.[27] *Ross v. Gadwah*, 554 A.2d 1284 (l988); Alaska Bar Association Ethics opinion no. 854; (after *Ross*, the New Hampshire legislature enacted a statute creating attorney-client confidentiality between guardian ad litem and child. N.H. Rev. State. *458.127-a 110 (l992)*); *but see Bentley v. Bentley*, 448 N.Y.S. 2d 559 (l982). In *Bentley*, the New York appellate division of the Supreme Court held that interviews between the law guardian and the children in divorce-related proceedings are privileged since the relationship of law guardian and children is one of attorney-client and as such is not subject to cross-examination. However, in New York, the law guardian represents the child's wishes. It has been argued that since an attorney who represents best interest stands in the shoes of his client there is no privilege with his client. The attorney, this analysis goes on to argue, is his own client. If one is not representing one's client's wishes, it is difficult to assert privilege. The policy behind privilege is to protect the communication so an attorney can effectively represent his client's wishes. This is not the case with best interest representation.

§ 12.9 The Lawyer as a Witness

A. Revised Rules of Professional Conduct

Rule 3.7 Lawyer As Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

[27] Note, however, that regardless of the existence or nonexistence of the attorney-client privilege, the Juvenile Code requires information to be kept confidential.

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.[28]

REV. RULE PROF. COND., 3.7

B. Lawyer in the Role of Attorney Advocate

A lawyer who is paired with a GAL volunteer and assumes the role of attorney advocate may interpret Rule 3.7 the same as in any other type of legal representation. An attorney advocate working with a volunteer would rarely be in a position to want or need to testify since the volunteer takes on the role of witness when necessary.

C. Lawyer in the Role of Both Attorney and Volunteer

1. The circumstances

There are three situations in which an attorney will act as both GAL and attorney, representing the best interests of the child with no volunteer assistance: (1) when the attorney is an attorney advocate and there is no volunteer assigned to a case due to a shortage of volunteers, so the attorney has been appointed for both roles;[29] (2) when an attorney contracts with a district to handle certain cases without program or volunteer assistance; and (3) when a pro bono attorney is assigned to a case with no volunteer assistance.

In these situations, the attorney who is appointed as GAL as well as the attorney takes on both roles. In so doing, the attorney is often going to be in the position of needing to present evidence obtained firsthand to the court. The question, then, is whether Rule 3.7 prevents an attorney from acting in this role.

2. North Carolina State Bar Ethics Committee

With the development of the new Pro Bono Project of the Guardian ad Litem Program, GAL legal staff sought the advice of the State Bar Ethics Committee on the issue of attorneys acting in both the role of GAL and attorney in juvenile court representation.

The result was a Revised Ethics Advisory 2251, which is set out below:

Lawyer as Witness

Inquiry: *The North Carolina Guardian Ad Litem (GAL) Program is currently piloting a new pro bono project through which attorneys in selected counties may volunteer to serve as legal advocates for abused, neglected, and dependent children. The GAL*

[28] Also see comments to this Rule at the end of this section of the manual.

[29] A common problematic situation is one in which no volunteer is assigned to a case but no one officially takes on the role of the volunteer. An argument can be made that unless an attorney is officially appointed to act in both roles, the attorney cannot and should not take on the responsibilities normally assumed by the volunteer. As such, the AA who is not officially appointed to act in the role of GAL may be more likely to be considered in violation of Rule 3.7 if he or she acts as a witness than one who is officially acting in the capacity of a GAL pursuant to appointment.

Program has a significant shortage of volunteers to serve as attorneys. [Footnote: In fiscal year 1997 the GAL program's 89 paid attorney advocates represented 15,582 child victims statewide. This is an attorney-client ratio of 1:175. In some urban areas, the ratio was 1:900.] In addition, the GAL Program needs volunteers to serve as guardians ad litem. Therefore, the Program would like to have any willing attorney-advocates also appointed as the GALs on their cases.

Often GALs present evidence obtained firsthand. For example, a GAL might need to report to the court that a parent had been observed in an intoxicated state or that a teacher had described disturbing behavior by a child involved in the case. Such testimony might be presented to the court in a written report or during the hearing itself.

All of the cases involving GALs are heard before a judge and never before a jury. Attorney believes it would be a substantial hardship on the GAL program to forego dual appointments for attorney volunteers.

Is it a violation of the Revised Rules for an attorney to serve in the GAL Program as both the guardian ad litem and the attorney-advocate?

Opinion: *Yes, however, Rule 3. 7 of the revised Rules of Professional Conduct provides as follows:*

> *A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:*
>
> > *(1) the testimony relates to an uncontested issue;*
> > *(2) the testimony relates to the nature and value of legal services rendered in the case; or*
> > *(3) disqualification of the lawyer would work substantial hardship on the client.*

Ordinarily, an attorney who learns he will need to be a witness in his client's case should not act as advocate at trial nor should he seek the court's permission to do so unless he reasonably believes one of the above exceptions applies. A court has substantial discretion under this rule to permit an attorney to serve as advocate in a matter notwithstanding his role as witness. For example, where an attorney-advocate seeks appointment as GAL, a court may take into consideration the shortage of GALs and attorney-advocates in North Carolina in assessing whether denial of the appointment of GAL works a "substantial hardship" on the client.

3. Conclusion

In this Advisory, the Ethics Committee's initial answer is a bit confusing. While the Advisory indicates that such a dual role and submission of evidence would only be appropriate if the court, in its discretion, deems it appropriate, other things indicate that in general, this dual role is acceptable to the Bbar. First, it is noteworthy that the above Advisory was the third version and was revised to, among other things, delete original language that required the attorney to seek prior approval from the court before being appointed to serve in both roles. In addition, a Subcommittee Report on this Advisory states "one member of the subcommittee observed that the Act creating the GAL program contemplates a lawyer serving in both capacities and

therefore, as a matter of public policy there is an implicit recognition that an exception should be allowed to the prohibition on combining the roles of advocate and witness."[30]

Therefore, it seems that the State Bar Ethics committee finds it generally acceptable for an attorney to act as both attorney advocate and GAL in spite of the language in Advisory 2251. Given the language in the Advisory, however, it is wise for any attorney acting in both roles to make sure that the court is aware of the situation to ensure that the court has no problem with the attorney presenting evidence obtained firsthand.

§ 12.10 Professional Responsibility According to the GAL Guidelines for Best Practice

The following is an excerpt from Guardian ad Litem Guidelines for Best Practice (subsection IV.E.4) discussing professional responsibility for attorney advocates:

a. Maintains professional standards and ethics.

   (1) The vulnerability of the population of children served by the Program, as well as the Program's credibility and integrity in the legal and child advocacy communities, requires a high standard of ethics. The Attorney Advocate is expected to bring ethical conflicts and questions to the Guardian ad Litem Services Division Program Administrator and/or Associate Counsel for assistance with resolution.

   (2) Attorney Advocates are not appointed to cases in which their representation would violate the North Carolina Rules of Professional Conduct (RPC). (Rules 1.7; 1.9; and 1.10 of the Revised Rules of Professional Conduct of the North Carolina State Bar.)

   (3) Attorney Advocates follow all RPCs and withdraw from any case in which they would violate the RPCs by continuing representation.

   (4) Attorney Advocates zealously represent the best interests and protect the legal rights of their child-clients throughout the proceedings.

   (5) Attorney Advocates may withdraw from a case only if they can do so without violating the RPCs after consulting with the GAL District Administrator.

   (6) Attorney Advocates who interact on a regular basis, consult with each other, or are in any sense of the word colleagues, are considered part of a "law firm" for the purpose of applying the RPCs to conflicts.

b. Works and interacts appropriately for the situation with system players such as Department of Social Services, Mental Health, Office of Juvenile Justice, Clerks'

[30] Subcommittee Report, Ethics Advisory 2251, December 21, 1999.

Offices, and others to enhance Guardian ad Litem facilitation and cooperation.

c. Appears for scheduled court hearings throughout the proceedings. If unable to attend, ensures that the child-client will be represented by securing separate counsel and being responsible for compensation of that representation if necessary.

d. Offers and accepts constructive criticism regarding program operation and job duties.

e. Completes training related to Juvenile Law and the Guardian ad Litem Program as required by the Attorney Advocate contract.

f. Notifies the GAL District Administrator or designee if unable to fulfill contract obligations in regard to any hearing, and works with the District Administrator or designee to secure counsel for that hearing including offering compensation for coverage if necessary.

g. Provides complete, timely and accurate requests for payment by the Program as requested and attaches any documentation to payment requests as policy dictates.

h. In accordance with provisions of the North Carolina State Bar, retain client files for a minimum of six (6) years after the case is closed, unless arrangements have been made with GAL staff for the Program to retain the files.

28 N.C.A.C. 1A.0301 (2007)

.0301 DESIGNATED AGENCIES AUTHORIZED TO SHARE INFORMATION

The following agencies shall share with one another upon request, information in their possession that is relevant to any case in which a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined or delinquent:

(a) The Department of Juvenile Justice & Delinquency Prevention;

(b) The Office of Guardian Ad Litem Services of the Administrative Office of the Courts;

(c) County Departments of Social Services;

(d) Area mental health developmental disability and substance abuse authorities;

(e) Local law enforcement agencies;

(f) District attorneys' offices as authorized by *G.S. 7B-3100*;

(g) County mental health facilities, developmental disabilities and substance abuse programs;

(h) Local school administrative units;

(i) Local health departments; and

(j) A 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, as an agency authorized to share information pursuant to these Rules and the standards set forth in *G.S. 7B-3100*.

Authority *G.S. 7B-3100*;

28 N.C.A.C. 1A.0302 (2007)

.0302 INFORMATION SHARING AMONG AGENCIES

(a) Any agency that receives information disclosed pursuant to *G.S. 7B-3100* and shares such information with another authorized agency, shall document the name of the agency to which the information was provided and the date the information was provided.

(b) When the disclosure of requested information is prohibited or restricted by federal law or regulations, a designated agency shall share the information only in conformity with the applicable federal law and regulations. At the request of the initiating designated agency, the designated agency refusing the request shall inform that agency of the specific law or regulation that is the basis for the refusal.

Authority *G.S. 7B-3100*;

SELECTED REVISED RULES OF PROFESSIONAL CONDUCT
NORTH CAROLINA STATE BAR

North Carolina State Bar
(Current with amendments received through 4/1/2007)

RULE 1.1 COMPETENCE

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to, or consultation or association with, another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that which is reasonably necessary under the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into, and analysis of, the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined, in part, by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Distinguishing Professional Negligence

[7] An error by a lawyer may constitute professional malpractice under the applicable standard of care and subject the lawyer to civil liability. However, conduct that constitutes a breach of the civil standard of care owed to a client giving rise to liability for professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client competently. A lawyer who makes a good-faith effort to be prepared and to be thorough will not generally be subject to professional discipline, although he or she may be subject to a claim for malpractice. For example, a single error or omission made in good faith, absent aggravating circumstances, such as an error while performing a public records search, is not usually indicative of a violation of the duty to represent a client competently.

[8] Repeated failure to perform legal services competently is a violation of this rule. A pattern of incompetent behavior demonstrates that a lawyer cannot or will not acquire the knowledge and skills necessary for minimally competent practice. For example, a lawyer who repeatedly provides legal services that are inadequate or who repeatedly provides legal services that are unnecessary is not fulfilling his or her duty to be competent. This pattern of behavior does not have to be the result of a dishonest or sinister motive, nor does it have to result in damages to a client giving rise to a civil claim for malpractice in order to cast doubt on the lawyer's ability to fulfill his or her professional responsibilities.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) A Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(1) A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, or by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances. .

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

Scope of Representation Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation. Lawyers are encouraged to treat opposing counsel with courtesy and to cooperate with opposing counsel when it will not prevent or unduly hinder the pursuit of the objective of the representation. To this end, a lawyer may waive a right or fail to assert a position of a client without first obtaining the client's consent. For example, a lawyer may consent to an extension of time for the opposing party to file pleadings or discovery without obtaining the client's consent.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, a specification of the scope of representation will normally be a necessary part of any written communication of the rate or basis of the lawyer's fee. See Rule 1.0(e) for the definition of "informed consent."

[9] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There is also a distinction between giving a client legitimate advice about asset protection and assisting in the illegal or fraudulent conveyance of assets.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but

then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rule 4.1.

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule .0122 of Subchapter 1B of the Rules of the North Carolina State Bar (providing for court appointment of a lawyer to inventory files and take other protective action to protect the interests of the clients of a lawyer who has disappeared or is deceased or disabled).

Distinguishing Professional Negligence

[6] Conduct that may constitute professional malpractice does not necessarily constitute a violation of the ethical duty to represent a client diligently. Generally speaking, a single instance of unaggravated negligence does not warrant discipline. For example, missing a statute of limitations may form the basis for a claim of professional malpractice. However, where the failure to file the complaint in a timely manner is due to inadvertence or a simple mistake such as mislaying the papers or miscalculating the date upon which the statute of limitations will run, absent some other aggravating factor, such an incident will not generally constitute a violation of this rule.

[7] Conduct sufficient to warrant the imposition of professional discipline is typically characterized by the element of intent or scienter manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

RULE 1.4 COMMUNICATION

(a) A lawyer shall;

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to consult with the client about the means to be used to accomplish the client's objectives. In some situations--depending on both the importance of the action under consideration and the feasibility of consulting with the client--this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain

the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

(5) to secure legal advice about the lawyer's compliance with these Rules;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information acquired during a lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot property be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their clients, the confidentiality rule is subject to limited exceptions. , In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. Paragraph (b)(2) recognizes that a lawyer should be allowed to make a disclosure to avoid sacrificing the interests of the potential victim in favor of preserving the client's confidences when the client's purpose is wrongful. Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information acquired during the representation. Paragraph (b)(4) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

[8] Although paragraph (b)(2) does not require the lawyer to reveal the client's anticipated misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[9] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information acquired during the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[10] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the

disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[11] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[12] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[13] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information acquired during the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(1) permits the lawyer to make such disclosures as are necessary to comply with the law.

[14] Paragraph (b)(1) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See Rule 1.4. Unless review is sought, however, paragraph (b)(1) permits the lawyer to comply with the court's order.

[15] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16] Paragraph (b) permits but does not require the disclosure of information acquired during a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. When practical, the lawyer should first seek to persuade the client to take suitable action, making it unnecessary for the lawyer to make any disclosure. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by

paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[17] A lawyer must act competently to safeguard information acquired during the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[18] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[19] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyer's Assistance Program

[20] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule, therefore, requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional client-lawyer relationship.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (c).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1, Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client may be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent a seller of commercial real estate, a real estate developer and a commercial lender is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interest should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to

a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client- lawyer relationship. See Rule 1.19.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the

meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse

consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include; where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the

likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. See Comment [15]. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly

informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one or more of the clients in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent or the continued representation of the client(s) is not materially adverse to the interests of the former clients. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce, Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the information learned by the lawyer to establish a substantial risk that the lawyer has information to use in the subsequent matter. A conclusion about the possession of such information

may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1. 6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; It should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients, In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons, does not necessarily deprive the information of its confidential nature. If the information is known or readily available to a relevant sector of the public, such as the parties involved in the matter, then the information is probably considered "generally known." See Restatement (Third) of The Law of Governing Lawyers, 111 cmt. d.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e).

With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. , unless the prohibition is based on a personal interest of the prohibited lawyer, including a prohibition under Rule 6.6, and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1. 6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0--Comments [2]-[4].

Principles of Imputed Disqualification.

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.
[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict

may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (i) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; or

(2) the client knowingly and freely assents to the termination of the representation; or

(3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the client insists upon taking action that the lawyer considers repugnant, imprudent.-or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud; or

(6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

[Adopted July 27, 1997. Amended February 27, 2003.]

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3. Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special

effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1. 14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Forfeiture by the client of a substantial financial investment in the representation may have such effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on a taking action that the lawyer considers repugnant or imprudent or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10] The lawyer may never retain papers to secure a fee. Generally, anything in the file that would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released.

[11] A lawyer who represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal, must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent

lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such a an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request,

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party or

(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

[Adopted July 24, 1997. Amended February 27, 2003; Amended effective October 1, 2003; Amended Effective November 16, 2006.]

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses, including lost income, or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Paragraph (c) permits a lawyer to take steps in good faith and within the framework of the law to test the validity of rules; however, the lawyer is not justified in consciously violating such rules and the lawyer should be diligent in the effort to guard against the unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that the statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not, by subterfuge, put before a jury matters which it cannot properly consider.

[5] Paragraph (d) makes it clear that a lawyer must be reasonably diligent in making inquiry of the client, or third party, about information or documents responsive to discovery requests or disclosure requirements arising from statutory law, rules of procedure, or caselaw. "Reasonably" is defined in Rule 0.1, Terminology, as meaning "conduct of a reasonably prudent and competent lawyer." Rule 0.1(i). When responding to a discovery request or disclosure requirement, a lawyer must act in good faith. The lawyer should impress upon the client the importance of making a thorough search of the client's records and responding honestly. If the lawyer has reason to believe that a client has not been forthcoming, the lawyer may not rely solely upon the client's assertion that the response is truthful or complete.

[6] To bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, and as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact and is prohibited by paragraph (e). However, a lawyer may argue, on an analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[7] Paragraph (f) permits a lawyer to advise managerial employees of a client to refrain from giving information to another party because the statements of employees with managerial responsibility may be imputed to the client. See also Rule 4.2.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not:

(1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(2) communicate ex parte with a juror or prospective juror except as permitted by law;

(3) communicate ex parte with a judge or other official except:

(A) in the course of official proceedings;

(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;

(C) orally, upon adequate notice to opposing party; or

(D) as otherwise permitted by law;

(4) engage in conduct intended to disrupt a tribunal, including:

(A) failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply;

(B) engaging in undignified or discourteous conduct that is degrading to a tribunal; or

(C) intentionally or habitually violating any established rule of procedure or evidence; or

(5) communicate with a juror or prospective juror after discharge of the jury if:

(A) the communication is prohibited by law or court order;

(B) the juror has made known to the lawyer a desire not to communicate; or

(C) the communication involves misrepresentation, coercion, duress or harassment.

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a a juror or a prospective juror.

(c) A lawyer shall reveal promptly to the court improper conduct by a juror or a prospective juror, or by another toward a juror, a prospective juror or a member of a juror or a prospective juror's family.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the North Carolina Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of provisions. This rule also prohibits gifts of substantial value to judges or other officials of a tribunal and stating or implying an ability to influence improperly a public official.

[2] To safeguard the impartiality that is essential to the judicial process, jurors and prospective jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with prospective jurors prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a prospective juror about the case.

[3] After the jury has been discharged, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. The lawyer must refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] Vexatious or harassing investigations of jurors or prospective jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of jurors or prospective jurors should act with circumspection and restraint.

[5] Communications with, or investigations of, members of families of jurors or prospective jurors by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, jurors or prospective jurors.

[6] Because of the duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a juror, a prospective juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

[7] The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

[8] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[9] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for

subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[10] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other

witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) In writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

[3] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory personnel, is legally entitled to make. The Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of the dispute.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. When a government agency or body is represented with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[6] Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[7] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[8] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[9] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability . It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

[10] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[11] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and

(b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[Adopted July 24, 1997. Amended February 27, 2003.]

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. To avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where

necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the 'former situation', the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1);

(A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);

(B) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice;

(C) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required;

(D) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation; or

(E) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice.

(F) the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and

(i) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

(ii) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

(iii) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

(iv) is domiciled in North Carolina;

(v) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

(vi) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar.

A lawyer acting pursuant to this provision is not subject to the prohibition in Paragraph (b) (1), may not provide services for which pro hac vice admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

(d) A lawyer shall not assist a another person in the unauthorized practice of law.

(e) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(f) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

[Adopted July 24, 1997. Amended February 27, 2003; Amended Effective November 16, 2006.]

Comment

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is admitted to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another jurisdiction, but not in this jurisdiction, will engage in conduct in this jurisdiction under circumstances that do not create significant risk to the interests of their clients, the courts or the public. Paragraph (c) identifies six situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. See Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of paragraph (c)(2)(A) and (F), nothing in this Rule is intended to authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is a partner, shareholder or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 NCAC 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before a the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(1), a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. Nothing in paragraph (c)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.

[4] When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates but only in connection with the client's matters.

[5] Paragraph (c)(2)(B) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

[6] Paragraph (c)(2)(C) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[7] Paragraph (c)(2)(D) recognizes that association will a lawyer licensed to practice in this jurisdiction is likely to protect the interests of both clients and the public. The lawyer admitted to practice in this jurisdiction, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

[8] Paragraph (c)(2)(F) permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

[9] The definition of the practice of law is established by G. S. § 84- 2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (d) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[10] Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[11] In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for, and employ independent judgment. In, adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

[12] An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

SELECTED ETHICS OPINIONS

[Reprinted with Permission of the North Carolina State Bar[31]]

RPC 14
October 24, 1986

County Attorney as Guardian Ad Litem

Opinion rules that county attorney who occasionally advises the Department of Social Services may not act as guardian ad litem in child abuse cases.

Inquiry:

Attorney C is county attorney for County X. As county attorney, C represents the interests of the county at the direction of the five –member Board of Commissioners, who employ him at their pleasure. Occasionally, Attorney C is asked informal questions by County X's Department of Social Services' director. Attorney C is not attorney of record for the Department of Social Services. Nor does he participate as its attorney in any proceedings officially involving the Department of Social Services. However, County X, of course, does provide funding for the operation of the Department of Social Services.

Attorney C considered becoming an appointed Guardian Ad Litem in cases involving abused and neglected children. In some of these cases, the interests of the Department of Social Services may appear to conflict with those of the abused or neglected children. May Attorney C ethically serve as Guardian Ad Litem for abused and neglected children while serving as county attorney for County X?

Opinion:

No. Although Attorney C does not provide extensive legal services for the Department of Social Services, he does advise them from time to time in his capacity as county attorney. Therefore, he does have a conflict of interest preventing him from serving as Guardian Ad Litem in any proceeding in which the Department of Social Services is or may be involved. *See* Rule 5.1; *see also* CPR 171. Nor can he obtain valid, informed consent from the two clients involved. Thus, the representation is barred.

RPC 61
July 13, 1990

Editor's Note: This opinion was originally published as RPC 61 (Revised).

Defense Counsel's Right to Interview Minor Prosecuting Witness

Opinion rules that a defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

Inquiry:

Vi, a seven-year-old child, is carried by her mother, Eve, to the Duke Pediatric Unit, where physical evidence of sexual abuse is diagnosed, and where Vi reports to the physician that her stepfather, Mo, is the perpetrator. Mo is arrested for felonious sex crimes against his young stepdaughter, Vi. Attorney X is appointed or retained to represent Mo. Eve, mother of Vi, expresses that she sympathizes with her husband, Mo, now in jail, and refuses to believe Vi's accusations. Eve brings Vi to Attorney X's office. May Attorney X interview Vi and obtain a statement without the knowledge or consent of the district attorney?

Opinion:

Yes. Rule 7.4(a) of the Rules of Professional Conduct only prohibits communication with a person known to be represented by counsel in regard to the matter in question. The prosecuting witness in a criminal case is not represented, for the purposes of the rule, by the district attorney. For that reason, the lawyer for the defendant need not obtain the consent of the district attorney to interview the prosecuting witness. Nor may the district attorney instruct the witness not to communicate with the defense lawyer. Rule 7.9(d). However, it would be unethical under Rule 7.4(a) for any attorney to question or interview Vi without first ascertaining whether a guardian ad litem or attorney had been appointed for Vi and, if so, without obtaining the consent of the guardian ad litem or attorney. The defense attorney must be careful to ensure that the prosecuting witness is not intimidated or induced to believe the attorney is disinterested or representing the interests of the witness. Rule 7.4(c). Reasonable efforts must be made immediately to correct any such misunderstanding if such becomes apparent. This is particularly important when the prosecuting witness is a child.

RPC 87
April 13, 1990

Interviewing Nonparty Witnesses

Opinion rules that a lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

Inquiry:

Attorney A has filed suit against Z in a civil matter. Attorney A wishes to contact X, who is a nonparty, potential witness. X has informed Attorney A that she has an attorney representing her respecting the civil matter about which Attorney A has sued Z. X is willing to discuss the civil matter with Attorney A, however. Once Attorney A learns that X has an attorney, must A obtain permission of X's attorney before discussing the civil matter with X further?

The express language of Rule 7.4 appears to be limited only to **parties** in a matter. The last sentence of the comment to the Rule, however, states that it applies to "**any person**, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." (emphasis added) Since this language is in the comment, rather than the Rule itself, does it represent only an aspirational standard, or is it obligatory?

Opinion:

Once Attorney A learns that X has an attorney, A must obtain the permission of X's attorney before discussing the civil matter with X. This is made clear by that portion of the comment to the Rule which is set forth in the inquiry. In this instance, as in most cases, the comment is intended to explain the Rule.

As a matter of policy, Rule 7.4(a) was designed to reduce the risk that an attorney/client relationship in regard to a particular matter might be subverted by the importunings of counsel representing other persons or entities whose interests in the same matter might be adverse. The attorney/client relationship enjoyed by a potential witness and his or her counsel is no less worthy of protection than that enjoyed by any named party and his or her lawyer.

RPC 119
October 18, 1991

Editor's Note: *But see* Rule 4.2(a) of the Revised Rules.

Communication Between Opposing Parties

Opinion rules that an attorney may acquiesce in a client's communication with an opposing party who is represented without the other attorney's consent, but may not actively encourage or participate in such communication.

Inquiry:

Attorney A represented a passenger who suffered serious injuries when thrown from an auto driven by a fraternity friend who was represented by Attorney B. Attorney B also represented the father of the driver under family purpose allegations. Attorney C represented the liability carrier. The injuries sustained by the plaintiff were severe and the liability carrier indicated that it would pay its limits. The principal issue was the contribution of the driver and his father. A few days before the scheduled trial and after inconclusive negotiations between the attorneys on the excess aspect, Attorney B permitted his client, the driver, to telephone Attorney A's client who was a military officer in another state in an effort to negotiate a settlement. Attorney A had no knowledge of the communication until receiving a call from his client. Confusion resulted over what the plaintiff agreed to accept. Attorney A protested to Attorneys B and C concerning the direct communication with his client. Again, without the knowledge of Attorney A but with the permission of Attorney B, the defendant-driver contacted Attorney A's client and attempted to resolve the amount and method of paying the excess.

Is it permissible for an attorney to allow his client to contact the adverse party and attempt to negotiate settlement without the knowledge or permission of the attorney for the adverse party, even though at one time the parties may have been close friends?

Opinion:

Yes. Opposing parties themselves may communicate with each other with or without the consent of their lawyers about any matters they deem appropriate. Such communications may include efforts to negotiate a resolution of a controversy between the parties, the results of which may be reported to the parties' lawyers. At the same time Rule 7.4(a) provides: "During the course of his representation of a client, a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." Although client contact with the opposing represented party can be allowed or permitted by the attorney, the attorney cannot cause (by active encouragement, client preparation, or personal participation) such communication so as to accomplish indirectly what he or she could not do directly due to the prohibition of Rule 7.4(a). The lawyer must be careful to distinguish between active encouragement and participation on the one hand and passive acquiescence on the other. It is improper

for the attorney to use his or her client as an agent, or to use any other actual agent of the attorney, to communicate with the opposing represented party in violation of Rule 7.4(a).

This opinion supersedes CPR 150.

RPC 120
July 17, 1992

Editor's Note: This opinion was originally published as RPC 120 (Revised). *See also* RPC 175.

Reporting Child Abuse

Opinion rules that, for the purpose of the Rules of Professional Conduct, a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement.

Inquiry:

Attorney A represents Clients H and W who are the parents of three minor children. During the course of the representation, H and W inform Attorney A of a matter unrelated to the representation, namely, that the minor children are the victims of continuing emotional and/or sexual and/or physical abuse.

G.S. §7A-543 generally requires that "any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found." The rule does not except from its terms attorneys whose suspicions are aroused by information received in confidence. Must Attorney A report the abuse of H and W's children to the director of the Department of Social Services against the wishes of her clients H and W?

Opinion:

No. A lawyer is not ethically required to report the child abuse under the facts described in the inquiry. Rule 4(b)(1) generally prohibits a lawyer from knowingly revealing confidential information of her client. The information in question is certainly confidential information as that term is defined in Rule 4(a) in that it was gained in the professional relationship, the clients have requested that it be held inviolate, and its disclosure would likely be embarrassing or detrimental to the clients. Rule 7.1(a)(3) states that a lawyer shall not intentionally prejudice or damage his or her client during the course of the professional relationship. Despite the language used by G.S. §7A-543 ("any person" shall report suspected child abuse or neglect to the director of the Department of Social Services in that county), there is nothing in Chapter 7A, Article 44, of the North Carolina General Statutes on "Screening of Abuse and Neglect Complaints" that abrogates attorney-client confidentiality or privilege. (G.S. §7A-551 specifically abrogates the physician-patient and psychologist-client privileges, while not mentioning the attorney-client privilege.)

Recognizing the State Bar's lack of authority to rule on questions of law, and rendering this opinion as an ethical matter only, until such time as our courts should dispositively rule that G.S. §7A-543 abrogates client confidentiality and privilege and requires a lawyer to report child abuse, Rule 4 controls and the lawyer is not ethically required to report child abuse (from information gained in the professional relationship), and the failure to so report will not be deemed a violation of Rule 1.2(b) and (d) and/or Rule 7.2(a)(3). In other words, although a lawyer failing to report suspected child abuse might sometime be criminally prosecuted pursuant to G.S. §7A-543, the State Bar will not treat this conduct as unethical under the present state of the law.

The above notwithstanding, it is possible that the exception contained in Rule 4(c)(4) might justify the disclosure of the confidential information in question. That provision authorizes an attorney to disclose confidential information regarding the intention of her clients to commit a crime. If Attorney A in this situation is satisfied that her clients intend to continue abusing their children, disclosure would certainly be allowed by this exception to the general rule.

Further, because G.S. §7A-543 is unclear and subject to being interpreted as abrogating attorney-client confidentiality and privilege, until our courts settle the legal question, an attorney will be allowed, in his or her discretion, to interpret G.S. §7A-543 as requiring such report and thus may ethically report the information gained through the confidential relationship concerning child abuse under the exception to Rule 4(b) contained in Rule 4(c)(3) to the effect that confidential information may be disclosed when "required by law."

This inquiry and response has focused solely on reporting suspected, but unknown and previously unreported, past and possibly ongoing child abuse, in order for it to be investigated and dealt with by the Department of Social Services. Once a client is accused of, under investigation for, or charged with child abuse that is a past act, attorney-client confidentiality and privilege would be protected by the client's constitutional rights to effective assistance of counsel, and it would be unethical to divulge such information gained in the professional relationship as to the client's past conduct.

RPC 163
April 15, 1994

Editor's Note: This opinion was originally published as RPC 163 (Revised).

Request for Independent Guardian Ad Litem Where Existing Guardian Has Conflict

Opinion rules that an attorney may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

Inquiry #1:

Attorney X represents A, a seventeen-year old high school student who was injured in a motor vehicle accident at the time that she was riding in an automobile being driven by her mother, M. There is a question as to whether the oncoming vehicle was negligent, whether M was negligent, or both. A's father, F, and M originally asked Attorney X to represent both M and A. Attorney X explained that there appeared to be a conflict of interest between M and A and that Attorney X would be willing to represent only A. M and F agreed. Attorney X entered into a fee agreement with F signing as guardian for A. No lawsuit has been filed at this time. After investigating the motor vehicle accident, Attorney X concluded that M was most likely negligent, although the driver/owner of the oncoming vehicle may also have been negligent. F left a telephone message for Attorney X indicating that he was no longer interested in pursuing A's claims since it appeared likely that M would be the major defendant and if a judgment was entered against her, it would raise F and M's automobile insurance rates. F did not respond to Attorney X's request that he come in to discuss the matter in person. Attorney X wrote to F explaining that M and F's insurance rates would go up if the driver of the other car made a claim against M and, therefore, making a claim on A's behalf would have no additional adverse effect on the family's insurance rates. In this letter, Attorney X told F that he believed that F and M had a moral as well as an ethical duty to A to proceed. Attorney X believes that A's parents are not acting in A's best interests. They appear to be protecting their own interests to the exclusion of A's interests. Having

advised F that Attorney X believes that he has an ethical and moral duty to proceed, is Attorney X's ethical duty satisfied?

Opinion #1:

Yes. However, on these particular facts, where F's only stated reason for failing to pursue his daughter's claim is the protection of the family's automobile insurance rates and no other concerns or contingencies have been indicated by F, it would be permissible for Attorney X to seek the appointment of an independent guardian ad litem to represent A's interests. This would be consistent with Attorney X's primary duty to represent the interest of A, who is the real party in interest. *See* CPR 15.

Inquiry #2:

May Attorney X seek the appointment of an independent guardian ad litem and proceed with filing suit after the independent guardian ad litem has reviewed the case and agrees that Attorney X should proceed?

Opinion #2:

Yes. *See* Opinion #1 above.

RPC 175
January 13, 1995

Editor's Note: This opinion was originally published as RPC 175 (Revised).

Reporting Child Abuse

Opinion rules that a lawyer may ethically exercise his or her discretion to decide whether to reveal confidential information concerning child abuse or neglect pursuant to a statutory requirement.

Inquiry #1:

RPC 120 was adopted by the Council of the State Bar on July 17, 1992. The opinion provides that a lawyer may, but need not necessarily, disclose confidential information concerning child abuse pursuant to a statutory requirement set forth in G.S. §7A-543 *et seq.* In 1993 the North Carolina General Assembly amended G.S. §7A-543 and G.S. §7A-551. G.S. §7A-543 now generally provides that as follows:

> …any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent…or has died as a result of maltreatment shall report the case of that juvenile to the director of the Department of Social Services in the county where the juvenile resides or is found.

G.S. §7A-551 now generally provides as follows:

> …[n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect or dependency case.

Does Rule 4 of the Rules of Professional Conduct require an attorney report his or her suspicion that a child is abused, neglected or dependent to the local Department of Social Services (DSS) if the information giving

rise to the suspicion was gained during a professional relationship with a client, which is not for the purpose of representing the client in an abuse, neglect or dependency case, and the information would otherwise be considered confidential information under Rule 4?

Opinion #1:

No. Rule 4(b) prohibits a lawyer from revealing the confidential information of his or her client except as permitted under Rule 4(c). Rule 4(c) includes a number of circumstances under which a lawyer "may reveal" the confidential information of his or her client. Subsection (3) of Rule 4(c) allows a lawyer to reveal confidential information "when… required by law or court order."

The rule clearly places the decision regarding the disclosure of a client's confidential information within the lawyer's discretion. While that discretion should not be exercised lightly, particularly in the face of a statute compelling disclosure, a lawyer may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client. See Rule 7.1(a)(3) (which prohibits actions by a lawyer which will intentionally "[p]rejudice or damage his client during the course of the professional relationship…"). For example, a lawyer may be unwilling to comply with the child abuse reporting statute because he or she believes that compliance would deprive a client charged with a crime of the constitutional right to effective assistance of counsel. Under such circumstances, where a lawyer reasonably and in good faith concludes that revealing the confidential information will substantially harm the interests of his or her client and, as a matter of professional responsibility, declines to report confidential client information regarding suspected child abuse or neglect to DSS, the failure to report will not be deemed a violation of Rule 1.2(b) and (d) (respectively defining misconduct as committing a criminal act and engaging in conduct prejudicial to the administration of justice) or Rule 7.2(a)(3) (prohibiting a lawyer from concealing that which he is required by law to reveal). It is recognized that the ethical rules may not protect a lawyer from criminal prosecution for failure to comply with the reporting statute.

Inquiry #2:

Is it ethical for a lawyer to reveal confidential information of a client regarding suspected child abuse or neglect to DSS pursuant to the requirements of the child abuse reporting statute?

Opinion #2:

Yes, a lawyer may ethically report information gained during his or her professional relationship with a client to DSS in compliance with the statutory requirement even if to do so may result in substantial harm to the interests of the client. Rule 4(c)(3).

Note: The foregoing opinion is limited to the specific inquiries set out therein. It should not be read to stand for the general proposition that an attorney's good faith is a bar to a disciplinary proceeding based upon the attorney's violation of a statute.

RPC 199
January 13, 1995

Ethical Responsibilities of Court-Appointed Lawyer

Opinion addresses the ethical responsibilities of a lawyer appointed to represent a criminal defendant in a capital case who, in good faith, believes he lacks the experience and ability to represent the defendant competently.

Inquiry #1:

Attorney A was appointed by a district court judge to serve as lead counsel in defending an indigent defendant ("Defendant") against a charge of first-degree murder. Attorney A is licensed to practice in North Carolina but has limited experience in representing criminal defendants. He practices law in a rural area without a sufficient library and other resources appropriate for the ongoing legal research necessary for a capital case. Attorney A believes he is not competent to represent a client in a capital murder case. He has never been on any court list for appointment to represent indigent defendants.

Attorney A filed a motion to withdraw with the district court which advised the court that he did not believe he was competent to provide legal representation in such a matter. After a hearing, the district court concluded that Attorney A is competent and denied the motion to withdraw. Attorney A in good faith still believes that he is not competent to represent Defendant. Is it ethical for Attorney A to take additional steps to legally challenge the appointment?

Opinion #1:

Yes. Rule 6 of the Rules of Professional Conduct provides that a lawyer shall not handle a legal matter that he knows he is not competent to handle unless he can associate an experienced lawyer to assist him. If a lawyer who is appointed to represent an indigent criminal defendant honestly and reasonably concludes that he is not competent to represent the client, at a minimum, he has a duty to advise the court of his perceived lack of competency, as Attorney A did in the preceding inquiry. If the court determines that the lawyer is competent but the lawyer in good faith continues to believe that he is not competent and his representation would be harmful to the client's interests, it is not unethical for the lawyer to challenge the appointment by appropriate legal procedures, including but not limited to, making a motion to have the appointment set aside in superior court, filing a petition for *certiorari* with the appellate courts or appealing a contempt ruling for refusal to serve. If the lawyer controverts his appointment through such legal proceedings, he must be acting in good faith and not merely to avoid the inconvenience or expense of the appointment. *See* Rule 7.2(a)(1).

Although the lawyer has an initial duty to advise the court that he believes he is not competent to handle a matter, if the court nevertheless determines that the lawyer is competent and refuses to release the lawyer from the appointment, it is not unethical for the lawyer to proceed with the representation on this basis without further challenge to the appointment.

Inquiry #2:

Is it ethical for Attorney A to refuse to serve as appointed counsel for Defendant and accept the court's sanction?

Opinion #2:

Yes, if Attorney A has unsuccessfully challenged the appointment through reasonably available legal procedures and he continues, as a matter of professional responsibility, to believe that he is not competent to serve as legal counsel to Defendant, it is not unethical for Attorney A to refuse to serve and to accept the court's sanction. *See* Rule 6(a)(1).

Inquiry #3:

Would the responses to inquiry #1 or inquiry #2 be different if Attorney A is appointed to assist another experienced lawyer who will serve as lead counsel?

Opinion #3:

Yes. Whether Attorney A is appointed lead counsel or appointed to assist an experienced lawyer would be relevant to the assessment of Attorney A's competency to represent Defendant. As noted in Rule 6, a lawyer may consider himself competent to handle a legal matter he would otherwise not be competent to handle if he associates an experienced lawyer to assist him with the matter. If Attorney A is serving as "second chair" to an experienced lawyer, it would not be reasonable for him to conclude that he is not competent to handle the matter.

Inquiry #4:

Attorney A's malpractice insurer has expressed concern that Attorney A's representation of Defendant in the capital case may present an unreasonable risk of exposure to a malpractice claim, particularly since it would require Attorney A to practice in an area outside his chosen areas of concentration. If Attorney A represents Defendant, he believes he should make a record that will document his own lack of competence in order to preserve a due process or other constitutional challenge to the state system of appointing attorneys for indigent defendants charged with capital crimes. By so doing, Attorney A fears he may be building a civil case against himself for malpractice if Defendant is convicted of first-degree murder or some lesser charge. Does Attorney A have a conflict of interest?

Opinion #4:

No. The fact that Attorney A's malpractice insurer has expressed concern regarding Attorney A's representation of Defendant does not create a disqualifying conflict of interest because Attorney A's responsibility to his client should not be limited or affected by his malpractice carrier's concern. *See* Rule 5.1(b). If Attorney A accepts the appointment of the court and proceeds with the representation, Attorney A has a duty to zealously represent his client to the best of his ability. *See* Canon VII. This includes taking whatever steps are necessary to make himself competent to handle the case including, but not limited to, attempting to associate an experienced lawyer or seeking the court appointment of an experienced lawyer to assist him, educating himself about the relevant law, utilizing available resources such as the resource center in the office of the appellate defender (which provides assistance to counsel for those accused of capital crimes), traveling to an adequate law library, etc. Attorney A may not pursue a course of conduct that will intentionally prejudice or damage Defendant during the course of the professional relationship. *See* Rule 7.1(A)(3). This would include approaching the representation from the perspective that his job is to document his own incompetence.

If Attorney A represents Defendant to the best of his ability, but concludes that he may have committed an error or errors that were prejudicial to Defendant's case, he must advise Defendant that mistakes were made that may have been harmful to Defendant's case and that it is in Defendant's best interest to consult independent counsel regarding his legal rights. *See* Rule 6(b)(2)(1) and (2).

Note: Whether a lawyer can be required, over his objection, to represent a criminal defendant if he has not voluntarily placed his name on a list for court appointments is a legal issue which the Ethics Committee has no authority to address. Moreover, no opinion is expressed herein as to the constitutional propriety of appointing inexperienced lawyers to represent indigent criminal defendants in capital cases.

RPC 208
July 21, 1995

Avoiding Offensive Trial Tactics

Opinion rules that a lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.

Inquiry #1:

Attorney A, who represents the defendant in a civil matter, did not receive the notice of hearing from opposing counsel, Attorney X, because Attorney A's address had changed. At the civil district court calendar call for the first day of the session, when hearing dates are set, Attorney A did not appear nor did his client. Attorney X asked the court to set the matter for trial at the earliest possible date. The case was set for trial two days later. Neither the judge nor Attorney X inquired as to whether Attorney A had received the notice of hearing nor did they attempt to ascertain whether Attorney A was prevented from appearing at the calendar call by an emergency or otherwise. Attorney L, who was at the calendar call on an unrelated matter and who is not associated with either Attorney A or Attorney X, subsequently advised Attorney A of the trial date. Under these circumstances, before asking the court to set the case for trial, must Attorney X verify that the notice of hearing was actually received and that there was no emergency or other problem preventing the appearance of Attorney A or his client at the calendar call?

Opinion #1:

No, Attorney X is not required to verify that the notice of hearing was actually received by the opposing lawyer. However, Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to zealously represent a client

> …by acceding to reasonable requests by opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

Avoiding offensive tactics and treating others with courtesy includes not taking advantage of the opposing party or the opposing counsel's failure to respond to a notice of hearing when there has been no prior lack of diligence or responsiveness on the part of the opposing counsel. Under these circumstances, as a matter of professionalism, Attorney X should make a reasonable effort to ascertain Attorney A's whereabouts or the reason for his absence before asking the judge to schedule the hearing at the earliest possible date.

Inquiry #2:

Does the court have a duty to verify that Attorney A has received notice of the hearing?

Opinion #2:

Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed to the ethical duty of a judge in this situation.

Inquiry #3:

Do the other lawyers at the calendar call have a responsibility to verify that Attorney A has received notice of the hearing or that there was no emergency or other problem preventing Attorney A's appearance at the hearing?

Opinion #3:

No. However, as a matter of professionalism, lawyers are encouraged to treat other practitioners with courtesy and to assist other practitioners in meeting the duty of competent representation.

RPC 237
October 18, 1996

Ex Parte Communications with Judge

Opinion rules that a lawyer may not communicate with the judge before whom a proceeding is pending to request an ex parte order unless opposing counsel is given adequate notice or unless authorized by law.

Inquiry #1:

Attorney A represented Wife in negotiations on a separation agreement from Husband. Husband was represented by a lawyer in Attorney B's law firm. A separation agreement, giving Wife custody of the minor child of the marriage, was executed and incorporated by reference in the divorce decree. The case was heard by Judge J.

Several years later, Attorney B filed a motion on behalf of Husband for a change of custody. Attorney B would like to contact Judge J in chambers to ask Judge J to sign an *ex parte* order changing the custody of the child to Husband. Without sending Attorney A a copy of the motion or notifying Attorney A of his intentions, may Attorney B communicate with Judge J outside the course of the official proceedings for the purpose of asking Judge J to sign the *ex parte* order?

Opinion #1:

No. Rule 7.10(b) prohibits a lawyer representing a client in an adversary proceeding from communicating as to the merits of the cause with a judge before whom the proceeding is pending if the communications will occur outside official proceedings. Rule 7.10(b)(3) does permit oral communications with a judge provided the opposing party is given adequate notice. Although Rule 7.10(b)(4) also permits *ex parte* communications with a judge about the merits of a cause if authorized by law, such communications must be specifically authorized by statute, court rule, or other law. *See*, e.g., G.S. §50B-2(c) (authorizing *ex parte* orders in domestic violence actions); G.S. §50-13.5(d)(3) (authorizing *ex parte* custody orders when a child is exposed to substantial risk of injury, abuse or abduction); and Rule 65 of the Rules of Civil Procedure (*ex parte* temporary restraining orders permitted).

Inquiry #2:

Does Attorney B have a duty to give Attorney A notice of oral or written communications with Judge J outside the course of official proceedings if Attorney A is the attorney of record?

Opinion #2:

Yes. *See* opinion #1. If the communications are in writing, Attorney B must promptly deliver a copy of the written communication to Attorney A. Rule 7.10(b)(2).

Inquiry #3:

If Attorney B asks the judge in chambers to issue a show cause order directing Husband to appear and show cause at some later date, may Attorney B communicate with Judge J, outside the course of official proceedings in the cause, without notifying Attorney A?

Opinion #3:

No, if Attorney B will communicate with Judge J as to the merits of the cause. However, if Attorney B submits only the written pleadings necessary for the issuance of a show cause order and does not communicate with the judge as to the merits of the cause, he may communicate with the judge in this manner provided he promptly delivers a copy of the pleadings and order to Attorney A. *See* Rule 7.10(b)(2).

Inquiry #4:

Does a lawyer have a duty to examine the court record to determine whether there is an attorney of record for the opposing party before seeking an order from a judge outside the course of official proceedings?

Opinion #4:

A lawyer should make reasonable inquiry, including an examination of the court record, to determine if there is an attorney for the opposing party. Although there may be no attorney of record, Rule 7.10(b) requires notification to an unrepresented opposing party prior to communicating orally with the judge as to the merits of the cause.

RPC 246
April 4, 1997

Duty of Confidentiality Owed to Prospective Client

Opinion rules that, under certain circumstances, a lawyer may not represent a party whose interests are opposed to the interests of a prospective client if confidential information of the prospective client must be used in the representation.

Inquiry:

In 1993, Attorney A represented Mr. And Ms. X on personal injury claims arising out of an automobile accident. In September 1996, Mr. X was seriously injured, as were three passengers in his automobile, in a single car accident. Mr. X contends that the accident was caused by the driver of another automobile who forced him off the road and then left the scene of the accident. While Mr. X was in the hospital, Ms. X went

to Attorney A to retain him to represent Mr. X on his claim for injuries arising out of the accident. Attorney A interviewed Ms. X, discussed the facts of the case with her, and obtained confidential information from her concerning the cause of the accident. Attorney A kept a photocopy of the accident report Ms. X brought to him. At the end of the interview, Attorney stated that he believed Mr. X would be considered the party at fault and he did not want to represent Mr. X.

Attorney A now represents the three passengers in Mr. X's automobile on their liability claims against Mr. X for injuries arising out of the accident. Neither Mr. X nor Ms. X consents to the representation of the passengers on their claims against Mr. X. May Attorney A proceed with the representation of the passengers without the consent of Mr. X or Ms. X?

Opinion:

No, Attorney A may not continue his representation of the passengers if he obtained confidential information from Ms. X that he intends to use to the advantage of the passengers in their action against Mr. X.

Although the duties of professional responsibility flowing from the attorney-client relationship do not generally attach until after a lawyer has agreed to represent a client, "there are some duties, such as that of confidentiality under Rule 4, that may attach when the lawyer agrees to consider whether a client-lawyer relationship may be established." Rules of Professional Conduct, Section .02, Scope, comment [3]. When Ms. X met with Attorney A to retain him in the new matter, she did so in the context of her prior professional relationship with Attorney A. In this situation, it is reasonable to conclude that Ms. X believed that her communications with Attorney A would be treated as confidential. Therefore, the duty of confidentiality attached to her communications although Attorney A did not ultimately agree to the representation. Rule 4(b)(3) prohibits the use of confidential information of a client for the advantage of a third person unless the client consents. If Ms. X does not consent to the use of the information obtained from her, Attorney A has a conflict of interest and is disqualified from the representation of the passengers. Rule 5.1(c).

RPC 249
April 4, 1997

Communication with a Child Represented by GAL and Attorney Advocate

Opinion rules that a lawyer may not communicate with a child who is represented by a GAL and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.

Inquiry #1:

Joey is ten years old. He lives with his mother and her boyfriend. The Department of Social Services (DSS) substantiated numerous abuse allegations against the mother for improper discipline and beatings. After no improvement in the mother's behavior, DSS filed a neglect and abuse petition and received a nonsecure custody order. Pursuant to G.S. §7A-586(a) of the Juvenile Code, the court appointed a guardian ad litem and an attorney advocate to represent the interests of Joey. G.S. §7A-586(a) provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The statute states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The GAL and the attorney advocate have standing to represent the juvenile in all actions under the subchapter.

The attorney for Joey's mother, Attorney M, would like to interview Joey without informing the GAL or the attorney advocate. May he do so?

Opinion #1:

Rule 7.4(1) provides that, during the course of his or her representation of a client, a lawyer is prohibited from communicating or causing another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so. Joey is represented by an attorney, and the attorney advocate's consent must be obtained prior to any communication by Attorney M with Joey.

Inquiry #2:

Is the permission of the attorney for DSS sufficient to allow Attorney M to interview Joey without the consent of the attorney advocate?

Opinion #2:

No, the attorney for DSS does not represent Joey.

Inquiry #3:

The district attorney intends to prosecute the mother for child abuse. The district attorney would like to interview Joey without informing or obtaining the consent of the GAL or the attorney advocate. May the district attorney interview Joey under these circumstances?

Opinion #3:

No. The comment to Rule 7.4 states, "This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." *See also* RPC 87.

Inquiry #4:

May the district attorney instruct a sheriff's deputy to interview Joey without informing or obtaining the consent of the GAL or the attorney advocate?

Opinion #4:

No, an attorney may not instruct an agent to do that which the attorney cannot do. *See* Rule 3.3.

Inquiry #5:

May the attorney for DSS interview Joey without informing or obtaining consent of the GAL or the attorney advocate?

Opinion #5:

No. *See* opinion #1 above.

Inquiry #6:

If the GAL is also an attorney, would any of the above opinions be different?

Opinion #6:

No. If an attorney advocate was appointed, the GAL is not acting in the capacity of an attorney for the juvenile. Rule 7.4(d) requires the consent of the attorney representing the client prior to direct communication with the client.

Inquiry #7:

If the court appoints a GAL for Joey but does not appoint an attorney advocate, may the attorney for Joey's mother, the district attorney, or the attorney for DSS interview Joey without the consent of the GAL?

Opinion #7:

No, the consent of the GAL must be obtained before communicating with Joey. This is consistent with the policy and purpose behind G.S. §71-586. *See also* RPC 61.

Inquiry #8:

Would the preceding opinions be different if a guardian ad litem were appointed pursuant to G.S. §1A-1, Rule 17, which provides for the appointment of a guardian ad litem for infants or incompetent persons who are parties in civil actions?

Opinion #8:

No, if the GAL has an attorney for the matter, opposing counsel may not communicate with the GAL or the minor without the consent of the attorney. Rule 7.4(1). Moreover, if the guardian ad litem is not represented by an attorney in the matter, RPC 61 still prohibits communications with the minor unless the consent of the guardian ad litem is obtained.

[Reprinted with Permission of the North Carolina State Bar [32]]

97 Formal Ethics Opinion 3
October 24, 1997

Editor's Note: Opinion was originally published as RPC 255. Before adoption, it was revised to reference the appropriate sections of the Revised Rules of Professional Conduct under which it was finally decided.

Ex Parte Communication with a Judge Regarding a Scheduling or Administrative Matter

Opinion rules that a lawyer may engage in an ex parte communication with a judge regarding a scheduling or administrative matter only if necessitated by the administration of justice or exigent circumstances and diligent efforts to notify opposing counsel have failed.

Inquiry #1:

Attorney A represents Defendant X who is charged with driving while impaired. The case is scheduled for trial in district court the following day. Criminal district court is in session daily, and a motion to continue could be heard in open court. Attorney A, outside the course of official proceedings, contacts the local district court judge to request a continuance of the trial of Defendant X. Attorney A does not discuss the merits of the case with the local judge. Is a communication with the local district court judge to request a continuance, made without the prosecutor's knowledge or presence, an ethical violation?

Opinion #1:

Yes, unless the *ex parte* communication is necessitated by the administration of justice or exigent circumstances and diligent efforts to contact the opposing lawyer (in this case, the prosecutor) have failed.

Rule 3.5(a) of the Revised Rules of Professional Conduct prohibits communications with the judge except in the following situations: (1) in the course of official proceedings; (2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel; (3) orally, upon adequate notice to the opposing counsel; or (4) as otherwise authorized by law. If an *ex parte* oral communication with a judge may influence the outcome of a case, the lawyer should avoid the communication unless the opposing party receives adequate notice or the communication is allowed by law. *See* RPC 237 (citing statutes permitting *ex parte* communications in certain emergencies). Nevertheless, the administration of justice or exigent circumstances may necessitate an *ex parte* oral communication with a judge to resolve a scheduling or administrative matter. If so, the lawyer may engage in the *ex parte* communication with the judge only after a diligent effort has been made to notify the opposing lawyer.

Inquiry #2:

A retired judge from outside the district is scheduled to preside over the next day's session of district court. Attorney A is seeking the continuance from the local district court judge because he wants to avoid the trial of Defendant X's case by the visiting judge. Does this affect the opinion set forth above?

Opinion #2:

No.

Inquiry #3:

Defendant Z is charged with driving while impaired. He is the grandson of a retired deputy sheriff who has been very active in local politics for many years. The deputy sheriff supported and campaigned for at least two of the three local district court judges. At least two of the judges have visited in the retired deputy's home.

One of the three judges voluntarily recused himself from the trial of Defendant Z. The day before the case was scheduled for trial, the prosecutor separately approached each of the other two judges. Without the knowledge of Defendant Z's lawyer, the prosecutor informed each judge of Defendant Z's relationship to the retired deputy sheriff and inquired whether the judge would hear the case. Each judge indicated that he would recuse himself from the case. As a consequence, the trial was postponed in order that it might be heard by a judge from another county. Is a communication with a local judge to inquire as to whether the judge will recuse himself from a particular case, made without the opposing lawyer's knowledge or presence, an ethical violation?

Opinion #3:

Yes. *See* opinion #1 above.

97 Formal Ethics Opinion 4 (revised)

April 17, 1998

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97 Formal Ethics Opinion 5
January 16, 1998

Editor's Note: This opinion was decided pursuant to the Revised Rules of Professional Conduct.

Ex Parte Submission of Proposed Order to Judge

Opinion rules that a lawyer must give the opposing counsel a copy of a proposed order simultaneously with the lawyer's submission of the proposed order to a judge in an ex parte communication.

Inquiry #1:

Attorney A represents a prisoner condemned to death. He files a motion for appropriate relief ("MAR") seeking a new trial, pursuant to G.S. §15A-1415 *et seq.*, by mailing the motion to the clerk of Superior Court with a letter requesting that the MAR be brought to the court's attention. Attorney A also serves a copy of the motion on Attorney B who is the district attorney and represents the state of North Carolina in this matter. Attorney C, an assistant attorney general, also represents the state in the matter.

After receiving the MAR, Attorney C prepares an answer and proposed order. The proposed order decides numerous contested factual and legal issues in the state's favor, dismisses the MAR, and includes space for the judge's signature. Attorney B delivers the MAR, the unfiled answer, the proposed order, and documents

from the court file to Superior Court Judge D in chambers. Judge D has had no previous involvement in the case. Attorney B offers to make any modifications to the proposed order requested by Judge D.

Subsequently, Judge D signs the proposed order and returns it to Attorney B. Attorney B then files the answer and the signed order with the clerk of court and mails copies of the documents to Attorney A. This occurs five days after Attorney B delivered the answer and proposed order to Judge D. When Attorney A receives the answer and order from Attorney B, it is the first notice that Attorney A has received that the case was under consideration by Judge D. May lawyers make a written presentation to a judge without timely notice to the opposing lawyer?

Opinion #1:

No. Rule 3.5 of the Revised Rules of Professional Conduct addresses a lawyer's duty to maintain the impartiality of a tribunal. Comment [7] to Rule 3.5 includes the following observations:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.

This advice should be heeded in all *ex parte*communications with a judge.

Rule 3.5(a)(3)(ii) permits a lawyer to communicate *ex parte* with a judge in writing only "if a copy of the writing is furnished simultaneously to the opposing party." The repealed rule on the same topic, repealed Rule 7.10(b)(2), allowed a written communication with a judge "if the lawyer promptly deliver[ed] a copy of the writing to opposing counsel…" The rule was changed to emphasize the importance of notifying the opposing counsel of an *ex parte* written communication with a judge. Delivery of a document to opposing counsel five days after its submission to a judge would not be "prompt" under the standard of the repealed rule and it utterly fails to meet the requirement of "simultaneous" delivery under Rule 3.5(a)(3)(ii). To comply with Rule 3.5, a lawyer must hand deliver a copy of the written communication to the opposing lawyer at the same time or prior to the time that the written communication is hand delivered to the judge or, if the written communication is mailed to the judge, the lawyer must put the written communication in the mail for delivery to opposing counsel at the same time or before it is placed in the mail for delivery to the judge.

Inquiry #2:

It is the practice of the bar in this judicial district to give the opposing lawyer prior or contemporaneous notice of the submission to the court of a proposed order and the opportunity to comment upon or object to the proposed order. May a lawyer fail to comply with this practice by submitting a proposed order to a judge in an *ex parte* communication prior to providing the proposed order to the opposing counsel?

Opinion #2:

No. *See* opinion #1 above. Such conduct also violates Rule 3.5(a)(4)(I) which prohibits conduct intended to disrupt a tribunal, including "failing to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving opposing counsel timely notice of the intent not to comply." Moreover, failure to give the opposing lawyer an opportunity to comment upon or object to a proposed order before it is submitted to the judge is unprofessional and may be prejudicial to the administration of justice. It is the more professional practice for a lawyer to provide the opposing counsel with a copy of a proposed order in advance of delivering the proposed order to the judge and thereby give the opposing counsel an adequate opportunity to comment upon or object to the proposed order.

At a minimum, Rule 3.5(a)(3)(ii) requires a lawyer to furnish the opposing lawyer with a copy of the proposed order simultaneously with its delivery to the judge and, if the proposed order is furnished to the opposing counsel simultaneously, Rule 3.3(d) requires the lawyer to disclose to the judge in the *ex parte* communication that the opposing lawyer has received a copy of the proposed order but has not had an opportunity to present any comments or objections to the judge. Rule 3.3(d) provides that "in an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

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98 Formal Ethics Opinion 12
July 16, 1998

Ex Parte Communication with a Judge

Opinion sets forth the disclosures a lawyer must make to the judge prior to engaging in an ex parte communication.

Inquiry #1:

When may a lawyer communicate ex parte with a judge to request a continuance or discuss other administrative matters?

Opinion #1:

As noted in 97 Formal Ethics Opinion 3, the administration of justice or exigent circumstances may necessitate an *ex parte* oral communication with a judge to resolve a scheduling or administrative matter. If so, the lawyer may initiate an *ex parte* communication with the judge only after a good faith effort is made to notify the opposing lawyer. 97 Formal Ethics Opinion 3. Unlike the prohibition on *ex parte* communications "as to the merits of a matter" in Rule 7.10(b) of the superseded (1985) Rules of Professional Conduct, Rule 3.5(a) of the Revised Rules of Professional Conduct prohibits all *ex parte* communications with a judge except in the following situations: (1) in the course of official proceedings; (2) in writing, if the lawyer simultaneously delivers a copy of the writing to opposing counsel; (3) orally, upon adequate notice to the opposing counsel; or (4) as otherwise authorized by law. Because an *ex parte* communication may influence the outcome of a case, a lawyer should avoid such communications unless the opposing party receives adequate notice or the communication is allowed by law. *See* RPC 237 (citing statutes permitting *ex parte* communications in certain emergencies) and 97 Formal Ethics Opinion 3.

Inquiry #2:

Lawyer A has two different matters scheduled simultaneously in courts in different judicial districts. She has made several unsuccessful attempts to notify the opposing counsel in one matter that she needs to request a continuance from the judge. May Lawyer A request a continuance in an *ex parte* communication with the judge?

Opinion #2:

Yes, provided she fully informs the judge of the reason for her *ex parte* communication and she gives the judge an opportunity to determine whether he will hear the matter *ex parte*. The disclosures to the court

should include the following: (1) that the lawyer is about to engage in an *ex parte* communication; (2) why it is necessary to speak to the judge *ex parte*; (3) the authority (statute, caselaw or ethics rule or opinion) that permits the *ex parte* communication; and (4) the status of attempts to notify the opposing counsel or the opposing party if unrepresented. If these disclosures are made, the judge can decide whether an *ex parte* discussion with the lawyer is appropriate.

Inquiry #3:

Do the limitations on *ex parte* communications with a judge apply equally to criminal defense counsel and to the lawyers in the district attorney's staff?

Opinion #3:

Yes.

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98 Formal Ethics Opinion 13
July 23, 1999

Written Communications with a Judge or Judicial Official

Opinion restricts informal written communications with a judge or judicial official relative to a pending matter.

Inquiry:

Attorney A represents the employee in a workers' compensation case. Attorney X represents the employer and the insurance carrier. After the case was assigned to a deputy commissioner for hearing, Attorney A wrote to Attorney X regarding discovery disputes, medical treatment and examination of the employee, and alternative employment for the employee. The letter implied that Attorney X had engaged in improper conduct by communicating with an examining physician and failing to respond to discovery. The letter was copied to the deputy commissioner scheduled to hear the case.

Apart from the submission or filing of formal pleadings, motions, petitions, or notices, may a lawyer communicate in writing with a judge or other judicial official about a proceeding that is pending before the judge or judicial official?

Opinion:

A lawyer may communicate in writing with a judge or judicial official under the limited circumstances set forth below.

Rule 3.5(a)(3) of the Revised Rules of Professional Conduct regulates *ex parte* communications by a lawyer with a judge or other judicial official. The phrase "other judicial official," as used in the rule, includes, but is not limited to, the commissioners and deputy commissioners of the Industrial Commission.

On its face, Rule 3.5(a)(3) appears to permit unlimited written communications with a judge or other judicial official relative to a proceeding pending before the judge or judicial official provided a copy of the written communication is furnished simultaneously to the opposing party. The rule must be read, however, in conjunction with Rule 8.4(d) which prohibits conduct that is prejudicial to the administration of justice, and with comment [7] to Rule 3.5 which states:

> All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party.

The submission to a tribunal of formal written communications, such as pleadings and motions, pursuant to the tribunal's rules of procedure, does not create the appearance of granting undue advantage to one party. However, informal *ex parte* written communications, whether addressed directly to the judge or copied to the judge as in this inquiry, may be used as an opportunity to introduce new evidence, to argue the merits of the case, or to cast the opposing party or counsel in a bad light. To avoid the appearance of improper influence upon a tribunal, informal written communications with a judge or other judicial official should be limited to the following:

> 1) Written communications, such as a proposed order or legal memorandum, prepared pursuant to the court's instructions;
>
> 2) Written communications relative to emergencies, changed circumstances, or scheduling matters that may affect the procedural status of a case such as a request for a continuance due to the health of a litigant or an attorney;
>
> 3) Written communications sent to the tribunal with the consent of the opposing lawyer or opposing party if unrepresented; and

4) Any other communication permitted by law or the rules or written procedures of the particular tribunal.

2003 Formal Ethics Opinion 16

July 16, 2004

Representation of Absent Respondent in Dependency Proceeding

Opinion rules that a lawyer who is appointed to represent a parent in a proceeding to determine whether the parent's child is abused, neglected, or dependent, must seek to withdraw if the client disappears without communicating her objectives for the representation, and, if the motion is denied, must refrain from advocating for a particular outcome.

Inquiry:

At an initial non-secure custody proceeding, Attorney is appointed by the court to represent Mother who is a respondent in a proceeding brought by the local department of social services to determine whether Mother's minor son is an abused, neglected, or dependent juvenile. Another lawyer is appointed to represent Father. Although Mother is present at the time of the appointment, she and Father subsequently disappear. At the time of the appointment, Attorney had minimal conversation with Mother and he does not know what position she would take in the proceedings.

"Dependent juvenile" is defined in the Juvenile Code, G.S. 7B-101(9), as "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or

supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement."

Attorney knows that the parents are missing and, therefore, there is no parent responsible for the son's care. May Attorney advocate for an adjudication of dependency in the proceeding?

Opinion:

No. As stated in Rule 1.2(a) of the Rules of Professional Conduct, "…a lawyer shall abide by a client's decisions concerning the objectives of representation…." Comment [1] adds that the rule "confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." If the client is not present to give instructions to the lawyer as to the objectives of the representation, the lawyer may not substitute his own objectives even if the facts appear to support a particular position.

A lawyer is required to make a motion to withdraw when the client has disappeared and the lawyer is ignorant of the client's objectives for the litigation. RPC 223. Such a motion is appropriate only after the lawyer has used reasonable diligence to locate the client but is unsuccessful. *Id*.

If Attorney's motion to withdraw is denied, Attorney may participate in the proceedings to the limited extent that such participation is consistent with the known objectives of the missing client and the court's order of appointment. However, Attorney may not advocate for any particular position or outcome in the proceeding and Attorney does not have a duty to file an appeal.

2004 Formal Ethics Opinion 11

January 21, 2005

Lawyer Appointed as Guardian-ad-Litem

Opinion explores the role of a lawyer who is appointed guardian-ad-litem for respondent parent with diminished capacity.

Inquiry #1:

Attorney A is appointed guardian-ad-litem (GAL) for a respondent parent with diminished capacity in a Termination of Parental Rights (TPR) action. The parent is indigent and, pursuant to N.C. Gen. Stat. A7 7B-1111(a)(6), has also been appointed legal counsel, Attorney B. In *In re Shepard*, 03-212 (N.C. App. filed January 20, 2004), the court of appeals held that, in a TPR action based upon parental "incapability," a parent's GAL, who is a lawyer but is not providing legal representation to the parent, "may testify as to the ward's parental capability, and ultimately against the interest of their ward as to the termination hearing." *Id*. at 1. The basis for the court's decision stems from the observation that the North Carolina State Bar's Rules of Professional Conduct do not appear to govern the conduct of a GAL who acts "purely as a guardian and not an attorney." *Id*. at 8. The court also suggested that the role of the GAL is to ensure that the parent receives procedural due process by helping to explain and execute his or her rights.

Is a lawyer, appointed solely as GAL for the parent, governed by the Rules of Professional Conduct?

ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

Opinion #1:

The court in *Shepard* recognized that some of the Rules of Professional Conduct create duties that are owed only in the professional client-lawyer relationship. For example, the confidentiality rule only applies when a lawyer has a client-lawyer relationship or has agreed to consider the formation of one. Scope, cmt. [4]. Conversely, there are other rules that apply although a lawyer is acting in a non-professional capacity. For example, a lawyer who commits fraud in a business transaction has violated Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Preamble, cmt. [3].

The GAL does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients. *See* RPC 249. Notwithstanding the above, it may be prudent for the GAL to explain fully to the parent, to the extent possible, his or her role in the litigation, specifically that the GAL is not acting as the parent's lawyer.

Inquiry #2:

If the court appointed a lawyer to serve both as lawyer for the parent and as the parent's GAL, do the Rules of Professional Conduct require that the lawyer keep all communications confidential?

Opinion #2:

Yes. A lawyer serving as both lawyer and GAL for a parent in a TPR action must comply with Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 generally prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent or one of the exceptions allowing disclosure applies.

Inquiry #3:

If the court appoints the same lawyer as counsel for the parent and as the parent's GAL, does the lawyer have a conflict of interest?

Opinion #3:

The *Shepard* court acknowledged that there exists little guidance on the role or specific duties of a GAL, but suggested that the role of the GAL is guardian of the parent's procedural due process. *Shepard*, at 7. If the role of the GAL is limited to ensuring procedural due process for the parent by helping to explain and execute his or her rights, then this role is consistent with the role of a lawyer representing a client. Therefore, there is no conflict of interest in undertaking representation as both GAL and lawyer. The Ethics Committee takes no position at this time as to whether the GAL has additional responsibilities or whether an expanded role could result in a conflict of interest.

Inquiry #4:

Assume the parent has separate appointed counsel. Under *Shepard*, how can the parent's GAL perform his duties with competence if the parent has been advised by her lawyer that she should not share confidential information with the GAL?

Opinion #4:

The performance of the GAL's duties, as distinct from a lawyer's duties to a client, is not a matter upon which the Ethics Committee can opine.

Inquiry #5:

Assume the facts in Inquiry #4. Can the parent's lawyer ever advise the client to confer candidly with the GAL under the Rules of Professional Conduct?

Opinion #5:

Yes. In light of the *Shepard* decision, a lawyer should inform the parent, to the extent possible, that the GAL does not owe the parent a duty of confidentiality and that the GAL could be called upon to testify as to parental capability. Then, the lawyer must analyze each case and determine whether the parent's full disclosure to the GAL will accomplish the goals of the representation. If the lawyer believes full disclosure is appropriate under the circumstances, he or she may advise the client that he may be candid with the GAL. Likewise, a lawyer may reasonably conclude that full disclosure would not be in the parent's interests and may advise the client against it.

2006 Formal Ethics Opinion 10

July 21, 2006

Safeguarding Confidential Health Information of Clients and Third Parties

Opinion rules that a lawyer must use reasonable care under the circumstances to protect from disclosure a client's confidential health information and is encouraged, but not required, to use similar care with regard to health information of third parties.

Inquiry #1:

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) required the US Department of Health and Human Services to establish a set of national standards for the protection of certain health information including identifiable medical records of individual patients. Pursuant to this mandate, the US Department of Health issued Standards for Privacy of Individually Identifiable Health Information (the Privacy Rule) which establishes national standards for the protection of protected health information. The Privacy Rule applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with certain specified transactions.[1]

Lawyers frequently obtain medical records and health information of both clients and opposing parties in conjunction with the prosecution or defense of medical malpractice and personal injury cases and other representations involving questions of injury or disability. It does not appear that lawyers or law firms are covered by the Privacy Rule.[2] However, in light of the public policy favoring the protection of sensitive medical information that is manifested by the Privacy Rule, what actions should a lawyer take to safeguard the health information of a client from disclosure to unauthorized persons?

Opinion #1:

The duty of confidentiality set forth in Rule 1.6 of the Rules of Professional Conduct prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent, the disclosure is impliedly authorized to carry out the purpose of the representation, or the disclosure is otherwise permitted by the Rules. Comment [3] to Rule 1.6 observes that the confidentiality rule applies "not only to matters communicated in confidence by the client, but also to all information acquired during the

representation." Therefore, health information obtained during the representation of a client is clearly covered by the duty of confidentiality.

Neither Rule 1.6 nor the comment to the rule provide guidance on the standard of care that a lawyer must use in fulfilling the duty of confidentiality. However, in the absence of a specific mandate, a lawyer is generally expected to use reasonable care in fulfilling his or her duties under the Rules. *See* Rule 0.2, Scope ("The Rules of Professional Conduct are rules of reason."). For example, RPC 133 states that a law firm is not required to shred waste paper that includes confidential client information and may recycle the waste paper provided the lawyer determines that

> those persons or entities responsible for the disposal of waste paper employ procedures which effectively minimize the risk that confidential information might be disclosed...[and] custodial personnel…are conscious of the fact that confidential information may be present in waste paper products and are aware that the attorney's professional obligations require that there be no breach of confidentiality in regard to such information.

Similarly, RPC 215 provides that a lawyer may communicate confidential client information over a cellular or cordless telephone, despite the risk of interception, because the duty of confidentiality "does not require that a lawyer use only infallibly secure methods of communication." Instead, the lawyer "must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication." *Id.; accord* RPC 133 (some client information may be so sensitive that the duty can only be satisfied by shredding waste paper). Thus, the standard of care for safeguarding client confidential information is reasonable care as dictated by the circumstances.

In determining the degree of protection and care with which a client's health information is handled, the public policy of providing substantial protection for the privacy of such information which is expressed in the Privacy Rule should inform the actions of lawyers and law firms, particularly with regard to the disposal of such records.

Inquiry #2:

Lawyers may receive the health information of an opposing party or other third party in conjunction with the representation of a client. What duty does a lawyer have to protect the privacy of the health information of a third party?

Opinion #2:

Any information acquired during the course of a representation, including information of third parties, is confidential and may only be disclosed as authorized by Rule 1.6. Nevertheless, even if disclosure is permitted under the Rules, lawyers are encouraged to respect the privacy of third parties and to handle and dispose of health information of third parties with the same care that would be used with regard to the health information of a client.

It goes without saying that if a lawyer determines that health information in his or her possession is subject to the requirements of the Privacy Rule, the lawyer must follow the mandates of the rule with regard to the retention, transmission, or disposal of the health information.

Endnotes

1. *Summary of the HIPAA Privacy Rule*, OCR Privacy Brief, US Department of Health and Human Services, Office for Civil Rights. http://www.hhs.gov/ocr/privacysummary.pdf
2. *Id.*

2006 Formal Ethics Opinion 19

January 19, 2007
Communication by Guardian ad Litem with Represented Person

Opinion rules that the prohibition against communications with represented persons does not apply to a lawyer acting solely as a guardian ad litem.

Inquiry #1:

G.S. Section 7B-601 of the Juvenile Code provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The section states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The section also provides that the GAL and the attorney advocate have standing to represent the juvenile in all actions under the subject chapter.

Some of the duties of the GAL, as defined in G.S. 7B-601, include: investigating the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; facilitating, when appropriate, the settlement of disputed issues; exploring options with the judge at the dispositional hearing; and protecting and promoting the best interests of the juvenile.

It is alleged that Child A was sexually abused by her father. Attorney X and Guardian Ad Litem Y were appointed to represent Child A in the juvenile petition. Guardian Ad Litem Y is not an attorney. She is interested in interviewing the mother of Child A. The mother is represented in this matter by another attorney. Must Guardian Ad Litem Y obtain the approval of the mother's attorney before communicating with the mother?

Opinion #1:

No. Rule 4.2 only prohibits communications with a represented person "[d]uring [the lawyer's] representation of a client." This prohibition does not apply to Guardian Ad Litem Y because it does not apply to nonlawyers.

Inquiry #2:

Would Opinion #1 be different if Guardian Ad Litem Y is an attorney but is performing the role of guardian ad litem solely and is not performing the role of the attorney advocate?

Opinion #2:

No. Guardian Ad Litem Y may communicate with the mother without obtaining the consent of the mother's attorney. If Guardian Ad Litem Y is not acting as the attorney advocate but is only serving as the appointed special guardian "at law" of the child, she is not subject to the prohibition in Rule 4.2 because she is not acting in the course of her representation of a client. *See* Opinion #1.

Inquiry #3:

Would Opinion #1 change if the person with whom Guardian Ad Litem Y wanted to speak also had an appointed GAL?

Opinion #3:

No.

ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

SELECTED ETHICS DECISIONS

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ED 99-5 Communications with a Minor Absent Consent of the Minor's Attorney-Advocate

Inquiry #1:

Six years ago, Attorney a was appointed attorney-advocate for a nine-year-old boy through the Guardian ad Litem program. *See* N.C.G.S sec. 7A-586. For the last several years, Attorney A has also been the boy's appointed guardian ad litem. In this capacity, she has represented the boy's best interests in all legal proceedings including the termination of his mother's parental rights.

Unbeknownst to Attorney a. Attorney B recently interviewed the boy extensively relative to the boy's expressed desires in the juvenile proceeding. In addition to interviewing the boy, Attorney B also called a press conference and included a press release in which he divulged confidential information about the boy including the boy's history of abuse. Attorney B did not obtain the consent of Attorney A to release the information. Attorney B sought to be appointed to represent the boy but the request was denied.

May a lawyer interview a minor without the knowledge or consent of the minor's attorney-advocate?

Opinion #1:

Yes, unless law or court order prohibits the communication.

Rule 4.2 of the revised Rules of Professional Conduct does not prohibit a lawyer who does not have a client in a particular matter from consulting with a person who, though represented, seeks another opinion. *See* Rule 4.2, Cmt. [1]. Moreover, Rule 1.14(a) permits a lawyer to "maintain a normal client-lawyer relationship with a client" although "[the] client's ability to make adequately considered decisions in connection with the representation is impaired. . . because of minority. . . ." Nevertheless, if a minor lacks the ability to consent to representation as a matter of law or the court has ordered that there be no communications with the minor without the consent of the attorney-advocate, the lawyer may not communicate with the minor in the context of a client-lawyer relationship without that consent.

Inquiry #2:

May Attorney B reveal confidential information of the boy without the consent of the Attorney A?

Opinion #2:

No, unless allowed by one of the exceptions to the duty of confidentiality and such disclosure is not otherwise prohibited by court order or law. If a court order or law prohibits the disclosure of confidential information of the boy relative to the abuse and negligence case without the consent of the attorney-advocate, Attorney B may not reveal the information without that consent. If the consent of the attorney-advocate is not required, Attorney B may reveal the boy's confidential information only if permitted to do so by the Revised Rules of Professional Conduct. 98 Formal Ethics opinion 18. Having entered into a client-lawyer relationship with the boy, Attorney B may only reveal confidential information if one of the following applies: (1) disclosure is impliedly authorized by the client as necessary to carry out the goals of the representation; (2) the client consents to the disclosure; (3)

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disclosure is permitted under the Revised Rules of Professional Conduct or required by law or court order; or (4) the lawyer reasonably believes that disclosure is necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.

Whether disclosure is authorized under Rule 1.6(d) depends upon the facts of each case. However, before revealing confidential information of a minor, even with the minor's implied or expressed consent, a lawyer must consider the minor's ability to make adequately informed decisions relative to the representation and should examine the minor's privacy interests carefully, particularly with regard to revealing confidential information to the media.

ETHICS AND POLICY ISSUES IN GUARDIAN AD LITEM REPRESENTATION

SELECTED ETHICS ADVISORIES

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EA 2251 Lawyer as witness

Inquiry: The North Carolina Guardian Ad Litem (GAL) Program is currently piloting a new pro bono project through which attorneys in selected counties may volunteer to serve as legal advocates for abused, neglected, and dependent children. The GAL Program has a significant shortage of volunteers to serve as attorneys.[1] In addition, the GAL Program needs volunteers to serve as guardians ad litem. Therefore, the program would like to have any willing attorney-advocates also appointed as the GALS on their cases.

Often GALs present evidence obtained firsthand. For example, a GAL might need to report to the court that a parent had been observed in an intoxicated state or that a teacher had described disturbing behavior by a child involved in the case. Such testimony might be presented to the court in a written report or during the hearing itself.

All of the cases involving GALs are heard before a judge and never before a jury. Attorney believes it would be a substantial hardship o the GAL program to forego dual appointments for attorney volunteers.

Is it a violation of the Revised Rules for an attorney to serve in the GAL Program as both the guardian ad litem and the attorney-advocate?

Opinion: Yes, however, Rule 3.7(a) of the Revised Rules of Professional conduct provides as follows:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

Ordinarily, an attorney who learns he will need to be a witness in his client's case should not act as advocate at trial nor should he seek the court's permission to do so unless he reasonably believes one of the above exceptions applies.

A court has substantial discretion under this rule to permit an attorney to serve as advocate in a matter notwithstanding his role as witness. For example, where an attorney-advocate seeks appointment as GAL, a court may take into consideration the shortage of GALs and attorney-advocates in North Carolina in assessing whether denial of the appointment of GAL works a "substantial hardship" on the client.

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[1] In fiscal year 1997, the GAL program's 89 paid attorney-advocates represented 15,582 child victims statewide. This is an attorney-client ration of 1:175. In some urban areas, the ratio was 1:900.

EA 2073 Communicating with a Represented Person

Inquiry #1 G.S. Section 7A-586 of the Juvenile Code provides for the appointment of a guardian ad litem (GAL) for every child alleged to be abused or neglected. The section states that a GAL who is not an attorney shall be appointed an attorney to assure the protection of the child's legal rights through the dispositional phase of the proceedings and after disposition when necessary to further the best interests of the child. The section also provides that the GAL and the attorney advocate have standing to represent the juvenile in all actions under the subject chapter.

Some of the duties of the GAL, as defined in G.S. 7A-586, include: investigating the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; facilitating, when appropriate, the settlement of disputed issues; exploring options with the judge at the dispositional hearing; and protecting and promoting the best interests of the juvenile.

It is alleged that Child A was sexually abused by her father. Attorney X and Guardian Ad Litem Y were appointed to represent Child A in the juvenile petition. Guardian Ad Litem Y is not an attorney. She is interested in interviewing the mother of Child A. the mother is represented in this matter by another attorney. Must Guardian Ad Litem Y obtain the approval of the mother's attorney before communicating with the mother?

Opinion #1: No. The prohibition on communications with a represented opposing party found in Rule 7.4 of the Rules of Professional Conduct does not apply to Guardian Ad Litem Y because the Rules of Professional Conduct do not apply to nonlawyers.

Inquiry #2: Would the answer to inquiry #1 be different if Guardian Ad Litem Y is an attorney but is performing the role of guardian ad litem solely and is not performing the role of the attorney advocate?

Opinion #2: Guardian Ad Litem Y may communicate with the mother without obtaining the consent of the mother's attorney. Rule 7.4 prohibits communications with a represented opposing party "[d]uring the course of [the lawyer's]representation of a client." If Guardian Ad Litem Y is not acting as the attorney advocate but is only serving as the appointed legal representative of the child, she is not subject to the prohibition in Rule 7.4 because she is not acting in the course of her representation of a client.

CHAPTER 13
THE ATTORNEY ADVOCATE'S ROLE IN OTHER PROCEEDINGS

Table of Contents

§ 13.1 Introduction [1]

N.C.G.S. § 7B-601 defines the Attorney Advocate's role .Section 7B-601 provides the court with the authority to appoint the attorney advocate and also sets out the duties of the Guardian ad Litem program.[2] This statute states that the GAL and attorney advocate have standing to represent the juvenile in all actions "under this Subchapter where they have been appointed." The attorney advocate has neither the authority nor the obligation under his or her appointment to take actions that do not fit within the scope of those duties set out in the statute. This does not mean that any action taken that is outside the scope of the duties set out in the statute is automatically inappropriate or problematic; rather, every action must be evaluated on a case by case basis and the attorney may very well be able to play a role in proceedings outside the child protection case that is beneficial to the child without exceeding the scope of the attorney's statutory authority.

One key phrase of section 7B-601 which speaks indirectly to the role of the attorney and guardian ad litem in matters outside the child protection proceedings is the duty articulated in the statute to "report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court." Thus, the attorney advocate and volunteer are not responsible for taking every action necessary to meet the child's needs but are instead responsible for determining what the child's needs are, informing the court of those needs, and asking the court to address those needs that are not being met. Action could mean asking DSS or a service provider to take a specific action or address a particular situation; or it could mean asking the court to order DSS or a service provider to do the same. When there are matters outside the scope of the child protection proceedings, addressing the child's needs and protecting the child's best interests might mean informing the court of such matters and asking the court or the child's legal custodian to get someone to address the child's needs; it might also mean using the powers of persuasion to get an individual or agency to deal with things a certain way; or it might mean pointing the child in the right direction so that the child can address his or her own needs. In some situations, it may be appropriate for the attorney to choose to assist the child outside the scope of his or her role as attorney advocate, understanding that such assistance may not be compensated by the GAL program.

Nevertheless, the subject of the attorney advocate's role in other proceedings is not clearly defined. This chapter seeks to examine some of the issues related to the attorney's role in other proceedings but the reader is cautioned to remember that much of what is stated in this chapter consists of mere advice or a statement of GAL policy and that neither case law nor statutes have played much of a role in these issues.

§ 13.2 When Child Is Involved in a Criminal Proceeding as Victim, Witness, or Defendant

A. Introduction and GAL Policy

The Guardian ad Litem Program sometimes has child clients who are involved in a criminal proceeding as a victim, witness, or even as the defendant. In these situations, questions often arise as to the role of the GAL Attorney Advocate (AA). Although the AA lacks statutory authority to be involved in cases

[1] Note: Ilene Nelson originally contributed much to this chapter.

[2] The statute refers to the "program's" duties, which the GAL program has taken to mean the volunteer, attorney, and GAL staff acting as a team.

that do not relate to Chapter 7B proceedings,[3] the AA can take actions that carry out the AA's duty of representation of the child's best interests in the abuse/neglect/dependency case.

It is important to remember that defense attorneys and prosecutors are often unaware of or do not consider that the child has a GAL or another attorney appointed in the child protection proceeding -- especially where the criminal case is unrelated to the abuse/neglect/dependency case. It is therefore essential to let them know, from the beginning, that the child has an attorney advocate and it is good for the AA to have a conversation with them about the role that the GAL and AA would like to play in the criminal proceedings. When a parent is charged with a crime arising from the same actions alleged in an abuse or neglect petition, the AA should also inform defense attorneys, parent's attorneys, prosecutors, and other attorneys that the AA represents that child and that they must obtain permission from the AA to talk to the child.[4]

B. When the Child-Client Is Petitioned as a Delinquent or Undisciplined Juvenile

If a petition is filed alleging that the child is a delinquent or undisciplined juvenile, the AA can use the power of persuasion when necessary to promote the child's best interests in the abuse/neglect/dependency case. The AA can contact the child's defense attorney, court counselor, and the district attorney to find out more about the case and, under proper court authority, can share information about the child that might be helpful in achieving a satisfactory outcome for the child-client.[5] It is critical that a child know that this communication is being contemplated and to consult the child regarding his or her wishes.

The AA may be able to provide information that would influence the decisions of the prosecutor or guide the direction of the child's representation by his or her criminal attorney, even though the child's attorney in the criminal matter represents the wishes, and not the best interests, of the child. Consider, for example, the issue of whether to transfer the child to adult court. If the Attorney Advocate has information about important treatment needs of the child, this information should be shared since it may be impossible for a child to receive appropriate services and to meet his best interests in the abuse/neglect/dependency case if he is incarcerated in the adult prison system.[6] Furthermore, this information must be considered before a judge can transfer the matter to superior court. [*See* 7B-2203(b)]

C. When the Child Is a Victim or Witness

The influence a GAL or AA might have on the criminal procedure for the benefit of the child-client should not be underestimated.

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[3] The attorney's authority is limited by 7B-601 wherein the attorney has "standing to represent the juvenile in all actions under this Subchapter where they have been appointed." Here, "Subchapter" refers to the Subchapter I of the Juvenile Code relating to abuse, neglect, and dependency.

[4] RPC 61 and RPC 249 directly address these issues and should be utilized when necessary. See § 1.6.E. and § 12.9.C. of this manual for more information. Note that the prohibition is on attorneys or their agents talking to a represented person.

[5] Such information may only be shared pursuant to 7B-3100 or pursuant to court order. For more information on agency sharing of information, see § 1.9. Note that the child's attorney in the criminal matter is not an "agency" the GAL would be permitted to share information with pursuant to 7B-3100 and the GAL would need a court order to share information with the attorney.

[6] See footnote 5 on the importance of making sure there is authorization for sharing information.

1. In criminal matters relating to abuse or neglect

Section 7B-601(b) of the North Carolina General Statutes states that "the court may authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein the juvenile may be called on to testify in a matter relating to abuse." While the statute speaks to the GAL, the GAL program has generally interpreted that to mean the GAL and/or the attorney advocate. This statute speaks to a very limited power to accompany the juvenile, does not confer standing in a criminal matter, and does not even address the role of the GAL or AA in a matter that is not "relating to abuse." However, this does not mean that the attorney has no role to play.[7]

2. Victim's rights and physical protection

If the child is a victim, rather than the perpetrator of a criminal act, the same powers of persuasion (as discussed above for delinquency matters) can be utilized. For example, a GAL or AA might convince the prosecutor to request that a restraining order be attached to any release or probationary sentence imposed on the defendant to protect the child victim (especially applicable when the defendant is not a party to the abuse or neglect proceedings and therefore not under the jurisdiction of the juvenile court).

3. Protection from further trauma

When the child is a victim and/or a witness, the GAL or AA can also be instrumental in protecting the child from some of the trauma of interviews and testimony, and is authorized by 7B-601(b) to accompany the child in certain cases. The AA may suggest to the prosecutor that he or she move to have the child testify outside the presence of the accused and/or in a nontraditional courtroom setting.[8] In addition, the AA may work with the district attorney to ensure that there are no unnecessary repetitive interviews and to encourage the implementation of other strategies to make the testimonial role of the child appropriate to meet that child's needs.

§ 13.3 When Child Is Involved in Civil Litigation

A. Introduction and GAL Policy

If a child is called as a witness or is a party in a civil matter unrelated to the child protection proceeding, neither the GAL nor the attorney advocate have standing under 7B-601 to represent the child in that civil matter.[9] As discussed earlier in the section on criminal proceedings, this does not mean that the GAL and AA cannot play an indirect role in protecting the child's rights in these proceedings. In fact, if the civil proceeding affects the child's best interests in the child protection proceeding, then the GAL and AA have a *duty* to take the appropriate steps in the civil proceedings, including filing a motion to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure if necessary and appropriate. When there is no connection between the child's best interests in the

[7] NOTE: Rule 7.1 of the North Carolina General Rules of Practice contemplates appointment of a guardian ad litem: "When any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney from a list of pro bono attorneys approve by the Chief District Court Judge, as guardian ad litem for such minor victim or witness."

[8] For more information on testimony in nontraditional settings, see § 7.2.E. in this manual on evidence.

[9] See footnote 2.

abuse/neglect/dependency case and the civil matter, the GAL and AA can still facilitate promotion of the child's interests and protection of the child's welfare by helping to make sure that the child gets appropriate representation in the civil matter.

B. When Child May Have a Civil Cause of Action

In the course of the child protection proceedings, the AA may identify a potential cause of action affecting the legal rights of the child that is outside the scope of the AA's representation of the child. GAL program policy prohibits an attorney advocate from representing a GAL client in any fee-generating legal case. While taking a fee generating case would not necessarily violate the Rules of Professional Conduct, this is a GAL Program policy because the Program and anyone associated with it must, at all times, avoid even the appearance that there could be a conflict or a confusion in roles. The role an attorney plays in a fee generating case is different than the role an attorney plays in representation of the child's best interests in a child protection proceeding. This policy helps to ensure that best interest representation remains pure, eliminating the possibility that roles could become confused and eliminating any possibility of appearing as though a decision made in the course of representation of an abused or neglected child could ever be motivated by personal financial gain instead of a child's best interests. Although the attorney advocate is not an employee of the Administrative Office of the Courts (AOC) or the Guardian ad Litem Program, the Attorney Advocate's actions are a direct reflection on the GAL Program and Program has an interest in avoiding even the appearance of a conflict in order to preserve its credibility and effectiveness. This prohibition is part of the Attorney Advocate's contract for services.

If pursuit of the civil claim will not be adverse to the best interests of the child in the child protection proceedings, then the attorney advocate may take appropriate steps that will result in these legal rights being protected though independent representation. One way to accomplish this may be by an application to the court, pursuant to North Carolina General Statute G.S. 35A-1221, for appointment of a "guardian of the estate" for the child.[10] It would then be the duty of the guardian of the estate to assess the merits of the case and pursue any potential claims on behalf of the child, including retaining independent counsel if the guardian is not an attorney. If the AA has information that would be pertinent to the potential claim, the AA can share this information with the guardian of the estate or the child's independent attorney only upon receipt of a court order allowing such disclosure.

C. When Child Is a Witness or Defendant

When a child is called as a witness in a civil proceeding, the AA's duty to the child in the collateral proceeding depends on whether the litigation will affect the child's best interests and legal rights as related to the child protection proceeding. The scope of the attorney advocate's involvement in such proceedings will be determined by the attorney advocate's duty to protect the child's legal rights in the child protection proceedings.

Examples of situations that might impact a child's best interests could include a child testifying in a domestic violence action brought by one of the child's parents or in an alimony proceeding relating to the parent's divorce. In such a situation, the attorney advocate may need to accompany the child to a deposition or hearing in order to protect the child's legal rights in the child protection proceeding. Furthermore, if testifying in the civil action will be traumatic to the child, then the attorney advocate may want to use the power of persuasion to convince attorneys that the child should be protected from such trauma, as discussed in section II.C. above.

[10]When the guardian of the estate is likely to be an attorney known to the GAL program or GAL attorney, however, the program or GAL attorney could ask that attorney to request appointment of himself or herself as guardian of the estate.

A child may also be called as a witness in an action that will have no effect on her legal rights and no impact on the child protection proceedings, for example, a car wreck. Although in cases such as these the attorney advocate has no duty to the child-client, the attorney could provide *general* support and advice regarding the child's role as witness. However, since the attorney-advocate does not represent the child-client in the civil proceedings, the attorney should avoid giving any *specific* advice regarding specific testimony or the particulars of the case.

If the child is named as a party in a civil matter, a guardian ad litem must be appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure to represent the child's best interests. This guardian ad litem is separate and apart from the volunteer GAL serving in the child protection proceeding. Although the attorney advocate has no duty to represent the child in the civil proceeding, the attorney advocate may assist the child by petitioning the court for the appointment of a Rule 17 guardian ad litem[11] when one has not been appointed.

§ 13.4 Emancipation

A. Introduction and GAL Policy

A child of sixteen years of age or older must show financial independence to be able to be emancipated. It is therefore rare for a child-client of the GAL Program to seek emancipation. Emancipation proceedings are separate actions before the juvenile court. There is no provision for court-appointed counsel or GAL and no attorney fees are available.

If the child wants to be emancipated and the GAL believes emancipation is in the child's best interest, the GAL and AA may assist with the proceedings because it is not a fee-generating proceeding and there should be no conflict of interest.[12] If the GAL does not believe emancipation to be in the child's best interest, the GAL and AA should not assist the child with the petition and, in fact should counsel her against it, even though she is entitled to initiate the petition with or without the GAL's approval or assistance.

Therefore, the first issue for the GAL and AA to determine is whether they think it is in the child's best interest to be emancipated. According to the emancipation statutes, G.S. 7B-3500 through 7B-3509, the child will have the burden of showing by a preponderance of the evidence that emancipation is in his or her best interests. The court is to consider, among other things, the child's ability to function as an adult as well as her employment status and stability of living arrangements. G.S. 7B-3504. The GAL will therefore need to get to know the child well enough to form her own opinion regarding emancipation before offering assistance with a petition for emancipation. This can be done, in part, by asking that the child formulate detailed plans and actions with respect to finances, housing, and education. The court will expect to hear about such plans, and the GAL should be able to assess the child's ability to function as an adult in the process of observing these plans.

[11] See Rule 17 of the North Carolina Rules of Civil Procedure for details.
[12] See footnote 10.

B. The Emancipation Procedure

At common law, several methods of emancipation existed. However, the only method of common law emancipation that survived the most recent revisions of the North Carolina Juvenile Code is emancipation by marriage. *See* G.S. 7B-3509, *see also* G.S. 51-2(a). All other common law forms of emancipation have been superceded by statute. *See id*. However, as part of the Juvenile Code revisions, the legislature created a procedure by which a minor can request emancipation from his or her parent, guardian, or custodian. *See* G.S. 7B, Article 35 (2007). By statute, a minor may file a civil complaint for emancipation. *See* G.S. 7B-3500. The child is the only individual with standing to bring this action. *See id*. Any juvenile who is sixteen (16) years or older and has resided in the same county or federal territory in North Carolina for a minimum of six (6) months prior to the date of filing may request emancipation. *See id*.

1. Petition and summons

The petition for emancipation must include the following information: The minor's full name, birthdate, and state and county of birth; the name and last known address of the parent, guardian, or custodian; and the minor's address and how long he or she has resided there. *See* G.S. 7B-3501. In addition, the petition must include the minor's reasons for requesting emancipation and a summary of how the minor plans to meet his or her needs and living expenses. The petition may include a statement of employment and wages earned, which must be verified by the employer. A certified copy of the minor's birth certificate must be attached to the petition, and the petition must be signed by the minor and verified. *See id*.

A copy of the petition and summons must be served on the parent, guardian, or custodian, who shall be named as respondents. *See* G.S. 7B-3502. The summons must include the time and place of hearing. If personal service cannot be achieved (for example, if there is no known address for the respondent(s)), then another means of service pursuant to Rule 4(j) of the Rules of Civil Procedure is acceptable. The respondent(s) may file a written answer within thirty (30) days of service of process. *See id*.

2. Hearing and determination

None of the parties have the right to request a jury trial. *See* G.S. 7B-3503. At the hearing, the court shall permit all parties the opportunity to present evidence and cross-examine witnesses. The minor has the burden to show by a preponderance of the evidence that emancipation is in his or her best interest. The court has the authority, with reasonable cause, to order the minor to be examined by a psychiatrist, licensed clinical psychologist, physician, or any other expert the court may choose, in order to evaluate the mental or physical condition of the minor. The court may also order an investigation by the Department of Social Services or a juvenile court counselor. It is important to note that no husband-wife or physician-patient privilege applies in these proceedings. *See id*.

The court must review the following factors in its determination: (1) parental need for the minor's earnings, (2) the minor's ability to function as an adult, (3) the minor's need to be able to contract as an adult or to marry, (4) the employment status of the minor and stability of the minor's living arrangements, (5) the extent of discord existing between the minor and his or her family, (6) the minor's rejection of parental supervision or support, and (7) the quality of parental supervision and support. *See* G.S. 7B-3504.

A final decree of emancipation must include findings that (1) all parties are properly before the court or have been duly served and failed to appear and time to answer has expired, (2) the minor has shown a proper and lawful plan for adequately providing for his or her own needs and living expenses, (3) the minor is knowingly seeking emancipation and fully understands the ramifications of such action, and (4) emancipation is in the best interest of the minor. *See* G.S. 7B-3505. If the court determines that these four criteria have not been met, then the court shall order the proceeding dismissed. *See id*.

3. Costs [7B-3506]

The court may order any party to pay the costs of the action or may order the costs remitted for good cause. The clerk of court may charge an additional fee for giving the minor a certificate of emancipation, which lists the name of the minor, that the minor has been emancipated by court decree, and is sealed by the clerk of court.

4. Legal effect [7B-3507]

Once the court has issued the decree of emancipation, the minor has the same rights to make contracts and conveyances, to sue and be sued, and to transact business as an adult. The parent, guardian, or custodian is relieved of all legal duties and obligations that may arise in regard to the emancipated minor and is divested of all rights over and to the child. The decree of emancipation is irrevocable.

The decree of emancipation does not relieve the emancipated minor from responsibility to support his or her parents under G.S. 14-326.1 (establishing criminal liability for any person of full age and sufficient means who fails to maintain and support his or her parents if the parents are unable to support themselves). In addition, the decree does not interfere with the emancipated minor's right to inherit by intestate succession.

5. Appeals [7B-3508]

Either the minor or the parents (guardian or custodian) may appeal the court's decision. Appeals are made directly to the court of appeals. Notice may be given either in open court at the hearing or in writing within ten (10) days after the entry of the order. Pending the appeal, the court may enter a temporary order regarding custody or placement of the petitioning minor as the court finds to be in the best interests of the petitioner or the state.

§ 13.5 Abortion [13]

A. Introduction and GAL Policy

An attorney advocate may encounter a situation where a child-client becomes pregnant and questions arise surrounding abortion. While parental consent is required for minors who seek abortions in North Carolina, the statute provides an opportunity for the minor to seek a court order allowing her to bypass the parental consent requirement. (This is described in further detail below.) The judge does not decide whether the child should have an abortion, just whether the minor is of sufficient maturity to make her own decision. If an AA wishes to assist the minor in gaining access to the courts to seek a judicial

[13] Note: Thanks to Stacy Strohauer, who researched and wrote most of the text in this section on abortion.

bypass, the AA can direct the child to Planned Parenthood or to any available list of attorneys willing to accompany minors to court in such situations. It is not the duty of the attorney advocate to actually represent the child in the proceeding itself, and the AA cannot bill the GAL program for any time spent assisting the child in such proceedings.[14]

B. The Constitutionality of Abortion Procedures

The current legal status of a woman's constitutional right to terminate a pregnancy is largely found in *Roe v. Wade*, 410 U.S. 113 (1973). In this case, the Supreme Court sets out the constitutional basis for the individual's right to have an abortion, the interests of the state with which the individual rights must be balanced, and permissible limitations and regulations that the states may place on the right to have an abortion. *See id*.

The Supreme Court begins its opinion by stating that "the Court has recognized that a right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 410 U.S. at 152. The constitutional right to such personal privacy is founded in the Ninth Amendment, stating that "certain rights shall not be construed to deny or disparage others retained by the people," U.S. Const. amend. IX, and by the Fourteenth Amendment, stating in part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States." U.S. Const. amend. XIV. The protected areas of privacy include "fundamental" personal rights, or those "'implicit in the concept of ordered liberty,'" *Roe*, 410 U.S. at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319 (1937)). These personal rights extend into areas related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Roe*, 410 U.S. at 152-153. This right to personal privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id*. at 153.

The Court in *Roe* asserts that while the Constitution protects a woman's right to an abortion, this is not an absolute right. 410 U.S. 113 (1973). At some point in the pregnancy, the state's interests in "safeguarding health, in maintaining medical standards, and in protecting potential life" compel limitations on, and regulations of, the right to terminate a pregnancy. *Id*. at 154. From the end of the first trimester, but prior to viability of the fetus, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id*. at 163. For example, a state may impose regulations on who performs the abortion, as to their licensure and qualifications, and on the facility in which the procedure can be performed. Moreover, the *Roe* Court declared that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-164. *See also Stenberg v. Carhart*, 530 U.S. 914 (2000).

Throughout the first trimester of pregnancy, the "trimester test" set out in *Roe* dictates that the physician and patient must be free to determine, without the influence of state regulations, whether the pregnancy should be terminated, and they may effectuate the decision free from interference by the state. *See id*. at 163. *But see Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Manning v. Hunt*, 119 F.3d 254 (1997). The Supreme Court later rejected this part of the test, calling it an overstatement to describe the right to decide to have an abortion as a right void of any state interference. *Manning* 199 Fd. at 260 (citing *Casey*, 505 U.S. at 875). The Court redefined the right to an abortion as the right " 'to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Id*. at 260 (citing *Casey*, 505 U.S. at 875). This redefinition allows state regulation of abortion decisions in ways related to maternal health throughout the first trimester. *See* G.S. 14-45.1(a) (2007).

[14] Any such time would be considered separate and apart from the AA's role as a GAL attorney.

Although *Roe v. Wade* was decided in 1973, its holding was very recently challenged and upheld by the United States Supreme Court in *Stenberg v. Carhart*, stating that "this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose." 530 U.S. 914 (2000). Similarly, the North Carolina Supreme Court stated that "[t]he central holding of Roe - - that a woman has a fundamental right to chose to have an abortion- -has not eroded." *Manning v. Hunt*, 119 F.3d 254, 260 (4th Cir. 1997).

C. Abortion Rights in North Carolina

North Carolina General Statute § 90-21.6 defines abortion as

> *the use or prescription of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant, for reasons other than to save the life or preserve the health of an unborn child, to remove a dead unborn child, or to deliver an unborn child prematurely, by accepted medical procedures in order to preserve the health of both the mother and the unborn child.*

G.S. 90-21.6(2) (2007). Under North Carolina law, it is lawful "to advise, procure, or cause" an abortion in the first twenty weeks of a woman's pregnancy "when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital or clinic certified by the Department of Health and Human Services to be a suitable facility for the performance of abortions. G.S. 14-45.1(a) (2007). After the twentieth week of pregnancy, it is lawful to advise, procure, or cause an abortion "if there is substantial risk that the continuance of the pregnancy would threaten the life or gravely impair the health of the woman." G.S. 14-45.1(b). These provisions are valid notwithstanding any of the criminal penalty provisions of North Carolina General Statute sections 14-44 and 14-45. *See* G.S. 14-45.1(b).

D. Abortion Rights for Minors in North Carolina

A minor has a constitutional right to terminate her pregnancy through an abortion procedure. *See Jackson v. A Woman's Choice, Inc.*, 130 N.C.App. 590 (1998) (citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979)). However, this right in North Carolina is subject to both the above limitations based on the stage of pregnancy and by a parental consent prerequisite. *See* G.S. 90-21.7 (2007). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, the United State Supreme Court "established that a state may require a minor to obtain the consent of a parent as a prerequisite to obtaining an abortion, provided there is an adequate judicial bypass mechanism." *In re Doe*, 126 N.C. App. 401, 405 (1997) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833).

North Carolina law requires that, prior to performing an abortion upon an unemancipated minor, the physician obtain the written consent of the minor and the minor's parent, guardian, custodian, or grandparent with whom the minor has been living for at least six months prior to obtaining consent. *See* G.S. 90-21.7(a). G.S. 90-21.7(b) provides the requisite bypass of parental consent, permitting the pregnant minor to petition the district court for a waiver of the consent requirement if (1) none of those from whom consent may be obtained is available "within a reasonable time or manner"; or (2) all such persons refuse to consent to the abortion; or (3) the minor elects not to seek consent from such a person from whom consent is required.

A judicial bypass mechanism "is unconstitutional if it unduly burdens the right of a woman to choose to terminate her pregnancy." *Doe*, 126 N.C. App. at 405 (citing *Bellotti v. Baird*, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979)). An undue burden is created when a provision effectively results in a "substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability." *Doe*, 126 N.C. App. at 405-406 (citing *Casey*, 505 U.S. 833). The constitutionality of North Carolina's parental consent statute with a judicial bypass was challenged in *Manning*, and the Supreme Court of North Carolina upheld the consent requirement and bypass as a constitutionally valid means of protecting the state's interests regarding minors seeking abortions. *Manning v. Hunt*, 119 F.3d 254 (1997). The court discussed the usefulness of the statute as an avenue for discovering sexual abuse and for keeping parents involved with the minor at such a difficult time. *See id*.

North Carolina General Statute section 90-21.8 provides the procedure through which a minor may petition the court for a waiver of parental consent. The minor may petition the district court and participate in the proceedings on her own behalf or through a guardian ad litem.[15] The minor or guardian ad litem shall be given assistance in preparing and filing the petition, and the court "shall ensure the minor's identity is kept confidential." G.S. 90-21.8(b). The minor has the right to court appointed counsel. *See* G.S. 90-21.8(c). The court must rule on the petition within seven days of its filing, unless the minor requests an extension. *See id*. The district court "shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the parental consent shall be waived." G.S. 90-21.8(d).

The statute dictates that a court must waive the parental consent requirement if the court finds "(1) [t]hat the minor is mature and well informed enough to make the abortion decision on her own; or (2) [t]hat it would be in the minor's best interests that parental consent not be required; or (3) [t]hat the minor is a victim of rape or of felonious incest under G.S. 14-178." G.S. 90-21.8(e). The district court must address all three prongs of the statute and must waive the consent requirement if any prong is met. *Doe*, 126 N.C. App. 401, 408. The mandatory consideration of these three factors serves to direct the court in its inquiry as to the ability of the minor to make the abortion decision herself for "[i]t is not the role of the trial court to substitute its decision as to which options available to the pregnant minor should be chosen; instead, the court is to determine whether the minor is mature and informed enough to make the decision on her own." *Doe*, at 407.

The minor has a right to appeal the district court's ruling in a *de novo* hearing in superior court. G.S. 90-21.8(h). The minor must file the notice of appeal within twenty-four hours of the issuance of the district court's order. There is no right to appeal to the court of appeals, but the minor may petition the court of appeals for a *writ of certiorari* to determine if the evidence supports the lower court's findings of fact and if these findings support the court's conclusions of law. *Doe*, 126 N.C. App. at 408. In the event of a medical emergency that "so complicates the pregnancy as to require an immediate abortion," the parental consent requirement does not apply. G.S. 90-21.9.

Under North Carolina law, a Class One misdemeanor is committed by one who "intentionally performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement" of the parental consent statutes discussed above. N.C. Gen. Stat. § 90-21.10 (2007). The court held in *Jackson v. A Woman's Choice, Inc*., 130 N.C. App. 590 (1998), that

[15] "Guardian ad litem" as used here was almost certainly referring to a Rule 17 GAL under the Rules of Civil Procedure and not to a GAL working under the supervision of the GAL program, because 7B-1200 and 7B-601 make it clear that program GALs are to represent children petitioned to be abused, neglected, or dependent (only) in proceedings under the Juvenile Code.

G.S. 90-21.7 "contains no requirement, express or implied, that the physician conduct an investigation into the circumstances of the purported written consent for an abortion to determine the validity of the writing." *Id*. at 594. The intent of the legislature is not to impose such criminal liability on health care providers acting in good faith. Furthermore, to do so would constitute an undue burden to the right of a woman to terminate her pregnancy. Thus the court held that "the unknowing and unintentional failure to obtain actual parental consent is not a violation of the statute." *Id*. at 595.

§ 13.6 Child's Inheritance Rights [16]

A. Introduction and GAL Policy

Inheritance rights, like many others, are tangential to an AA's work as a child advocate in juvenile court. However, it is important to make sure that these rights are protected and that child clients get all they are entitled to. As with other civil claims, the AA should make sure that a guardian of the estate is appointed for the purposes of pursuing inheritance rights. [17] That guardian can hire counsel to represent the estate. The attorney advocate should not become involved in this situation other than to assure that the child is properly represented and that important information in the child's best interest is shared pursuant to court order.

B. North Carolina Statutes

1. Termination of Parental Rights

A child's right to inheritance when parental rights have been terminated is controlled by G.S. 7B-1112, which provides that a parental rights termination order "permanently terminates all rights and obligations of the parent to the juvenile and of the juvenile to the parent . . . ," G.S. 7B-1112 (2007). However, "the juvenile's right of inheritance from the juvenile's parent shall not terminate until a final order of adoption is issued."[18] *Id*.

2. Adoption

Once the child has been adopted, he or she is "entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents." G.S. 29-17(a) (2007). *See Headen v. Jackson*, 255 N.C. 157 (1961); *Greenlee v. Quinn*, 255 N.C. 601 (1961). However, the child is no longer entitled by succession to any of the natural parent's property or the property of their heirs. *See* G.S. 29-17(b). An exception to this exists when the natural parent "has previously married, is married to, or shall marry an adoptive parent." G.S. 29-17(e).

3. Emancipation

When a juvenile obtains a final decree of emancipation from his or her parent(s), the parent, guardian, or custodian is relieved of all his or her legal duties or obligations to the juvenile. G.S. 7B-3507(2) (2007). However, the petitioner's right to inherit property is *not* severed or altered by a final decree of emancipation G.S. 7B-3507.

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[16] Note: Thanks to Stacy Strohauer, who researched and wrote the text for this section on a child's inheritance rights.
[17] See § 13.3.B. above regarding appointment of guardian of the estate. Note, again, that whether the GAL will be able to bill for time spent on such actions will depend on the particular payment plan and contract the attorney is working under.
[18] Note the fact that the statute does not provide an exception for the parent's right to inherit from the child.

4. Custody or guardianship with no TPR

When a child has been placed out of the home but parental rights have not been terminated, the child's inheritance rights are not affected by the out-of-home placement unless and until an adoption is finalized. The issue is discussed generally in 59 Am Jur 2d § 7, which states that "[t]he appointment of a guardian for a child does not do away with the relation or relieve either the parents or the children of their mutual obligations to each other." *See also* 39 Am. Jur. 2d § 77. This is certainly the case with inheritance rights in North Carolina. *See* G.S. 7B-1112. Additionally, G.S. 35A-1227 addresses the issue of funds owed to minors in a guardian's care, identifying ways for the minor to receive any property or funds to which the minor is entitled, including insurance proceeds and testamentary transfers of property. There is no indication that the minor is stripped of his inheritance rights while in the care of a guardian. *See* G.S. 35A-1227 (2007).

§ 13.7 Children Born in Other Countries [19]

A. Introduction

Applicable federal and state laws, regardless of the child's lawful status within the United States, protect every child present in the United States. This means that laws protecting children against maltreatment apply to all children within a court's jurisdiction. When, however, a child protection petition is filed on behalf of a child born outside of the United States who is not a United States citizen, the GAL and attorney advocate may face unusual circumstances, depending on the child's legal status within the United States. The child may be in the country illegally ("undocumented")[20] or the child may have a visa. Therefore, a preliminary task for the GAL is to determine whether the child is lawfully present in the United States.

B. Organization of Immigration System

On March 1, 2003 the Immigration and Naturalization Service (INS) ceased to exist and the Department of Homeland Security (DHS) began to carry out immigration services and enforcement. DHS is divided into three bureaus: (1) Citizenship and Immigration Services (CIS); (2) Immigration and Customs Enforcement (CPB); and (3) Customs & Border Protection. It is CIS that administers immigration benefits.

C. Lawful Permanent Residency

A "lawful permanent resident" (LPR) has permission to live and work permanently in the United States, absent certain criminal conduct. An LPR is often referred to as a "green card" holder. An LPR may travel in and out of the United States, and can apply to become a United States Citizen or acquire citizenship.

[19] Note: Debra Sasser contributed to this section in the 2002 edition.
[20] "Undocumented" refers to a person who does not have permission to be lawfully present in the United States.

D. Undocumented Children

If a child is in the country illegally, the child is subject to deportation. There are immigration options that will allow undocumented minors to permanently remain and work in the United States. Because of the increased number of undocumented child clients, it is important to be familiar with immigration options that can be utilized. Note that Attorney Advocates are not expected to file immigration documents—this aspect of a child client's case should be referred to an immigration attorney; however, the attorney does have the responsibly for asking questions on undocumented status; ensuring that juvenile court orders reflect the proper criteria to allow the child to pursue immigration options; and have a general understanding of the impact undocumented status may have on a child client.

Undocumented children in the foster care system are not entitled to certain benefits such as Medicaid and IV-E financial assistance due to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Public Law 104-193, [28] limited federal public benefits to qualified aliens. For example, federal adoption assistance under IV-E of the Act is limited to qualified aliens pursuant to 8 U.S.C. 1641(b) that includes certain permanent residents or refugees. Additionally, the child will not qualify for Medicaid. Do note that in some cases, North Carolina can provide assistance using state funds through the State Adoption Assistance Project that would allow for case monthly adoption assistance an vender payments, but not Medicaid.

E. Visas

A child born outside of the United States to parents who are not United States citizens can lawfully be present in the United States if the child has a visa issued by the DHS. The type of visa dictates the terms of the child's lawful presence in the United States. If a child's stay in the United States violates the terms of his or her visa (e.g., stays beyond the term allowed by the visa), the child may be deported.

1. Non-Immigrant Immigrant Visas

Non-immigrant visas allow individuals to come to the United States on a time-limited basis. Examples of non-immigrant visas are H-visas (work-related); B-visas (tourism); and F-1 visas (education).

2. Immigrant Visas

Immigrant visas allow individuals to reside and work in the United States permanently. An undocumented child who has been the victim of a serious crime and cooperated with law enforcement may qualify for a U-visa. An undocumented child has been the victim of severe forms of human trafficking may qualify for a T-visa.

Two examples of immigrant visas involve children born abroad whom United States citizens have or will adopt. The IR-3 visa indicates that United States citizens adopted the child abroad before bringing the child to the United States. The IR-4 visa indicates that the child was either adopted abroad by United States citizens but needs to be readopted in the United States or has been brought to the United States for adoption by United States citizens.

There is also an avenue to LPR through the Violence Against Women Act (VAWA) that an immigration attorney may explore on behalf of a self-petitioning child who has an abusive parent.

F. Special Immigrant Juvenile Status

Special Immigrant Juvenile Status ("SIJS") allows undocumented children who are in state court dependency proceedings to apply for lawful permanent residency.[21]

a. Requirements

In order for a juvenile to be eligible to apply for SIJS, the court must make **specific findings** in a **court order**. [22]

1. The child must be under the **jurisdiction of a dependency court** proceeding such as abuse, neglect, or dependency.

    - The court must retain jurisdiction throughout the SIJS application process. It is imperative to identify the issue early in a case, particularly with youth clients.

    - In North Carolina, if the SIJS applicant reaches eighteen before the adjustment of status is granted, then the application fails.

    - Note that in immigration practice, this jurisdiction can include dependency, delinquency and probate (guardianship) court.

2. The child must be **dependent on a juvenile court or** place in the **custody of a state agency** or department of social services.

    - This criterion is met in North Carolina if an undocumented child is adjudicated abused, neglected or dependent and placed out of home.

    - The court should make it clear that it made its findings and orders **based on abuse, neglect or abandonment of the child**, as opposed to just to get the child immigration status.

3. The child must have been "**deemed eligible for long-term foster care**."

    - What this criteria means in North Carolina is that reunification efforts are ceased, and another permanency plan has been implemented. It is appropriate to identify potential SIJS cases as part of regular concurrent planning for undocumented children.

4. The court or some administrative agency must rule that it is **not in the child's best interest to be returned to his or her home county.**

    - To conclude that it is contrary to best interests to return a child to his or her country of origin, it is suggested that sufficient evidence should be presented. For example, that the consulate of the child client's country of origin was contacted in an effort to locate appropriate family members.

[21] *See* 8 U.S.C. § 1101 (a)(27)(j) and the regulations at 8 C.F.R. § 204.11.
[22] See sample order in Appendix.

5. The child must be under the age of 21 and unmarried.

    - In North Carolina the child SIJS applicant would have to be less than eighteen to allow the retention of jurisdiction.

b. Benefits of SIJS

A child who successfully petitions for SIJS will become a lawful permanent resident with the right to remain lawfully in the United States, work legally, qualify for in-state tuition at college, and, in five years, apply for United States citizenship. The child is eligible for Medicaid and if adopted, federal adoption assistance.

c. Risks of SIJS

If the application is denied, the child might be deported since the DHS is now on notice that the child is an illegal alien. For this reason, it is very important to screen each case to determine the child's eligibility for the status. To protect the child's best interest, the AA should consult with or refer the case to an immigration specialist.

d. Resources

The Immigrant Legal Resource Center, a nonprofit legal center with expertise in laws affecting immigrant children, offers free telephone consultation, a free SIJS manual, updates on new developments, and, in some areas, free training. Contact the ILRC by telephone at (415) 255-9499, email at aod@ilrc.org. or mail at 1663 Mission St., Suite 602, San Francisco, CA 94103. Information and informative downloads at www.ilrc.org.

In the case of your particular child client, it is best to consult with an immigration law attorney. In North Carolina, the North Carolina Justice Center has an Immigrants Legal Assistance Project. You can contact the NCJC by phone at (919) 856-2570. The website is www.ncjustice.org and physical address at 224 S. Dawson Street, Raleigh, North Carolina, 27601.

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Selected North Carolina Forms

Available from civil clerks of court and online (often in fillable format) at http://www.nccourts.org then click on "Forms" to search by number

JUVENILE FORMS

GENERAL FORMS

AOC-J-207; Fillable Order to Appoint or Release Guardian ad Litem and Attorney Advocate
AOC-J-208; Fillable Summons in Proceeding for Termination of Parental Rights
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ABUSE, NEGLECT AND DEPENDENCY FORMS

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AOC-J-140; Fillable Motion for Review
AOC-J-141; Fillable Notice of Hearing in Juvenile Proceeding
AOC-J-142; Juvenile Summons and Notice of Hearing
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JUDICIAL WAIVER

AOC-J-600; Appointment of Guardian Ad Litem in Waiver of Parental Consent Proceeding (Revised 10-95)
AOC-J-601; Fillable Petition for Waiver of Parental Consent for Minor's Abortion (Revised 10-95)
AOC-J-602; Order on Minor's Petition for Waiver of Parental Consent Requirement for Abortion (Revised 10-95)
AOC-J-603; Certificate Waiver of Parental Consent Requirement for Minor's Abortion (Revised 2-97)
AOC-J-604; Notice of Confidential De Novo Hearing in Superior Court for Waiver of Parental Consent (Revised 10-95)

EMANCIPATION

AOC-J-900M; Fillable Juvenile Petition for Emancipation
AOC-J-901M; Final Decree of Emancipation
AOC-J-902M; Certificate of Emancipation
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AOC-G-100; Fillable Subpoena (Revised 3-98)
AOC-G-101; Certificate of True Copy
AOC-G-102; Exemplification
AOC-G-106; Fillable Petition to Sue/Appeal as an Indigent
AOC-FG-107; Fillable Motion, Appointment and Order Authorizing Payment of Interpreter
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PERMANENCY PLANNING

Permanency Planning Order

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION (JUVENILE)
_____COUNTY		FILE NOS: _____
IN THE MATTERS OF MINOR CHILD(REN): _____ DOB:	)))))	PERMANENCY PLANNING ORDER (N.C.G.S. 7B-907)

THIS CAUSE was heard before the Undersigned Judge Presiding at the _____ session of the _____ County District Court sitting at _____, North Carolina for the hearing of juvenile matters to review the custody and placement of the above named child(ren) and to develop a permanent plan for the child(ren) pursuant to N.C.G.S. 7B-907 *[and N.C.G.S. 7B-906 if combined with a review hearing]*. Those in attendance include _____, social worker for the _____ County Department of Social Services, _____, Staff Attorney for the _____ County Department of Social Services, _____, Guardian ad Litem appointed to represent the child, _____, Guardian ad Litem Attorney Advocate appointed to represent the child, _____, attorney for the [mother/father], and _____(other). The Court, after considering the evidence presented makes the following **FINDINGS OF FACT**:

1. The following reports were filed: _____*[list the type of report(s) and the___ party upon whose behalf each is being filed]*_____

2. Additions or objections made to the above named reports included _____ ____*[describe the additions or objections and name the party making the addition or objection]* These [addition(s)/objection(s)] were resolved as follows: ___*[describe any deletions, additions, or amendments made to reports]*_____

OR

No additions or objections were made to the above named reports.

3. As further findings of fact, the Court adopts _____*[title and date of DSS report, GAL report, or any other document the court intends to incorporate]*___ which is/are incorporated herein as if fully set forth, with the amendments noted in paragraph 2 above.

4. It is possible for the child(ren) to be returned to the home immediately, *[OR likely that the children will be returned home in the next 6 months,]* based on the following findings of fact: ____*[describe findings leading the court to this conclusion]*_____ _____. Reunification with the mother and/or father remains the permanent plan for the child(ren).

OR

It is not possible for the child(ren) to return home immediately nor is it likely that the child(ren) will be returned to the home in the next six months. It is not in the child(ren)'s best interest to be returned home based on the following findings of fact: ____*[describe the reasons why it is not in the child's best interest to be returned home]*_____.

If it is unlikely the child will be returned home in six months, continue to the next paragraph. Otherwise, skip to paragraph #9.

5. Because the juvenile's return home is unlikely within six months, this court has considered whether legal guardianship or custody with a relative or some other suitable person should be established and makes the following findings of fact: _____*[describe facts relating to this issue]* _____ _____. The rights and responsibilities which should remain with the parents include _____*[describe such rights and responsibilities]* _____.

6. Because the juvenile's return home is unlikely within six months, the court has considered whether adoption should be pursued and makes the following findings of fact: _____*[describe facts relating to this issue]*_____.

7. The barriers to the juvenile's adoption include the following _____*[describe any barriers to adoption]* _____

OR

The court finds no barriers to the juvenile's adoption.

8. Because the juvenile's return home is unlikely within six months, the court has considered whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and makes the following findings of fact: _____*[describe facts relating to this issue* ***including*** *the reasons why]*_____.

9. The court has considered whether the county department of social services has made efforts to prevent or eliminate the need for the child(ren) to be placed outside the home and whether, since the initial permanency plan hearing, there have been reasonable efforts to finalize the permanent plan for the juvenile and finds the following: _____*[Describe reasonable efforts made—note that court could reference the DSS report if such report includes these facts and is incorporated into the court order. Note that the court must address both efforts to prevent placement* ***as well as*** *efforts to finalize the permanent plan. This is required by the ASFA Regulations.]*_____ _____.

10. The court has considered whether visitation with _____is in the child's best interest and finds the following:_____.

If the permanency planning hearing is not combined with a review hearing, skip to paragraph 12

11. *[When the permanency planning hearing is combined with a review hearing, the court will also have to make findings required by 7B-906(c). Some of these will duplicate what is already*

addressed in this order but it is important that all the criteria listed in 7B-906(c) are considered and that findings are made on those that are relevant.]

12. The court makes the following additional findings of fact: _____*[describe any additional information the court has considered and any "other criteria the court deems necessary" to consider (7B-907(b)(6)]*_____.

Based upon the foregoing findings of fact, the Court makes the following CONCLUSIONS OF LAW:

1. The Court has jurisdiction over the subject matter and over the parties to this matter.

2. It is in the best interest of the child(ren) that the Court adopt the following recommendations in this matter: _____*[describe the recommendations and who is making them (DSS, GAL, parent's atty)]*_____.

3. The best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time is as follows: _____*[Describe the plan of care, e.g. custody, guardianship, TPR and adoption, and the individuals involved in that plan. Note that concurrent planning is permissible in which case such plan should be described and identified as a concurrent plan of care. If the court appoints a guardian for the juvenile pursuant to 7B-600, this order should state that such appointment is pursuant to G.S. 7B-600.]*_____. This plan of care is in the best interest of the child(ren).

4. It is in the child's best interest that the department of social services take whatever measures are necessary in order to implement and adhere to the above described permanent plan of care, including making reasonable efforts to do the following: _____*[describe measures that include what it will take to place the child in a timely manner in accordance with the permanent plan and whatever steps are necessary to finalize the permanent placement of the child]*_____.

5. The department of social services has/has not made reasonable efforts to prevent or eliminate the need for the child(ren) to be placed outside the home and has/has not made reasonable efforts to finalize a permanency plan.

It is in the best interest of the child(ren) that the department of social services continue to make reasonable efforts to reunify the family

OR

cease reunification efforts with _____*[the mother and/or father]*_____.

6. The best placement for the child is with _____*[Name of the person the child is to be placed with and, if parent or relative, describe that person's relationship to child.]*_____. This placement is in the child's best interest and this/these person(s) is/are willing and able to provide a safe *[and permanent (if this word is applicable)]* home for the child. This/these person(s) is/are considered by this court to be suitable for caring for this child.

7. Visitation is/is not in the best interest of the child [*under the following limited circumstances:* _____]

8. _____
_____
_____

It Is Therefore Ordered, Adjudged and Decreed As Follows:

1. The minor child, _____, shall be placed with _____*[Name of the person the child is to be placed with and, if parent or relative, describe that person's relationship to child.]*_____but legal custody of the child shall remain with the _____ County Department of Social Services. The Department of Social Services shall have placement authority over the child but if a change in placement is anticipated, and in the absence of emergency circumstances, the Guardian ad Litem for the child must be notified prior to such change so that the GAL has an opportunity to either consent to the change or make a motion to the court to examine placement issues prior to moving the child.

OR

The minor child, _____, shall be placed in the legal and physical custody of ___*[Name of the person the child is to be placed with and, if parent or relative, describe that person's relationship to child]*_____.

2. Visitation with _____*[describe name of person and relationship to child]* shall be as follows: _____.

OR

Is denied.

3. The permanent plan of care for the child is as follows: _____*[Describe the plan of care, e.g. custody, guardianship, TPR and adoption, and the individuals involved in that plan. Note that concurrent planning is permissible in which case such plan should be described and identified as a concurrent plan of care. If the court appoints a guardian for the juvenile pursuant to 7B-600, this order should state that such appointment is pursuant to G.S. 7B-600.]*_____.

4. The _____ County Department of Social Services is ordered to make reasonable efforts to place the child in a timely manner in accordance with the permanent plan set forth above.

5. The _____ County Department of Social Services is ordered to complete the following necessary steps to finalize the permanent placement of the child: _____
_____
_____.
The _____ County Department of Social Services is ordered to document such steps in the child's case plan.

6. The _____ County Department of Social Services *["shall file" is the language applied to actions filed before January 1, 2002; "will be filing" is more appropriate for actions filed on or after that date]* a petition for termination of parental rights for the following reason(s):

☐ The juvenile has been in the custody or placement responsibility of a county department of social services, and has been in placement outside the home for 15 of the most recent 22 months;

☐ a court of competent jurisdiction has determined that the parent has abandoned the child;

☐ a court of competent jurisdiction 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 commit murder or voluntary manslaughter of the child or another child of the parent.

The following paragraph 7 is only applicable to cases where TPR is not being pursued

7. The court is not ordering pursuit of termination of parental rights in spite of the existence of one or more of the three circumstances checked in paragraph six (6) above because the court finds:

☐ The permanent plan for the juvenile is guardianship or custody with a relative or some other suitable person;

☐ The Department of Social Services has not provided the juvenile's family with such services as the department deems necessary, and reasonable efforts are still required to enable the juvenile's return to a safe home

☐ Filing a petition for termination of parental rights is not in the child's best interest for the following reasons:_____.

OR

The court is not ordering pursuit of termination of parental rights because none of the three circumstances set out in paragraph six (6) above exist and filing a petition for termination of parental rights is not in the child's best interest because: _____
_____.

8. The respondent parent, _____, is ordered to do the following in order to facilitate the permanent plan of care: _____*[Note that according to In re Cogdill, the judge is not permitted to order anything not set out in 7B-904 but it may be appropriate for the judge to condition return of the child on the parent meeting certain criteria designed to correct the conditions which led to removal.]*_____.

9. The permanent plan for this child shall be reviewed on __(date and time)__ unless a motion is filed by any party requesting an earlier review.

10. _____
_____
_____

This is the _____ day of _____, 200_.

_____
Judge Presiding

Civil Child Custody [7B-911][1]

Permanency Order Planning Order

NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION
SURRY COUNTY		FILE NO. _____
MARY BETH JOHNSON,	)	
Plaintiff	)	
VS.	)	**PERMANENCY PLANNING**
	)	**REVIEW ORDER**
KIMBERLY JOHNSON and	)	
JAMES BRIGGS,	)	
Defendants	)	

THIS MATTER coming on before the undersigned District Court Judge presiding at the May 21, 2007 Session of Surry County District Court sitting in Dobson, North Carolina for the hearing of juvenile matters upon motion by Petitioner Surry County Department of Social Services (DSS) to determine the permanent plan for the juvenile Mark Johnson pursuant to NCGS § 7B-907. Present at the hearing were Thomas Jones, Attorney for DSS; Madeline Smith, Social Worker; Jennifer Nelson, Attorney for GAL; Jane Smith, Guardian ad Litem; Janet Hanson, Attorney for Respondent Mother; Kimberly Johnson, mother; and Mary Beth Johnson, maternal grandmother. The court after hearing evidence and considering the matter, based on clear and convincing evidence, makes the following:

FINDINGS OF FACT

1. That a child petition was filed by the Surry County Department of Social Services ("DSS") on October 27, 2005 alleging that Mark Johnson, a child born to Kimberly Johnson on June 30, 2000 was Neglected and Dependent. DSS obtained a nonsecure custody order at that time, and the juvenile was placed with his maternal grandmother, Mary Beth Johnson.

2. That the father, James Briggs, was served on October 27, 2005 but has failed to appear in court. The father has had no contact with the juvenile since December of 2000 and does not pay child support. That the mother was served on October 31, 2005 and is represented by counsel.

3. That the father and mother of the juvenile have a history of drug abuse which has interfered with their ability to provide care, supervision and physical necessities for the juvenile.

4. That during an investigation by DSS between February and June 2005, the mother tested positive for cocaine on more than one occasion.

5. That on November 3, 2005 the mother of the juvenile entered into a Case Plan under which she would complete parenting classes, substance abuse assessments, and submit to random drug screens.

[1] Thank you to Evelyn Griggs, GAL Law Intern, for her work drafting the orders for this section.

6. That the undersigned District Court Judge conducted adjudication and disposition hearings, pursuant to Chapter 7B of the General Statutes, on December 1, 2005, and found by clear and convincing evidence that the minor child was neglected. DSS was granted custody of the minor child and the court approved continued placement of the minor child with the maternal grandmother . At that time the court adopted the recommendations of the Case Plan, including parenting classes, complete a substance abuse assessment and follow all recommendations, and ordered supervised visitation one hour weekly at DSS.

7. That prior to today's date, the permanent plan was reunification with the mother.

8. That the mother of the juvenile did not comply with the Case Plan in that she did not maintain regular contact with the social worker, did not complete parenting classes, did not complete a substance abuse assessment, and had sporadic visitation.

9. That on June 2, 2006, October 14, 2006 and January 22, 2007 the mother of the juvenile tested positive for cocaine.

10. That DSS has made reasonable efforts since the initial permanency plan to implement that plan for the juvenile.

11. That the juvenile is currently in the legal custody of DSS, but he has been living in the home of Mary Beth Johnson in White Plains, N.C. since October of 2005.

12. That due to the mother's drug use, Mary Beth Johnson has periodically cared for the juvenile throughout his life and has been his primary caretaker since October of 2005.

13. That the mother of the juvenile, DSS, and the juvenile's Guardian ad litem have all asked for the juvenile to be placed into the legal custody of Mary Beth Johnson. She is a fit and proper person to have the care, custody and control of the juvenile, and to be named the juvenile's custodian and permanent caretaker.

14. That the court has examined Mary Beth Johnson and finds that she understands the responsibility she is assuming in becoming the juvenile's guardian, and she and her family have the resources to provide proper care and supervision for the juvenile.

15. That it is not in the juvenile's best interest to be returned home to his mother neither immediately nor within the next six months due to her inability to comply with the Case Plan and her continued drug use.

16. That it is not in the best interest of the child that adoption be pursued because he is currently with his maternal grandmother who has taken care of him periodically throughout his life.

16. That the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time is to leave him in his current placement and create a permanent plan established through a civil child custody order for him to remain with the maternal grandmother, and that the mother have weekly supervised visitation.

CONCLUSIONS OF LAW

1. That the court has jurisdiction of the subject matter and parties herein.

2. That this order is in the best interest of the minor child.

3. The father of the juvenile, James Briggs, has willfully refused to perform the legal and natural obligations of parental care and support.

4. Placement of the child into the custody of his mother is contrary to the child's welfare at this time.

5. The juvenile's maternal grandmother, Mary Beth Johnson is a fit and proper person to have the care, custody and control of the juvenile, pursuant to NCGS § 50-13.2.

6. It is in the juvenile's best interest for the permanent plan to be that physical and legal custody be placed with Mary Beth Johnson, the juvenile's maternal grandmother, and for Mary Beth Johnson to be named his custodian and permanent caretaker through a civil child custody order pursuant to NCGS § 7B-911.

7. It is in the best interest of the juvenile that the mother be allowed weekly supervised visits to maintain the bond between the juvenile and his mother.

8. It is not in the best interest of the juvenile for the father to be allowed visitation because he has not had a role in the juvenile's life since the juvenile was an infant.

9. That reasonable efforts to eliminate the need for placement shall cease because such efforts clearly would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.

THEREFORE, it is ordered as follows:

1. The juvenile, Mark Johnson, is placed into the legal custody of Mary Beth Johnson, and Mary Beth Johnson be named the Custodian of the Person for the child. In addition to the other duties and authority granted to her by law, Mary Beth Johnson shall have full authority to authorize and arrange for such medical, psychological or educational services as shall be required in the best interests of the child.

2. Supervised visitation between the juvenile and his mother, Kimberly Johnson, shall occur weekly on Sunday afternoons from 1pm-4pm in the home of Mary Beth Johnson, with Mary Beth Johnson present, or as determined through future proceedings by the court in this matter pursuant to NCGS § 50.13.7.

3. The father of the juvenile, James Briggs, has no visitation rights. If he wishes to regain those rights, he must petition the court for a modification of visitation pursuant to NCGS § 50-13.7.

This the _____ day of June 2007.

_____
District Court Judge Presiding

APPENDIX

Termination of Juvenile Court Jurisdiction

NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION
SURRY COUNTY		FILE NO. _____
MARY BETH JOHNSON,	)	
Plaintiff	)	
VS.	)	**CHILD CUSTODY ORDER**
	)	
KIMBERLY JOHNSON and	)	
JAMES BRIGGS,	)	
Defendants	)	

THIS MATTER coming on before the undersigned District Court Judge presiding at the May 21, 2007 Session of Surry County District Court sitting in Dobson, North Carolina for the hearing of juvenile matters upon motion by Petitioner Surry County Department of Social Services (DSS) for entry of a civil child custody order and termination of juvenile court jurisdiction pursuant to NCGS § 7B-911. Present at the hearing were Thomas Jones, Attorney for DSS; Madeline Smith, Social Worker; Jennifer Nelson, Attorney for GAL; Jane Smith, Guardian ad Litem; Janet Hanson, Attorney for Respondent Mother; Kimberly Johnson, mother; and Mary Beth Johnson, maternal grandmother. The court after hearing evidence and considering the matter, based on clear and convincing evidence, makes the following:

FINDINGS OF FACT

1. That a child petition was filed by the Surry County Department of Social Services ("DSS") on October 27, 2005 alleging that Mark Johnson, a child born to Kimberly Johnson on June 30, 2000 was Neglected and Dependent. DSS obtained a nonsecure custody order at that time, and the juvenile was placed with his maternal grandmother, Mary Beth Johnson.

2. That the father, James Briggs, was served on October 27, 2005 but has failed to appear in court. The father has had no contact with the juvenile since December of 2000 and does not pay child support. That the mother was served on October 31, 2005 and is represented by counsel.

3. That the father and mother of the juvenile have a history of drug abuse which has interfered with their ability to provide care, supervision and physical necessities for the juvenile.

4. That during an investigation by DSS between February and June 2005, the mother tested positive for cocaine on more than one occasion.

5. That on November 3, 2005 the mother of the juvenile entered into a Case Plan under which she would complete parenting classes, substance abuse assessments, and submit to random drug screens.

6. That the undersigned District Court Judge conducted adjudication and disposition hearings, pursuant to Chapter 7B of the General Statutes, on December 1, 2005, and found by clear and convincing evidence that the minor child was neglected. DSS was granted custody of the minor child and the court approved continued placement of the minor child with the maternal grandmother. At that time the court adopted the

recommendations of the Case Plan, including parenting classes, complete a substance abuse assessment and follow all recommendations, and ordered supervised visitation one hour weekly at DSS.

7. That the mother of the juvenile did not comply with the Case Plan in that she did not maintain regular contact with the social worker, did not complete parenting classes, did not complete a substance abuse assessment, and had sporadic visitation.

8. That on June 2, 2006, October 14, 2006 and January 22, 2007 the mother of the juvenile tested positive for cocaine.

9. That the juvenile is currently in the legal custody of DSS, but he has been living in the home of Mary Beth Johnson in White Plains, N.C. since October of 2005.

10. That due to the mother's drug use, Mary Beth Johnson has periodically cared for the juvenile throughout his life and has been his primary caretaker since October of 2005.

11. That the mother of the juvenile, DSS, and the juvenile's Guardian ad litem have all asked for the juvenile to be placed into the legal custody of Mary Beth Johnson. She is a fit and proper person to have the care, custody and control of the juvenile, and to be named the juvenile's custodian and permanent caretaker.

12. That the court has examined Mary Beth Johnson and finds that she understands the responsibility she is assuming in becoming the juvenile's guardian, and she and her family have the resources to provide proper care and supervision for the juvenile.

13. Inasmuch as the child has been adequately cared for by Mary Beth Johnson for more than eighteen months, the court finds that there is currently no need for intervention by the State of North Carolina or the Surry County DSS on behalf of the child. Further, that continued juvenile court jurisdiction is not necessary to ensure the best interests of the child.

CONCLUSIONS OF LAW

1. That the court has jurisdiction of the subject matter and parties herein.

2. That this order is in the best interest of the minor child.

3. The father of the juvenile, James Briggs, has willfully refused to perform the legal and natural obligations of parental care and support.

4. Placement of the child into the custody of his mother is contrary to the child's welfare at this time.

5. The juvenile's maternal grandmother, Mary Beth Johnson is a fit and proper person to have the care, custody and control of the juvenile, and pursuant to N.C.G.S. 7B-911 and 50-13.2, it is in the best interest of the juvenile that he be placed into the physical and legal custody of Mary Beth Johnson, and that Mary Beth Johnson be named as the juvenile's guardian and permanent caretaker.

6. That there is no further need for continued state intervention on behalf of the child through a juvenile court proceeding.

7. There is good cause, pursuant to N.C.G.S. 7B-911, to terminate the court's jurisdiction in this juvenile matter.

APPENDIX

THEREFORE, it is ordered as follows:

1. The juvenile, Mark Johnson, is placed into the legal custody of Mary Beth Johnson, and Mary Beth Johnson be named the Custodian of the Person for the child. In addition to the other duties and authority granted to her by law, Mary Beth Johnson shall have full authority to authorize and arrange for such medical, psychological or educational services as shall be required in the best interests of the child.

2. No further hearing shall be held by the court in this matter, and the court's jurisdiction in this juvenile matter is hereby TERMINATED.

3. The Department of Social Services, the Guardian ad litem, and all attorneys involved in this matter are hereby RELIEVED of further responsibility herein.

This the _____ day of June 2007.

_____
District Court Judge Presiding

EXPERTS

Motion for Expert

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION (JUVENILE)
WAKE COUNTY	FILE NO:

IN THE MATTER OF	)	
	)	
MINOR CHILD	)	
DOB 7/16/93,	)	MOTION FOR EXPERT
and	)	(G.S. 7A-454)
MINOR CHILD	)	
DOB 8/8/90	)	

NOW COMES the children, by and through their Guardian ad Litem and counsel, and Prays the Court for an order pursuant to G.S. 7A-454 authorizing the State to pay for the fees for the services of a psychological expert witness to inform the Court of needs of the minor children, and in support of this motion shows the following:

1. The minor children herein were adjudicated abused on March 31, 1998. They were left in the custody of the Wake County Department of Social Services and continued in placement with their paternal aunt and uncle.

2. The Guardian ad Litem is duly appointed by the Court and is ordered to and has a statutory obligation to conduct follow up investigations to ensure that the court orders are properly executed, and report to the court when the needs of the children are not being met.

3. Upon information and belief, the current placement of the minor children is not in their best interest and does not provide them with the stability and nurture that they need; therefore, they are in need of further review by the Court to determine appropriate placement for them.

4. The minor child, _____, has special emotional needs, is currently in counseling at the Wake Orange Mental Health Center, has had a Child Mental Health Evaluation, and has been identified by the public school as a special student.

5. The minor child , _____, is very hyperactive and was recommended to have a Developmental Evaluation to determine if he has special needs. He has had a Child Mental Health Examination and is in counseling at the Wake Orange Mental Health Center.

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

6. The Child Mental health Examiner and the children's therapist have information which is relevant to the placement and visitation needs of these children.

7. The Guardian ad Litem for the minor children needs to present evidence to the Court regarding their needs concerning placement and visitation with their parent and needs an Order of the Court to call _____, Ph.D., as an expert witness.

8. The minor children are indigent and cannot pay for the fees and expenses of their expert psychological witness and need an order of the Court for the expenses and fees of their expert to be paid by the State pursuant to N.C.G.S. §7A-454.

WHEREFORE, the minor children, through their Guardian ad Litem and Attorney Advocate, pray the Court for its order authorizing payment of expert witness fees and expenses to be paid pursuant to G.S. §7A-454.

This the 20th day of April, 1998.

_____

Jane Johnson, Attorney Advocate
820 Nichole Ln.
Raleigh, N.C. 27803-1543
(919) 937-6343
St. Bar No: 27134

CERTIFICATE OF SERVICE

I hereby certify that I have this day served all parties or their attorney with a copy of this Motion by hand delivery or by depositing it in the U.S. mail, postage prepaid, properly addressed, pursuant to Rule 5 of the Rules of Civil Procedure.

This the 20th day of April, 1998

_____

Attorney Advocate
Address
Telephone Number

Order for Expert

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION
ORANGE COUNTY	FILE NO:

IN THE MATTER OF	)	
	)	
DOB	)	ORDER

THIS CAUSE coming on to be heard before the Undersigned Judge Presiding at the May 24, 1998 Session of the Orange County District Court sitting at Raleigh, North Carolina for the hearing of juvenile matters, upon motion of the Guardian ad Litem for an order of the Court to be allowed to call an expert witness, and it appearing that those in attendance include, the juvenile, _____; _____, social worker for the Orange County Department of Social Services and her attorney, _____, Staff attorney for the Orange County Department of Social Services, _____, Guardian ad Litem for the juvenile, and the attorney advocate, Jane Johnson; and the Court, after considering the evidence presented does make the following **FINDINGS OF FACT:**

1. The juvenile has special emotional needs, is currently in psychotherapy and is placed in the _____.

2. The juvenile has been identified by the public schools as a special student for several years and has been classified as Behaviorally and Emotionally Handicapped (BEH).

3. There is some dispute about…….

4. A complete psychological evaluation of the juvenile has been performed by _____, Ph.D., a psychologist at the University of North Carolina in Chapel Hill and his testimony is necessary in this matter.

5. The juvenile, through his Guardian ad Litem, needs to present testimony to the court regarding his special needs and needs to call _____ as an expert witness to present that testimony.

6. The juvenile is indigent and cannot pay for the fees and expenses of his expert psychologist witness and needs an order of the Court for the expenses and fees of his expert to be paid by the State pursuant to N.C.G.S. §7A-454

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

Based upon the foregoing findings of fact, the Court makes the following **CONCLUSIONS OF LAW:**

1. The testimony of a psychologist who can identify and explain the special needs of the juvenile in this matter is necessary for the Court to have sufficient information upon to which to find facts and make orders concerning this juvenile.

2. The juvenile is indigent.

3. The payment of an expert witness for the juvenile is authorized by the General Statutes of North Carolina pursuant to § 7A-454.

NOW, THEREFORE, IT IS ORDERED that the guardian ad litem for the juvenile is authorized to call as an expert witness, _____, Ph.D. to testify at the hearing of this matter and that his expenses and expert witness fee shall be paid by the State pursuant to N.C.G.S. §7A-454.

This the ____ day of _____, 1993.

_____
The Honorable _____
District Court Judge Presiding

INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS

Application and Motion for Preliminary Injunction And Permanent Injunction

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISON (JUVENILE)
WAKE COUNTY	FILE NOS: 98 J X-XXX

IN THE MATTERS OF:	)	
	)	APPLICATION AND MOTION
MINOR CHILDREN,	)	FOR PRELIMINARY
	)	INJUNCTION AND
DOB:	)	PERMANENT INJUNCTION

Pursuant to North Carolina General Statutes section 1A-1, Rule 65, of the North Carolina Rules of Civil Procedure, the children, by and through their Guardian ad Litem and counsel move the court as follows:

1. That a preliminary injunction be issued from this court to enjoin [Father] and any person acting in concert or participation with him, from contacting or attempting to contact the minor children or their foster parents, seeing or attempting to see the children or their foster parents, discussing the sex abuse allegations with [Daughter], allowing or facilitating contact between Minor Children and Respondent [Mother], [her Boyfriend], or [Maternal Grandfather], or from violating any orders of the court, until such time as the allegations of the verified motion and affidavits filed in this matter shall be finally adjudicated.

2. That the court issue an immediate temporary restraining order in accordance with North Carolina Rules of Civil Procedure, Rule 65(b), to immediately enjoin [Father], and anyone acting in concert or participation with him, from contacting or attempting to contact the minor children or their foster parents, or seeing or attempting to see the minor children or their foster parents, in that immediate and irreparable injury, loss and damage will result to the minor children before notice can be served and a hearing on the minor children's application for preliminary injunction can be had thereon because the Guardian ad Litem is informed, believes, and therefore alleges that [Father] will continue to violate the court's orders prohibiting discussion of the sex abuse allegations with [Daughter]; his discussion or questioning about this matter compromises the investigation and possible prosecution of these allegations; that he will continue to expose them to or facilitate their exposure to Respondent [Mother], [her Boyfriend], and [Maternal Grandfather], who are not authorized to see the children; and that the Guardian ad Litem has no other adequate remedy at law.

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

3. That a hearing upon this application for preliminary injunction and issuance of temporary restraining order be had within ten (10) days of its filing as required by the North Carolina Rules of Civil Procedure.

4. In support of this motion, the minor children show the Court as follows: That a verified motion seeking the court to direct [Father], the father of minor children, and anyone acting in concert with him, to refrain from contacting or attempting to contact the minor children, or seeing or attempting to see the children, except upon the express order of the Court, and that he comply with all of the court's orders, and praying the court to issue a permanent injunction against Father and anyone acting in concert with him for these acts, and for costs and reasonable attorney's fees, was filed by the Guardian ad Litem on this date, the contents of which motion are incorporated herein by reference herein as if fully set out.

This the 7th day of January, 1998.

_____
Attorney Advocate
Address
Telephone Number

CERTIFICATE OF SERVICE

I hereby certify that I have this day served all parties or their attorney with a copy of this Motion and Application for Preliminary Injunction and Permanent Injunction by hand delivery or by depositing it in the U.S. mail, postage prepaid, properly addressed, pursuant to Rule 5 of the Rules of Civil Procedure.

This the 7th day of January, 1998.

_____
Attorney Advocate
Address
Telephone Number

Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISON (JUVENILE)
WAKE COUNTY	FILE NO: 98 J X-XXX

IN THE MATTERS OF:	)	
	)	MOTION
MINOR CHILDREN,	)	FOR TEMPORARY RESTRAINING
	)	ORDER, PRELIMINARY
DOB:	)	INJUNCTION AND PERMANENT
	)	INJUNCTION (G.S. 1A-1, RULE 65)

NOW COMES the children by and through their Guardian ad Litem and counsel, pursuant to N.C.G.S. 1A-1, Rule 65 of the North Carolina Rules of Civil Procedure, and move the Court for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction restraining [Father] and anyone acting in concert with him from contacting or attempting to contact the Minor Children or their foster parents, seeing or attempting to see the minor children or their foster parents, discussing the sex abuse allegations with [Daughter], facilitating contact between Respondent [Mother], [her Boyfriend] or [Maternal Grandfather] with Minor Children, or violating any of the court's orders, and for costs and reasonable attorney's fees. In support of this motion the movant shows the court the following:

1. This is an emergency motion which is made ex parte because immediate, irreparable injury, loss or damage will result to Minor Children before notice can be served and hearing held thereon in that such delay would afford [Father] the opportunity for his violations of the Court's orders to continue and could provide the impetus for removal of the children from the State.

2. A Temporary Restraining Order is necessary to restrain and enjoin Father and those acting in concert with him from continued violations of the Court's orders.

3. On January 4, 1998, the Court held a 7 day hearing in this matter and [Father] appeared before the Court, having come from New York City without having seen Minor Children for several years, to request visitation with Minor Children and to request that a home study be done on his home so that he could be considered for their placement.

4. At the hearing, the Court entered an order allowing [Father] to have one time overnight unsupervised visitation with the Minor Children on January 4, 1998, conditioned upon his not discussing the allegations in this case with them, specifically not discussing the sex abuse allegations with [Daughter], and not allowing the Respondent [Mother], [her Boyfriend], or [Maternal

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

Grandfather] to be in their presence or have contact with them. The Court specifically prohibited any other contact by [Father] with the Children, including not obtaining information about their placements, day care, school, and after school arrangements. The issue of further contact was to be addressed at the next hearing to be held on January 19, 1998.

5. [Father] was present during the hearing of this matter, acknowledged his understanding of the Court's order and his agreement to abide by all of its terms, and entered into a protection plan with the Wake County Department of Social Services agreeing to the terms, all of which is set out in the affidavit of Social Worker, which is attached to this motion and incorporated herein.

6. Upon that information and belief, on January 4, 1998, [Father] exercised his right to have unsupervised visitation and the minor children spent the night with him at the Holiday Inn in Goldrock, North Carolina.

7. Upon information and belief, during the visitation, [Father] discussed the sex abuse allegations with [Daughter], in violation of the Court's order.

8. Upon information and belief, during the visitation, [Father] called Respondent [Mother] at [Maternal Grandparents'] home and allowed Respondent [Mother] to talk with all three children on the telephone, in violation of the Court's order.

9. Upon information and belief, [Father] took the children to the home of the [Maternal Grandparents], knowing that Respondent [Mother], [her Boyfriend], and [Maternal Grandfather] were there and the children saw and visited with all these adults at that time, in violation of the court order.

10. Upon information and belief, [Father] left the grandparents' home with the three children and Respondent [Mother], continuing her unauthorized visit with the children, in violation of the court order.

11. Upon information and belief, [Father] and Respondent [Mother] and the children spent the night together in his motel room in violation of the court order.

12. Upon information and belief, [Father] took the children to their Respondent [Mother's] place of employment on January 5, 1998, in violation of the court order.

13. Upon information and belief, [Father] discussed the sex abuse allegations with [Daughter] several times during the visit, in violation of the court order.

14. Upon information and belief, [Father] obtained the telephone numbers and addresses of the children's foster parents from the children and has called them and their foster parents numerous times attempting to arrange visits with the children directly through the foster parents outside of court, in violation of the court order.

15. Upon information and belief, [Father] has questioned the foster mother's own

biological children in order to get exact directions to their home, find out when the parents are at work, and learn where the Children are in day care and after school care, in violation of the court order.

16. Upon information and belief, the foster parents are concerned about the security of the children's placements due to [Father's] actions.

17. The placements of Minor Children are compromised due to the interference of the [Father]; and further, the investigation of the sexual abuse allegations concerning [Daughter] and prosecution of these charges are compromised due to [Father's] violation of court orders.

18. [Father's] intentional violation of the Court's orders, his flagrant disregard of protective orders concerning the conditions of his visitation with the children, his continual telephone calls to the minor children in foster care in attempt to arrange unauthorized visits, and his knowledge of the whereabouts of their placements in foster care, provide reasonable grounds to believe that [Father] will continue to violate the Court's orders, continue to contact the minor children, continue to flagrantly disregard the orders of the Court, and continue to compromise the investigation and prosecution of the sexual abuse allegations concerning [Daughter], thereby causing immediate and irreparable injury, loss and damage to the minor children by exposing them to further risk of harm and inhibiting the ability of the Court to protect them.

WHEREFORE, the movant prays the Court to grant her Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction restraining [Father] and anyone acting in concert with him from contacting or attempting to contact the minor children or their foster parents, or seeing or attempting to see the minor children or their foster parents, discussing the sex abuse allegations with [Daughter], facilitating contact between the children and Respondent [Mother], [her boyfriend], or [Maternal Grandfather], or violating any of the Court's orders until such time as allegations of this motion shall be finally adjudged. Movant also prays that no security be required.

This the 7th day of January, 1998.

_____

Attorney Advocate
Address
Telephone Number

VERIFICATION

On this 7th day of January, 1998, _____, the GAL, personally appealed before me who, first being duly sworn, says that she is the Guardian ad Litem herein; that she has read the foregoing motion and knows its contents; and that the same is true of her own knowledge, except as to those matters stated upon information and belief, as to those, she believes them to be true.

_____

Guardian ad Litem

Sworn to and subscribed before me this 7th day of January, 1999.

_____

Notary Public

My commission expires: _____

Affidavit of Social Worker

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISON (JUVENILE)
EDGECOMBE COUNTY	FILE NOS: 98 J X-XXX

IN THE MATTERS OF:	)	
	)	
MINOR CHILDREN,	)	AFFIDAVIT OF SOCIAL WORKER
DOB:	)	
	)	

I, JOHN DOE, being first duly sworn, deposes and says:

1. I am a social worker in the Child Protective Services Section of the Wake County Department of Social Services.

2. I am more than eighteen (18) years of age and have personal knowledge of the facts and matters set forth in this affidavit, and am competent to give this affidavit.

3. I was present in court on January 4, 1998 for the seven day hearing of this matter when the Court ordered unsupervised visitation between Father children, conditioned upon several things.

4. On January 4, 1998, after the seven day hearing in this matter, I discussed with Father all of the terms and conditions of the Court's order allowing his visitation. This included, but was not limited to a discussion of the court's order that he not discuss the allegations of sex abuse with Daughter. I explained that any such discussion could compromise investigation and prosecution of the matter.

5. I also explained to Father the necessity of the Court's condition that Respondent Mother, her Boyfriend, and Maternal Grandfather, who are the alleged perpetrators, have no contact with the children.

6. I also explained to Father the necessity of the Court's condition that Respondent Mother, her Boyfriend, and Maternal Grandfather, who are the alleged perpetrators, have no contact with the children.

7. Additionally, I explained to Father that he was allowed to have no contact whatsoever

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This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7. This affidavit is to accompany the Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction.

with the children other than the court ordered unsupervised visit to take place that day and night; that this was necessary to protect the security of the children's placement, and that additional visitation and contact would be addressed at the next hearing which was scheduled to take place on January 18, 1998.

8. Father stated that he understood and agreed to all of the conditions placed on his visit by the Court; he restated them to me; and he signed a protection plan containing this agreement. A copy of the protection plan is attached to this affidavit and incorporated into it.

9. I delivered the children to Father for overnight visitation at 4:00 PM, on January 4, 1998, as ordered by the court and picked them up the next day at 8:00 AM.

10. Based upon my own observations and my investigation of the visit and events that have followed it, our agency substantiated neglect by Father for intentionally violating the court's orders in that:

A. Upon information and belief, Father called the Respondent Mother at Maternal Grandparents' house from his motel room during the visit and allowed the children to talk to her.

B. Upon information and belief, Father took the children to the home of the Maternal Grandparents, knowing that Respondent Mother, her Boyfriend, and Maternal Grandfather were there and the children saw and visited with all of these adults at that time.

C. Upon information and belief, Father let the grandparents' home with the three children and Respondent Mother, continuing her unauthorized visits with the children.

D. Upon information and belief, Father and Respondent Mother and the children spent the night together in his motel room.

E. Upon information and belief, Father took the children to their Respondent Mother's place of employment on January 5, 1998.

F. Upon information and belief, Father discussed the sex abuse allegations with Daughter several times during the visit.

G. In the presence of this affiant, Father told Daughter that if anyone ever messed with her again she should call him, even if she had to go to a phone booth and call him collect, and he, his father and his "crazy brother" would come down here and take care of it.

H. Upon information and belief, Father obtained the telephone numbers and addresses of the children's foster parents from the children and has called them and their foster parents numerous times attempting to arrange visits with the children directly through the foster parents outside of court.

I. Upon information and belief, Father has questioned the foster mother's own biological children in order to get exact directions to their home, find out when the foster parents are at work, and learn where the Children are in day care and after school care.

J. The Foster parents have expressed concern about the security of the children's placements because of Father's telephone calls, his knowledge of their addresses, his attempts to find out where the children are, and his attempts to arrange unauthorized visits through them with the children.

11. The children have been adjusting well to foster care.

12. Daughter has bonded with her foster mother and has made ongoing revelations concerning alleged sexual abuse by multiple adult abusers to her when she had not made these revelations to anyone else, including her parents or social worker.

13. It is in the best interest of these children to have consistency by remaining in their current foster homes and not being unnecessarily removed or further separated.

14. Father's unauthorized contacts with the children, his violation of court orders regarding his communication with Daughter about the sex abuse allegations, his facilitation of prohibited contact between the children and Respondent Mother, her Boyfriend, and Maternal Grandfather all compromise the safety and placements.

Further affiant sayeth not.

This the _____day of _____, _____.

_____
John Doe

Sworn to and subscribed before me,
This the _____ day of _____, _____.

_____
Notary Public

My Commission Expires: _____

[Attach Certificate of Service]

Notice of Hearing on Temporary Restraining Order, and Application for Preliminary Injunction

NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION (JUVENILE) FILE NO. 98J X-XXX

IN THE MATTER OF:)
)
MINOR CHILDREN,)
)
DOB:)

NOTICE OF HEARING ON TEMPORARY RESTRAINING ORDER, AND APPLICATION FOR PRELIMINARY INJUNCTION

TAKE NOTICE that the child by and through the child's Guardian ad Litem and counsel has filed a verified Motion and supporting affidavit, alleging that Father has violated orders of the court by discussing sexual abuse allegation with Daughter; allowing Respondent Mother, her Boyfriend, and Maternal Grandfather to have unauthorized access to the Minor Children; and further that his knowledge of the placements of the children and his telephone calls to them compromises the security of their placements. The Guardian ad Litem has obtained a Temporary Restraining order on this date and has applied for a Preliminary Injunction, and Permanent Injunction to enjoin Father and anyone acting in concert with him from contacting or attempting to contact the minor children or their foster parents, or from seeing or attempting to see the minor children or foster parents, from discussing the sex abuse allegations with Daughter, or from violating any of the court's orders. A hearing upon extension of said Temporary Restraining Order and Application and Motion for Preliminary Injunction shall be held at 9:30 AM January 15, 1998, in the Wake County District Courtroom, Wake County Courthouse, Tarboro, North Carolina.

This the 7th day of January, 1998.

_____
Attorney Advocate
Address
Telephone Number

[Attach Certificate of Service]

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

Temporary Restraining Order

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISON (JUVENILE)
WAKE COUNTY	FILE NOS: 98 J X-XXX

IN THE MATTERS OF:	)	
	)	
MINOR CHILDREN,	)	
	)	TEMPORARY RESTRAINING
DOB:	)	ORDER
	)	

THIS CAUSE, coming on ex parte by the attorney and Guardian ad Litem for the minor children herein, before the undersigned District Court Judge presiding for the entry of this order on January 7, 1998, pursuant to N.C.G.S. 1A-1, Rule 65 of the North Carolina Rules of Civil Procedure, for a Temporary Restraining Order restraining [Father] and anyone acting in concert with him from contacting or attempting contact the Minor Children or their foster parents, discussing the sex abuse allegations with [Daughter], facilitating contact between Respondent [Mother], [her Boyfriend], or [Maternal Grandfather] with Minor Children, or violating any of the court's orders, and for cost and reasonable attorney's fees. After reviewing the motion, application, affidavit and attachments, and hearing counsel, the Court makes the following

FINDINGS OF FACT:

1. On January 4, 1998, the Court held a 7 day hearing in this matter and Father appeared before the Court, having come from New York without having seen Minor Children for several years, to request visitation with Minor children and to request that a home study be done on his home so that his home could be considered for their placement.

2. At the hearing, the Court entered an order allowing Father to have one time overnight unsupervised visitation with the Minor Children on January 4, 1998, conditioned upon his not discussing the allegations in this case with them, specifically not discussing the sex abuse allegations with Daughter, and not allowing the Respondent Mother, her Boyfriend, or Maternal Grandfather to be in their presence or have contact with them. The Court specifically prohibited any other contact by Father with the children, including not obtaining information about their placements, day care, school, and after school arrangements. The issue of further contact was to be addressed at the next hearing to be held on January 19, 1998.

3. The Father was present during the hearing of this matter, acknowledged his understanding of the Court's order and his agreement to abide by all of its terms, and entered into a protection plan with Wake County Department of Social Services agreeing to the terms.

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

4. On January 4, 1998, Father exercised his right to have unsupervised visitation and the minor children spent the night with him at the Holiday Inn in Goldrock, North Carolina. During that visit, Father violated the Court's order in that:

A. Father discussed the sex abuse allegations with Daughter.

B. Father called Respondent Mother at Maternal Grandparent's home and allowed Respondent Mother at Maternal Grandparents' home and allowed Respondent Mother to talk with all three children on the telephone.

C. Father took the children to the home of the Maternal Grandparents, knowing that Respondent Mother, her Boyfriend, and Maternal Grandfather were there and the children saw and visited with all of these adults at that time.

D. Father left the grandparents' home with the three children and Respondent Mother, continuing her unauthorized visit with the children.

E. Father and Respondent Mother and the children spent the night together in his motel.

F. Father took the children to their Respondent Mother's place of employment on January 5, 1998.

G. Father obtained the telephone numbers and addresses of the children's foster parents from the children and has called them and their foster parents numerous times attempting to arrange visits with the children directly through the foster parents of court.

H. Father questioned the foster mother's own biological children in order to get exact directions to their home, find out when the foster parents are at work, and learn where the Children are in day care and after school care.

5. The foster parents are concerned about the security of the children's placements due to Father's actions.

6. The placements of Minor Children are compromised due to the interference of the Father; and further, the investigation of the sexual abuse allegations concerning Daughter and prosecution of these charges are compromised due to Father's violation of court orders.

7. The children may have to be moved to other foster placements to protect the security of the their placements, and compromise of the investigation and prosecution of the sex abuse charges may be permanent.

8. Father's intentional violation of the Court's orders, his flagrant disregard of protective

orders concerning the conditions of his visitation with the children, his continual telephone calls to the minor children in foster care in attempt to arrange unauthorized visits, and his knowledge of the whereabouts of their placements in foster care, provide reasonable grounds to believe that Father will continue to violate the Court orders, continue to contact the minor children, continue to flagrantly disregard the orders of the Court, and continue to compromise the investigation and prosecution of the sexual abuse allegations concerning Daughter, thereby causing immediate and irreparable injury, loss and damage to the minor children by exposing them to further risk of harm and inhibiting the ability of the Court to protect them.

9. It is necessary to grant the ex parte motion for a Temporary Restraining Order because waiting for notice to Father and opportunity for him to be heard allows additional time for his violations of the Court's orders to continue and could provide the impetus for removal of the children.

Based on the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW:

1. The Court has jurisdiction of the parties and subject matter of this matter.

2. This is an emergency motion which was heard ex parte because immediate, irreparable injury, loss or damage will result to Minor Children before notice can be served and hearing had thereon in that such delay would afford Father the opportunity for his violations of the Court's orders to continue and could provide the impetus for removal of the children from the State.

3. Immediate and irreparable injury, loss and damage has been inflicted upon Minor Children by Father's intentional violation of the Court's orders; his flagrant disregard of protective orders concerning the conditions of his visitation with the children; his continual telephone calls to the minor children in foster care in attempt to arrange unauthorized visits; and his unauthorized knowledge of the whereabouts of their placements in foster care; his attempts to learn the whereabouts of their day care, school, and after school care; his discussion of sex abuse allegations with Daughter, compromising the investigation and prosecution of these allegations; all of which exposes them to further risk of harm and inhibits the Court's ability to protect them.

4. A temporary restraining order is necessary to restrain and enjoin Father's violations of the Court's orders.

5. No security should be required.

Based on the foregoing Findings of Fact and Conclusions of Law

IT IS HEREBY ORDERED that:

1. The movant's Temporary Restraining Order is granted restraining and enjoining Father and anyone acting in concert with him from contacting or attempting to contact the minor children or their foster parents, or seeing or attempting to see the minor children or their foster parents, discussing the sex abuse allegations with Daughter, facilitating contact between the children and

Respondent Mother, her Boyfriend, or Maternal Grandfather, or violating any of the Court's orders until such time as hearing can be had on the merits of this matter and further orders entered.

2. This Temporary Restraining Order expires ten days from the date and time of its issuance, which date and time are endorsed below.

3. Hearing on the extension of this Temporary Restraining Order and movant's motion and application for a Preliminary Injunction shall be held at 9:30 AM, on January 15, 1998, in the District Courtroom, Wake County District Court, Tarboro, North Carolina.

4. No security from movant is required.

5. The original of this Temporary Restraining Order along with movant's Motion, Application and Motion, and Notice of Motion and Application shall be filed in the office of the Wake County Clerk of superior court and copies shall be immediately served upon Father and anyone believed to be acting in concert with him, and all parties, in accordance with the Rule of Civil procedure, so that they will have notice to appear and opportunity to be heard.

This the 7th day of January, 1998.

_____
District Court Judge Presiding

ENTERED:

DATE: _____

TIME: _____

CONTEMPT

Motion to Show Cause

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISON (JUVENILE)
WAKE COUNTY	FILE NOS: 98 J X-XXX

IN THE MATTERS OF:	)	
	)	
MINOR CHILDREN,	)	MOTION TO SHOW CAUSE
	)	(G.S.5A-21; 7B-904(e))
DOB:	)	

NOW COMES the minor children by and through their Guardian ad Litem and counsel, in the above-entitled matter and moves the court to issue an order requiring Joe Smith, father of the minor children, to appear and show cause, pursuant to G.S. 7B-904(e) and 5A-21, why he should not be held in civil contempt. In support of this motion, the minor children respectfully show the Court as follows:

1. Joe Smith, father of the minor children, appeared and submitted himself to the jurisdiction of the Court on January 4, 1998, at a seven-day hearing.
2. The court allowed the Mr. Smith to have unsupervised overnight visitation with the minor children on January 4, 1998, conditioned upon his not discussing the sex abuse allegations with Daughter and his not allowing any contact by the Respondent Mother, her Boyfriend, or Maternal Grandfather the alleged perpetrators, with the minor children. He was ordered to have no other contact with the minor children other than the specific unsupervised visits ordered by the court. Further contact was to be addressed at the next court hearing scheduled for January 19, 1998.
3. Mr. Smith specifically agreed in open court to abide by the Court's orders concerning his contact with the children and he entered into a written protection plan to specifying the same.
4. The Guardian ad Litem has filed a sworn affidavit executed by Social Worker, which is attached to this motion and incorporated herein by reference, alleging and detailing Mr. Smith's intentional violations of the Court's Order occurring on or about January 4-5, 1998.

WHEREFORE, Guardian ad Litem prays that Mr. Smith be ordered to show cause, if any there be, why he should not be held in civil contempt of this Court, and that the Court find Mr. Smith to be in civil contempt of Court and punish him for civil contempt of Court.

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

This the 7th day of January, 1998.

_____

Attorney Advocate
Address
Telephone Number

[Attach Certificate of Service]

Notice of Hearing

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISON (JUVENILE)
WAKE COUNTY	FILE NOS: 98 J X-XXX

IN THE MATTERS OF:	)	
	)	
MINOR CHILDREN,	)	NOTICE OF HEARING
	)	
DOB:	)	

TO: Respondent Father
Address

Respondent Mother
Address

Attorney (Father)
Address

Attorney (Mother)
Address

Attorney
Wake Co. DSS
Address

Social Worker
Wake Co. DSS
Address

PLEASE TAKE NOTICE that on the undersigned will bring the attached Motion to Show Cause on for hearing before the District Court of Wake County, Wake County Courthouse, Raleigh, North Carolina, at 9:30 a.m. 15th day of January, 1998, or as soon thereafter as the Court can hear it.

This the 7th day of January, 1998.

_____

Attorney Advocate
820 Lane
Raleigh, NC 27803
(919) -6343

[Attach Certificate of Service]

APPENDIX

Show Cause Order

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISON (JUVENILE)
WAKE COUNTY	FILE NOS: 98 J X-XXX

IN THE MATTERS OF:	)	
	)	
MINOR CHILDREN,	)	SHOW CAUSE ORDER
	)	(G.S. 7B-904(e))
DOB:	)	(G.S. 5A-21)

THIS CAUSE, coming onto be considered and being considered by the Court on Motion by the minor children, by and through their Guardian ad Litem and counsel, for Joe Smith, the father of the minor children, to appear and show cause, if any, why he should not be held in civil contempt of court;

IT APPEARING TO THE COURT, that on January 4, 1998, an Order was entered by the Court allowing the father to have unsupervised overnight visitation with the minor children only as specifically authorized by the Court and conditioned upon Father not discussing the sexual abuse allegations with Daughter or allowing Respondent Mother, her Boyfriend, or Maternal Grandfather to have any contact with the minor children other than the specifically authorized visit; Father was present in Court when that Order was entered and he specifically agreed to abide by the Court's Orders; and it appearing that Father has discussed the sex abuse allegations with Daughter, allowed prohibited contact between Respondent Mother, her Boyfriend, and Maternal Grandfather, and the children during his visitation, and that he has had repeated contact and attempted contact with the minor children.

The Court finds probable cause to believe that Father is in civil contempt; therefor

IT IS ORDERED, that Father appear in person before the Wake County District Court, Wake County Courthouse, in Raleigh, North Carolina, at 9:30 AM, on January 15, 1998; and show cause why he should not be held in civil contempt of Court for failure to comply with the lawful Order of this Court, and be punished accordingly.

AND IT IS FURTHER ORDERED, that a copy of this Order and Guardian ad Litem's motion be served upon Father and the other parties to this action as required by the Rules of Civil Procedure.

This the 7th day of January, 1998.

_____

District Court Judge Presiding

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

TERMINATION OF PARENTAL RIGHTS

Petition for Termination of Parental Rights

STATE OF NORTH CAROLINA COUNTY OF_____	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ____J ____
IN THE MATTER OF:) _____, a minor juvenile) d.o.b. ___/___/___)	PETITION FOR TERMINATION OF PARENTAL RIGHTS

[BEGINNING OF PETITION WHEN DSS IS PETITIONER]

The _____County Department of Social Services, through its Director, _____, Petitioner, files this Petition for Termination of Parental Rights pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes. As grounds for the relief sought, Petitioner alleges the following:

1. The Petitioner is the _____County Department of Social Services, whose address is _____(agency address)_____. _____(Director's Name)____ is the director of the department.

2. _____, c/o _____, District Administrator, Guardian ad Litem Program, (_____), was appointed guardian ad litem, pursuant to G.S. 7B-601, for the child in Juvenile File # ___J___, and has not been relieved of that responsibility.

[BEGINNING OF PETITION WHEN GAL IS PETITIONER]

The Guardian ad Litem, _____, petitioner, working with and supervised by the _____ County Guardian ad Litem Program staff, files this Petition for Termination of Parental Rights pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes. As grounds for the relief sought, Petitioner alleges the following:

1. The Petitioner is the Guardian ad Litem who (a) was appointed to represent the minor child pursuant to G.S. 7B-601 on _____, in ___J___, (b) has not been relieved of this responsibility, and (c) qualifies as a petitioner under the provisions of G.S. 7B-1103(6).

2. _____ [Name of GAL attorney] is the Guardian ad Litem attorney appointed to represent the child in the juvenile proceeding, docket number ___J___. Petitioner's mailing address is _____ [Attorney's Mailing Address].

[REMAINDER OF PETITION]

3. The name of the child as it appears on the child's birth certificate is _____. A copy of the child's birth certificate is attached hereto as Exhibit "A" and is incorporated by reference as part of this Petition.

4. The child, _____(Child's name)___ was born on _____(date)___, in _____(place)_____.

5. The child is residing in _____ County, North Carolina, at the time of the filing of this Petition.

6A. The child is in the legal and physical custody of the _____County Department of Social Services pursuant to the "Parent's Release, Surrender, and General Consent to Adoption" signed by the [mother and/or father], _____names(s)_____(dated)_____. A copy of the release and surrender is attached hereto as Exhibit "B" and is incorporated by reference.

OR

6B. The child is in the legal and physical custody of the _____County Department of Social Services pursuant to orders of the Court in Juvenile File# ___J___. The orders are designated as follows by judge and date: _____; _____; _____. Copies of the orders are attached hereto as Exhibits "C", "D", and "E", and are incorporated by reference.

7. The mother of the child is _____, who is more than eighteen (18) years of age and whose current address is _____.

8. The mother was unmarried at the time of the conception and birth of the child and has not subsequently married the reputed father of the child.

9. The biological father of the child is _____, who is more that eighteen (18) years of age and whose current address is _____.

AND/OR

10. The biological father of the child is _____, who is more than eighteen (18) years of age and who current whereabouts are unknown. Petitioner has made diligent efforts to ascertain the location of the father, including but not limited to the following (describe efforts in detail):

AND/OR

11. The identity of the child's biological father is unknown. Petitioner has made diligent efforts to ascertain the identity of the father, including but not limited to the following (describe efforts in detail):
12. No one has been appointed guardian of the person of the child pursuant to Article 1 of Chapter 35A of the General Statutes or G.S. 7B-600.

13. As alleged below, there are facts sufficient to warrant a determination that ground (s) exist(s) for the termination of parental rights.

/_/ a. The [mother/ father] has abused the child within the meaning of G.S. 7B-101(1), in that (allege specific facts):

/_/ b. The [mother/ father] has neglected the child within the meaning of G.S. 7B-101(15), in that (allege specific facts):

/_/ c. The [mother/father] has willfully, and not due solely to poverty, left the child in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting the conditions that led to the child's removal, in that (allege specific facts):

/_/ d. The child has been placed in the custody of the county department of social services, [a licensed child-placing agency a child caring institution, or a foster home] and the [mother/ father], for a continuous period of six months next preceding the filing of this Petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so, in that (allege specific facts):

/_/ e. The child was born out of wedlock and the father, before the filing of this Petition, has not done any of the following:
1) Established paternity judicially or by affidavit filed in a central registry maintained by the Department of Health and Human Services; or
2) Legitimated the child pursuant to G.S.49-10, or filed a petition for that specific purpose; or
3) Legitimated the child by marriage to the child's mother; or
4) Provided substantial financial support or consistent care with respect to the child and mother (allege specific facts):

/_/ f. The [mother/ father] is incapable of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7B-101(9), and that there is a reasonable probability that such incapability will continue for the foreseeable future. The [mother/father's] incapability is the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition. The following facts support this ground:

/_/ g. The [mother/ father] has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the Petition, in that (allege specific facts):

/_/ h. The [mother/ father] has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter or the child, another child or the parent, or other

child residing in the home; or has 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 in that:

/_/ i. The parental rights of the [mother/ father] with respect to another child of the [mother/ father] have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home in that:

14. This petition has not been filed to circumvent the provisions of G.S. Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Court would have jurisdiction to make a child custody determination pursuant to G.S. 50A-201.

15. The conduct of the [mother/ father] has been such as to demonstrate that he/she will not promote the child's healthy and orderly physical and emotional well-being.

16. The child is in need of a permanent plan of care at the earliest possible age, and this can be accomplished only by the severing of the relationship between the child and the [mother/ father] by termination of parental rights of the [mother/ father].

17. It is in the child's best interests that the parental rights of the [mother/ father] are terminated.

WHEREFORE, the Petitioner prays the Court as follows (include only applicable provisions):

1. That pursuant to G.S. 7B-1101, the Court appoint a guardian ad litem to represent the [mother/ father] of the child.

2. That pursuant to G.S. 7B-1105, the Court hold a preliminary hearing to ascertain the identity of the father of the child.

3. That the Court issues an Order terminating the parental rights of the [mother/ father] of the child.

4. That the Court tax the costs of this action to any party as the court finds appropriate.

5. That the Court grant such other and further relief as the Court may deem appropriate.

This _____ day of _____, _____.

_____
[Attorney's Name]
N.C. Bar # _____
[Address]
[Telephone number]

VERIFICATION

NORTH CAROLINA
COUNTY OF _____

_____, being first duly sworn, deposes and says that he/ she is the Petitioner herein; that he/ she has read the foregoing Petition for Termination of Parental Rights, and that the same is true of his/her own knowledge, except as to the matters and things stated upon information and belief, and as to those matters and things, he/she believes them to be true.

_____
[Petitioner's Name]

Sworn to and subscribed before me,
This the _____ day of _____, _____.

_____
Notary Public

My Commission Expires: _____

APPENDIX

Possible Exhibits to TPR Petition

POSSIBLE EXHIBITS TO TPR PETITION

EXHIBIT #	USED?	NAME OF EXIBIT
1.	_____	Affidavit regarding Petitioner's Efforts to Determine the Identity or Whereabouts of the Parent(s)
2.	_____	Copy of the Signed Parental Consent to Adoption Form
3.	_____	Copy of Petition to Adopt Child(ren)
4.	_____	Copy of Order Giving Custody to DSS
5.	_____	Copy of Order of Adjudication of Abuse
6.	_____	Copy of Order of Adjudication of Neglect
7.	_____	Affidavit regarding Parent's Failure to Make Positive Response Within Required time
8.	_____	Affidavit Regarding Parent's Mental Incapacity
9.	_____	Affidavit Regarding Abandonment by Parent
10.	_____	Affidavit Regarding Placement History of Child(ren)

Order Authorizing Service of Process by Publication

STATE OF NORTH CAROLINA COUNTY OF _____		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ____ J____
IN THE MATTER OF: _____ _____	)))))	ORDER AUTHORIZING SERVICE OF PROCESS BY PUBLICATION (G.S. 7B-1105)

THIS MATTER comes before the Court by way of a Petition for Termination of Parental Rights. Pursuant to G.S. 7B-1105 (a), this Court conducted a preliminary hearing on _____ to ascertain the name or identity of the father of the child, _____, at which time the following persons were present: _____, Guardian ad Litem for the child, _____, attorney advocate for the child, _____, social worker from the _____County Department of Social Services; and _____, representing the _____County Department of Social Services.

Testimony was elicited on behalf of petitioner, _____County Department of Social Services, from _____, social worker.

[If child's mother attends, add that to first paragraph and include appropriate findings.]

FINDINGS OF FACT

Based on the evidence and testimony presented, the Court makes the following findings of fact by clear, cogent and convincing evidence:

1. INSERT SPECIFIC FINDINGS OF FACT FORM THE EVIDENCE REGARDING WHAT THE PETITIONER KNOWS ABOUT THE PARENTAGE OF THE CHILD AND THE LOCATION OF THE MOTHER AT THE TIME OF THE CONCEPTION OF THE CHILD.

2. That the name or identity of the father of the child, _____, are not known and cannot be ascertained.

3. That the proper county for publication of notice to the unknown father of the Petition for Termination of Parental Rights is _____.

APPENDIX

CONCLUSIONS OF LAW

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

1. That the name or identity of the father of the child, _____, are not known and cannot be ascertained.
2. That the proper count for publication of notice to the unknown father of the Petition of Termination of Parental Rights is _____.
3. That there is good cause to require the Petitioner to publish the notice specified within this Order in _____ (city or town), in _____ county, North Carolina, for three (3) successive weeks.

Based on the foregoing findings of fact and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED:

1. That service of process by publication shall take place in _____, _____, North Carolina, for three (3) successive weeks published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 in the following form:

NOTICE OF PROCEEDING AND SERVICE OF PROCESS
BY PUBLICATION
STATE OF NORTH CAROLINA
COUNTY OF _____
IN THE GENERAL COURT OF JUSTICE
FILE NO. _____ J_____

In Re: _____
d.o.b. __/__/__

To: John Doe, father of a child born of _____ on __/__/__.

TAKE NOTICE that a pleading seeking relief against you has been filed in the above-entitled action. The nature of the relief being sought is as follows: termination of your parental rights to the above-named child.

You are required to answer the petition not later than _____, _____ (30 days) and upon your failure to do so the party seeking relief against you will apply to the Court for the relief herein sought.

You are entitled to attend any hearing affecting your rights. You are entitled to have counsel appointed by the Court if you are indigent. If you desire counsel, you should contact the Clerk of Court, Juvenile Division, _____, _____ County Courthouse, immediately to request counsel, This is a new case and any attorney appointed previously will not represent you in this proceeding unless ordered by the Court.

This the _____ day _____, _____.

_____
Attorney for Petitioner
(Address)
(Telephone)

2. That the matter be scheduled for further hearing at the appropriate time.

This the _____ day of _____, _____.

_____

[Name]
Judge Presiding

APPENDIX

Notice of Service of Process by Publication for Termination of Parental Rights

STATE OF NORTH CAROLINA COUNTY OF _____	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ____ J____

IN THE MATTER OF: _____ (can substitute "In re Doe," 7B-1105(d)) _____	)))))	NOTICE OF SERVICE OF PROCESS BY PUBLICATION FOR TERMINATION OF PARENTAL RIGHTS (G.S. 7B-1105(d))

TO: Father (Mother) (Father and Mother) of a Male/ Female juvenile born on or about _____ in _____ County, _____(city)_____, _____(state)____, Respondent(s).

PLEASE TAKE NOTICE that a petition has been filed by the _____ County Department of Social Services (petitioner) requesting the Court to terminate any parental rights you may have to the above named child. Your are required to answer the petition within thirty (30) days from the date of the first publication of this notice (written below) and if you fail to do so, your parental rights to the child will be terminated.

G.S. 7B-1106 entitles you to a court-appointed lawyer to represent you in termination action if you cannot afford to hire a lawyer, You may call the Deputy Clerk of the juvenile Court of _____County at _____ for further information.

This the _____day of _____, _____.

[Attorney Name]
Attorney for Petitioner
[Attorney Address]
Attorney Telephone Number]

Published: _____

Notice of Service of Process by Publication for Termination of Parental Rights (Another Version)

STATE OF NORTH CAROLINA COUNTY OF _____		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ____ J____
IN THE MATTER OF: _____ _____	)))))	NOTICE OF SERVICE OF PROCESS BY PUBLICATION RE: TERMINATION OF PARENTAL RIGHTS (G.S. 7B-1106; Rule 4(j1) of the N.C. Rules of Civil Procedure)

TO: Father (Mother) (Father and Mother) of a Male/ Female juvenile born or about _____ in _____ County, _____(city)_____, _____(state)____, Respondent(s).

PLEASE TAKE NOTICE that a petition ahs been filed by the _____ County Department of Social Services (petitioner) for the purpose of terminating your parental rights to the above named minor child(ren). You must prepare and file with the Clerk of Superior Court of _____ County a written answer to the petition within forty (40) days from the date of the first publication of this notice (written below). You also must serve a copy of the answer on the petitioner's attorney (address below). If you fail to file answer within the time period specified above, your parental rights to the child may be terminated, and the petitioner will apply to the Court for the relief demanded in the petition.

You are entitled to attend any hearing affecting your parental rights. You are entitled to have an attorney appointed by the Court if you cannot afford one, provided that you request an attorney at or before the time of the hearing. You may contact the Clerk of Superior Court immediately to request counsel. This is a new case and any attorney appointed previously will not represent you in this proceeding unless ordered by the Court.

If your address is known, the date, time and place of the hearing of the petition will be mailed to you upon filing of an answer or forty (40) days from the date of the first publication of this notice (written below) if no answer is filed.

APPENDIX

You may call the Deputy Clerk of the juvenile Court of _____ County at _____ for further information.

This the _____day of _____, _____.

[ATTORNEY NAME]
Attorney for Petitioner
[Attorney Address]
[Attorney Telephone Number]

Published: _____

Affidavit of Service of Process by Publication

STATE OF NORTH CAROLINA COUNTY OF _____		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ____ J____
IN THE MATTER OF: _____ _____	)))))	AFFIDAVIT OF SERVICE OF PROCESS BY PUBLICATION (G.S.1-600; 75.10(2))

The undersigned attorney, being duly sworn, deposes and says:

1. That he/she is the attorney of record for the Petitioner in this action;

2. That on the _____day of _____, _____, [DATE OF FILING OF TPR PETITION] the _____ County _____ [AGENCY NAME] through _____ [NAME AND TITLE OF INDIVIDUAL PETITIONER] did through its attorney file a petition with the Court requesting a termination of parental rights.

3. That it was necessary to obtain service of process by publication over _____ [NAME OF MOTHER/FATHER/PARENTS, IF KNOWN] [the mother/father/parents] of the child(ren) named in the petition, because [he/she/they] could not be served within this state in the manner described in Rule 4(j1) of the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rule 4(j1).

4. That on _____ [DATE OF PUBLICATION ORDER] THIS COURT ENTERED AN Order authorizing service of process by publication on the [mother/father/parents] of the minor child[ren].

5. That the whereabouts, dwelling house or usual abode of the [mother/father/parents] of the child[ren] [is/are] unknown and cannot with due diligence by ascertained, despite Petitioner's diligent efforts, namely *(refer to earlier affidavit setting out diligent efforts and /or describe specific and/or additional efforts here):*

6. That attached here to and incorporated by reference is a copy of an affidavit from newspaper . . .

7. That service of process has been given by publication which is a part of this Court's record, and a copy of which is attached to this affidavit.

This the _____ day of _____, _____.

[ATTORNEY NAME]
Attorney for Petitioner
[ATTORNEY ADDRESS]

[ATTORNEY PHONE NUMBER]

§ 1-75.10. Proof of service of summons, defendant appearing in action.

Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service. –

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or

b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication. – In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. – The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) Service by Registered or Certified Mail. – In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidence by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

Affidavit of Service of Process by Certified Mail

STATE OF NORTH CAROLINA COUNTY OF _____		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ____ J____
IN THE MATTER OF: _____ _____	)))))	AFFIDAVIT OF SERVICE OF PROCESS BY CERTIFIED MAIL

The undersigned attorney, being duly sworn, deposes and says:

That he/she is the attorney of record for the Petitioner in this program;

That a copy if the summons and petition to terminate Parental Rights in this matter was party to sent by certified mail, return receipt requested, to _____ [*name of Party sent to*], who is _____[*title and/or relationship of that person to the child-mother, father, parents, custodian, guardian, social worker, the child, etc.]* at _____ [*address*]. A copy of the receipt is attached here to as Exhibit A;

that a copy of the summons and petition were in fact received as evidence by the genuine attached registry receipt [or other evidence satisfying to the court of delivery to the addressee attached here as exhibit].

This the _____ day of _____, _____.

[ATTORNEY NAME]
Attorney for Petitioner
[ATTORNEY ADDRESS]
[ATTORNEY TELEPHONE NUMBER]

[Add Notary Block and Certificate of Service]

Acceptance of Service

STATE OF NORTH CAROLINA
COUNTY OF _____

File Number: _____
Film Number: _____
In the General Court of Justice
District Court Division

IN THE MATTER OF:
_____

ACCEPTANCE OF SERVICE*

_____

I, _____(Name)_____, __(position and agency, if applicable),_____ hereby accept service of the Summons and Petition for Termination of Parental Rights bearing the above file number, pursuant to Rule 4(j5) of the North Carolina Rules of Civil Procedure.

This the _____ day of _____, _____.

_____
(Name)
(Position and agency, if applicable)

Personally appeared before me _____, and accepted Service of the Summons and Petition in the Proceeding for Termination of Parental Rights bearing the above file number.

This the _____ day of _____, _____.

_____
Notary Public

My Commission expires: _____
SEAL

* It is probably preferable to have a person accepting service of a summons sign the back of the summons.

INTERPRETER

Motion for Appointment of a Volunteer Interpreter to Assist Guardian ad Litem

STATE OF NORTH CAROLINA	File No._____
	In the General Court of Justice
_____ County	District Court Division
)	
IN THE MATTER OF)	
)	MOTION FOR APPOINTMENT
)	OF A VOLUNTEER INTERPRETER
)	TO ASSIST GUARDIAN AD LITEM
)	
_____)	(G.S. 7B-601)

NOW COMES ___[*insert name of child*]___ (the "Child"), by and through [*his/her*] court-appointed Guardian ad Litem and attorney, and moves the court for an order appointing ____[*insert name of volunteer interpreter*]___ to serve as a volunteer foreign language interpreter to assist the Child's Guardian ad Litem and attorney in fulfilling their statutory duty to conduct an investigation to determine the facts, the needs of the Child, and the available resources with the family and community to meet those needs, and further authorizing the Child's Guardian ad Litem to disclose to ___*[insert name of volunteer interpreter]*__ confidential information about this matter, if necessary, so that the interpreter may effectively assist the Child's Guardian ad Litem and attorney. In support of this Motion, the Child shows unto the court as follows:

1. On __ *[insert date of petition]*___, the _____ County of Social Services filed a petition alleging that the Child is dependent, neglected, and/or abused.

2. On __ *[insert date GAL appointment order was signed]* ___, pursuant to G.S. §7B-601, the Court appointed __[*insert GAL's name*] __ to serve as the Child's Guardian ad Litem and __*[insert attorney's name]*__ to serve as the Child's attorney.

3. In order to fulfill the duties outlined in G.S. §7B-601(a), specifically the duty to conduct an investigation to determine the facts, the needs of the Child, and the resources available within the family and community to meet those needs, the Child's Guardian ad Litem and attorney will need to interview the Child's parents and other persons who have information and knowledge relevant to this matter.

Sample provided by Debra Sasser

4. Upon information and belief, the Child's parents and/or other persons with information and knowledge relevant to this matter speak Spanish, but do not speak English.

5. ___ [*insert name of volunteer interpreter]* ___ has volunteered *his/her* services as a foreign language interpreter to assist the Child's Guardian ad Litem and attorney.

6. Upon information and belief, ___ *[insert name of volunteer interpreter]* ___ is qualified by knowledge, skill, experience, training, and education to interpret the Spanish language into the English language and the English language into the Spanish language.

7. In the course of assisting the Child's Guardian ad Litem or attorney by providing interpreting services, it will become necessary for information about this case to be disclosed to the volunteer language interpreter. The Child's Guardian ad Litem, who is bound by the appointment order to maintain the confidentiality of this case, will need the Court's authorization for such disclosure.

8. Appointment of ___ *[insert name of volunteer interpreter]* ___ to assist the Child's Guardian ad Litem is in the best interests of the Child.

Wherefore, the Child, through *his/her* Guardian ad Litem and attorney, pray the Court for its order appointing ___ *[insert name of volunteer interpreter*] ___ to serve as a volunteer foreign language interpreter to assist the Guardian ad Litem in interviewing Spanish speaking persons who may have information and knowledge relevant to this matter, and further authorizing the Child's Guardian ad Litem to disclose, as necessary, information about the case to the volunteer foreign language interpreter.

This the _____ day of January, 2001.

_____
John Doe, Attorney Advocate
Address
Phone

[Attach Certificate of Service]

APPENDIX

Order Appointing Volunteer Interpreter

STATE OF NORTH CAROLINA

_____ County

File No._____
In the General Court of Justice
District Court Division

IN THE MATTER OF)
)
)
)
)
_____)

ORDER APPOINTING
VOLUNTEER INTERPRETER
TO ASSIST GUARDIAN AD LITEM

THIS CAUSE coming on for hearing before the Honorable ____*[insert name of judge]*_____ presiding at the __*[insert date of hearing]*___ session of the _____ County District Court on ___[*insert name of child*]'s___ (the "Child") motion for appointment of a volunteer language interpreter to assist the Child's Guardian ad Litem;

The Court finding that a sufficient showing has been made for the appointment of a foreign language interpreter as requested by the Child, that ___*[insert name of volunteer interpreter]*__ is qualified by knowledge, skill, experience, training and education to interpret the Spanish language into the English language and the English language into the Spanish language, that a foreign language interpreter is necessary in order for the Child's Guardian ad Litem and attorney to conduct an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs, and that such appointment would be in the best interests of the Child;

IT IS THEREFORE ORDERED that ____[*insert name of volunteer interpreter*]___ is appointed to serve as a volunteer foreign language interpreter to assist the Child's Guardian ad Litem in this matter. The volunteer foreign language interpreter is not authorized by this appointment to serve as a court interpreter in this matter, but is appointed solely as a volunteer to assist the Child's Guardian ad Litem in the investigation of this matter. Furthermore, this appointment does not entitle the volunteer foreign language interpreter to payment for professional services, expenses, or fees;

IT IS FURTHER ORDERED that the volunteer foreign language interpreter shall treat all information that he/she hears or obtains concerning this matter as confidential and shall not disclose any such information except to the Child's Guardian ad Litem or attorney, or as ordered by a court of competent jurisdiction;

IT IS FURTHER ORDERED that the Child's Guardian ad Litem and attorney may disclose to the volunteer language interpreter as much information about this matter as necessary to facilitate their investigation to determine the facts of this matter, the needs of the juvenile, and the available resources within the family and the community to meet those needs.

Sample provided by Debra Sasser

This the ___ day of January, 2001.

_____

_____County District Court Judge Presiding

LIVE VIDEO TESTIMONY

Motion for Live Video Testimony

STATE OF NORTH CAROLINA COUNTY OF _____		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ____J_____
IN THE MATTER OF: _____	)))))))	MOTION FOR LIVE VIDEO TESTIMONY

NOW COMES the child[ren], by and through [his/her/their] Guardian ad Litem and Attorney Advocate, and prays the Court for an order authorizing the use of live video equipment for transmission of the minor child[ren]'s testimony, and in support of this motion shows the following:

1. The minor child[ren] [is/are] the subject of a petition for [abuse/neglect] and will be called to testify in the adjudication hearing on that petition.

2. The Guardian ad Litem, _____, is duly appointed by the Court and is ordered to and has a statutory obligation to protect the best interests of the child pursuant to G.S. 7B-601.

[Paragraphs 3 through 7 should be tailored to the facts of the case; the following provides an example]

3. In order to protect the best interests of the child, the Guardian ad Litem seeks to reduce any trauma to the child which might result from the child testifying as a witness in the presence of respondent father [or to reduce any trauma to the child associated with testifying in the intimidating environment of the courtroom].

4. The minor child, _____, has been evaluated by a child therapist, _____, with the Johnson Mental Health Center, and has remained in counseling with this child therapist.

5. Upon information and belief, the child therapist, _____, has observed the child and has reason to believe it will be traumatic and detrimental to the child to be in the presence of _____, respondent father and alleged perpetrator of the abuse inflicted on the child. As more fully explained in the affidavit of the child therapist, which is attached as Exhibit A and incorporated herein, the child therapist believes that the child should only testify in a setting that makes it impossible for the child to see respondent father [or outside the intimidating environment of the courtroom].

6. The child is currently living in the licensed foster care home of _____.

7. Upon information and belief, the minor child's foster mother, _____, has observed the child's reactions to discussions regarding respondent father. As more fully explained in the affidavit of the foster mother, which is attached as Exhibit B and incorporated herein, the foster mother believes it would be traumatic and detrimental to the child to [be in the presence of respondent father under any circumstances] or [to testify in the intimidating environment of the courtroom].

8. The North Carolina Administrative Office of the Courts possesses live video equipment, which can be delivered at no cost to any courtroom in North Carolina. This equipment, referred to as the Remote Video Witness System, can be set up so that the witness can testify from a room adjacent to the courtroom with the respondent in the courtroom with the judge, or the witness can testify in the courtroom with the respondent watching from an adjacent room. The broadcast is live and in color. Throughout the proceeding the respondent may have confidential communication with his attorney over a secure phone line and the respondent's attorney may be in the room with the child witness.

9. The North Carolina Court of Appeals has reviewed and approved the use of remote video testimony equipment and procedures as outlined above, and has held that such use does not violate the defendant's (or respondent's) constitutional rights. *See State. v. Jones*, 89 N.C. App. 584 (1988), and *In the Matter of Johnny Stradford*, 119 N.C. App. 654 (l995).

10. The Guardian ad Litem for the minor child believes that remote video testimony of the child is necessary in order to protect the best interests of the minor child. The Guardian ad Litem further believes that in order to [*protect the child from the trauma associated with testifying in the presence of the respondent, that the equipment be set up so that the respondent is moved to an adjacent area and the child remains in the courtroom during the child's testimony*] OR [*to protect the child from the intimidating environment of the courtroom, that the equipment be set up so that the child is moved to and testifies from an area adjacent to the courtroom]*.

WHEREFORE, the minor child[ren], through [his/her/their] Guardian ad Litem and Attorney Advocate, pray the Court for its order authorizing the use of remote video equipment to transmit the minor child's testimony as outlined in paragraph 10 above.

This the 20th day of June, 2000.

_____

Jane Johnson, Attorney Advocate
820 Nichole Ln.
Raleigh, N.C. 27803-1543
(919) 937-6343
St. Bar No: 27134

[Attach Certificate of Service]

Order Approving Use of Remote Video Testimony Equipment

STATE OF NORTH CAROLINA COUNTY OF_____	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. ___ J ____
IN THE MATTER OF: _____	ORDER APPROVING USE OF REMOTE VIDEO TESTIMONY EQUIPMENT

THIS CAUSE coming on for hearing before the Honorable ____*[insert name of judge]*_____ presiding at the __*[insert date of hearing]*___ session of the _____ County District Court on ___[*insert name of child*]'s___ (the "Child") motion for remote video testimony equipment to be used by the child to testify in the adjudicatory hearing on the petition for [*abuse/neglect*] in the above captioned file;

The Court finding that a sufficient showing has been made for use of remote video testimony equipment as requested by the Child and that it would be in the best interest of the Child and the State of North Carolina and in the interest of justice to allow the Child's testimony to be by live video transmission while the [father/mother or name of guardian/custodian/or caregiver] is present in a room other than the one from which the child is testifying;

IT IS THEREFORE ORDERED that testimony of the child in this matter may be presented by live video transmission [*with the respondent moved to an adjacent area and the Child remaining in the courtroom during the Child's testimony*] OR [*with the Child moved to and testifying from an area adjacent to the courtroom*]. The Administrative Office of the Courts is hereby directed to furnish and supply such equipment as may be necessary to the Clerk of _____ County for use at the hearing in this matter on _____(date).

This the _____ day of _____, _____.

_____
The Honorable _____
District Court Judge Presiding

OBTAINING SUBSTANCE ABUSE RECORDS

Motion to Produce Records

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION (JUVENILE)
WAKE COUNTY	FILE NOS: _____

IN THE MATTERS OF	)	
MINOR CHILD,	)	MOTION TO PRODUCE
_____	)	RECORDS
DOB:	)	

NOW COMES the minor child, by and through the child's guardian ad litem and counsel, and hereby moves the Court for an Order that the entire mental health record, including, but not limited to, substance abuse records of Respondent Mother, be produced for review by the Guardian ad Litem. In support thereof, the Movant alleges and says as follows:

1. The Guardian ad Litem is duly appointed by the Court and is ordered to and has a statutory obligation to investigate the matter before the court.

2. _____is a named party to this action, the Respondent mother.

3. The petition in this matter alleges that respondent _____ has a history of substance abuse.

4. Respondent has been hospitalized at Johnson hospital on at least one occasion, and may have had intake, screening, evaluation or treatment at the Furman Mental Health Center, and the Pleasantville Alcohol and Drug abuse Treatment Center in Pleasantville, North Carolina.

5. Respondent's mental health records, including any identification and/or treatment as a substance abuser, are relevant information to this case and the Guardian ad Litem needs to review those records in order to fulfill her court ordered and statutory duties for these minor children, specifically to assess Respondent's mental status, the allegations of the petition, and her ability to parent her children, any needed services, and the best interest of the children.

6. Without a court order, the Guardian ad Litem will be unable to obtain this information which she believes to be necessary to fully protect the children and provide adequate representation to them.

7. The Juvenile Court proceedings are confidential, and the information in these records will remain confidential if provided to the Guardian ad Litem.

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

8. Without the substance abuse records, the Guardian ad Litem will be unable to assess the needs of the children in developing a permanent plan.

WHEREFORE, the undersigned prays the Court for its Order providing for release of the mental health records of Respondent, from the Furman Mental Health Center and the Pleasantville Alcohol and Drug abuse Treatment Center, including, but not limited to her substance abuse records, to the court for the Court's in camera review, and for said records thereafter to be provided to the Guardian ad Litem for review.

This the ____ day of _____, _____.

_____
Attorney Advocate
Address
Telephone Number

[Attach Certificate of Service]

Motion for Disclosure of Confidential Patient Information

STATE OF NORTH CAROLINA CHEROKEE COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. 98-J-
IN RE: , A MINOR CHILD)) BORN 06-23-92)	MOTION FOR DISCLOSURE OF CONFIDENTIAL PATIENT INFORMATION

NOW COMES the Attorney Advocate for the Guardian ad Litem for the above captioned minor child and moves the Court for an order pursuant to 42 C.F.R.2.12 et seq. directing Johnson Center for mental Health, Developmental Disabilities and Substance Abuse Services to disclose to the Court and the Petitioners in this Termination of Parental Rights action confidential patient information regarding John Doe, a fictitious name for a certain patient.

This motion is based upon the pleadings filed herein and upon the Findings of Fact and Orders of the Court in Cherokee County File No. 96-J-

In further support of this Motion, the Guardian ad Litem states as follows:

1. That the Guardian ad Litem and the Cherokee County Department of Social Services have jointly filed a Petition for the Termination of the Parental Rights of both parents in the above captioned matter.

2. That upon information and belief the Johnson Center for Mental Health, Developmental Disabilities and Substance Abuse Services in Marble, North Carolina has provided treatment and evaluation services to a John Doe.

3. That good cause exists as required by 42 C.F.R.2.12 et seq. for the Court to order disclosure of confidential patient information in that the public interest and the need on the patient, the doctor-patient relationship, or the effectiveness of the program's treatment services.

4. That the confidential patient information sought by the Guardian ad Litem is not available from another source.

5. That the Guardian ad Litem believes that the confidential patient information sought will be necessary for the full hearing on the merits of the Petition for Termination of Parental Rights filed herein.

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

APPENDIX

WHEREFORE, the Guardian ad Litem prays the court enter an Order which satisfies the requirements of 42 C.F.R.2.12 et seq. directing the Johnson Center for Mental Health, Development Disabilities and Substance Abuse Services in Marble, North Carolina to disclose to the Court and the Petitioners in this Termination of Parental Rights Action confidential patient information regarding John Doe, a fictitious name for a certain patient.

Dated: June 22, 1999

_____

Attorney Advocate
Guardian ad Litem
P.O. Box 59
Smith, North Carolina 28788
(Phone Number)
N.C. Bar No.

Order to Produce Records for Review

STATE OF NORTH CAROLINA NASH COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION (JUVENILE) FILE NO. 98-J-
IN THE MATTERS OF) MINOR CHILDREN,) DOB)	ORDER TO PRODUCE RECORDS FOR REVIEW
	Name of Patient: ----------

TO: _____, Director of Medical Records
Johnson Center for Mental Health
500 Smith Street
Marble, NC 27804

_____, Director of Medical Records
Taylor Alcohol and Drug Treatment Center
Director of Medical Records
2577 W. Jones St.
Greenville, NC 27834

_____, Director of Medical Records
Miller Hospital
2301 Main St.
Rocky Mt., NC 27804

THIS MATTER coming on before the undersigned Judge upon the Motion of the Guardian ad Litem for an Order releasing information and/ or medical records on the above named patient to the Guardian ad Litem; and

It appearing to the Court that such information is in the possession of the above entity or entities which may be within the protection provisions of Title 42, part 2 or the Code of Federal Regulations, entitled Confidentially of Alcohol and Drug Abuse Patients; and

That section 2.64 of said regulations requires that good cause must be found for revelation of said information; and

That release of this information may assist the Guardian ad Litem and protect the above children, which constitutes good cause.

THEREFORE, it is ordered as follows:

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

APPENDIX

1. That the above named providers shall produce a copy of all medical records, including all substance abuse records, regarding the aforementioned patient in its possession to the Court for an in camera review on Monday, August 31, 1998, at 9:30 AM; and

2. That a copy of this Order shall be provided to all parties to the above captioned matter; and

3. That the Court shall rule on the release of this information in camera unless any party files an objection with the Court by August 31, 1998.

This the _____ day of August, 1998.

_____
District Court Judge Presiding

CERTIFICATE OF SERVICE

I hereby certify that I have this day served all parties and the other persons named in this Order or their attorney with a copy of this Notice and Motion by hand delivery or by depositing it in the U.S. mail, postage prepaid, properly addressed, pursuant to Rule 5 of the Rules of Civil Procedure.

This the _____day of August, 1998.

_____
Attorney Advocate
Address
Phone number
Bar No.

Order to Produce Records

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION (JUVENILE)
NASH COUNTY		FILE NOS: ----------
IN THE MATTERS OF MINOR CHILDREN, DOB	)))	ORDER TO PRODUCE RECORDS

THIS MATTER coming on before the undersigned District Court Judge presiding at the August ___, 1998 Session of Nash County District Court sitting in Nashville, North Carolina for the hearing of juvenile matters, pursuant an Order to Produce Records and subpoenas issued by the Attorney Advocate for the Guardian ad Litem and minor children in this matter, which Court Order and subpoenas were directed to _____, Director of Medical Records of the Johnson Center for Mental Health, Marble, North Carolina; _____, Medical Records Director of Taylor Alcohol and Drug Treatment Center, Greenville, North Carolina; and _____, Director of Medical Records of Miller Hospital, Rocky Mt., North Carolina. Those appearing were: _____, attorney for the Respondent Mother; _____, Staff Attorney for Petitioner, Nash County Department of Social Services; and _____, Attorney Advocate for the Guardian ad Litem and the minor children. Based upon the evidence presented, the Court makes the following

FINDINGS OF FACT:

1. All parties are properly before the Court and the Court has jurisdiction of this matter. Subpoenas were issued to _____, Director of Medical Records of the Johnson Center for Mental Health, Marble, North Carolina; _____, Medical Records Director of Taylor Alcohol and Drug Treatment Center, Greenville, North Carolina; and _____, Director of Medical Records of Miller Hospital, Rocky Mt., North Carolina, directing production of all records of _____, Respondent Mother in this action, including, but not limited to substance abuse records.
2. The custodian of medical records at Taylor Alcohol and Drug Treatment Center found no records to produce; medical records were found at the Johnson Center for Mental Health and at Miller Hospital.
3. The undersigned Judge presiding, after reviewing the Petition and evidence in camera determined that:
    A. The Movant has a legally recognized interest in the disclosure which is sought.
    B. The motion was made in a juvenile proceeding and the records of these proceedings are sealed from public scrutiny, which provides adequate privacy for the limited disclosure of these records.

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

C. This hearing was held in a manner which ensured that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record.
D. Good cause exists pursuant to the requirements of Chapter 42 of the Code of Federal Regulations that all medical records of _____, including, but not limited to substance abuse records in the possession of the Johnson Center for Mental Health and at Miller Hospital, to be released to counsel for the parties, subject to the conditions set out in paragraph 4 below.
E. Other ways of obtaining the information are not available or would not be effective.
F. The public interest and need for the disclosure of these records outweigh the potential injury to the Respondent mother, the physician-patient relationship and treatment services.

4. The records may be obtained by the parties designated below, subject to the following conditions:

A. These records are ordered to be released immediately by the custodians of the medical records for Johnson Center for Mental Health and Miller Hospital to the Guardian ad Litem, the Nash County Department of Social Services, attorney for Respondent Mother, and attorney for the Respondent Father.
B. Any information read or obtained by any party from the medical records cannot be further disclosed without further order of the Court and must be kept in a manner that ensures its confidentiality.
C. No determination of the admissibility of these records at the adjudicatory hearing of this case is made at this time and any motion to introduce such records or portion thereof at the adjudicatory hearing shall be determined upon its own merits at that time.

Based upon the foregoing Findings of Fact, the court makes the following

CONCLUSIONS OF LAW:

1. All parities are properly before the Court, and the Court has jurisdiction of this matter.

2. There is good cause pursuant to Chapter 42 of the Code of Federal Regulations to order the release of such records in the possession of Johnson Center for Mental Health and Miller Hospital, but subject to the following conditions:

A. These records, are ordered to be released immediately by the custodians of the medical records Johnson Center for Mental Health and Miller Hospital.to the Guardian ad Litem, the Nash County Department of Social Services, attorney for Respondent Mother, and attorney for the Respondent Father.

B. Any information read or obtained by any party from the medical records cannot be further disclosed without further order of the Court and must be kept in a manner that ensures its confidentiality.

C. No determination of the admissibility of these records at the adjudicatory hearing of this case is made at this time and any motion to introduce such records or portion thereof at the adjudicatory hearing shall be determined upon it own merits at that time.

THEREFORE, it is ordered as follows:

1. The medical records of _____, including but not limited to substance abuse records, in the custody of Johnson Center for Mental Health and Miller Hospital are ordered to be released immediately be their custodians to the Court to the Guardian ad Litem, the Nash County Department of Social Services, attorney for Respondent Mother, and attorney for the Respondent Father.
2. Any information read or obtained by any party from the medical records cannot be further disclosed without further order of the Court and must be kept in a manner that ensures its confidentiality.
3. No determination of the admissibility of these records at the adjudicatory hearing of this case is made at this time and any motion to introduce such records or portion thereof at the adjudicatory hearing shall be determined upon its own merits at that time.

This the _____ day of September, 1998.

_____
District Court Judge Presiding

APPENDIX

Authorization to Release Information

AUTHORIZATION TO RELEASE INFORMATION

I, ___*[name of person whose records are sought]*___ Social Security number: _____ date of birth: _____ hereby request and authorize __*[name of hospital or treatment center]*_____
to release the following information: any and all records pertaining to my screening, intake, evaluation, diagnosis, treatment, attendance, compliance and prognosis; progress notes, therapy notes; type and dosage of medication; psychological, psychiatric, vocational and drug screen testing; laboratory test; x-rays; treatment goal plan, attendance, and any other information relating to my screening, intake, consultation, treatment, therapy, counsel or referral to: the Guardian ad Litem, _____, and/ or Attorney Advocate, Judy Johnson, on request for the purpose of assisting the Guardian ad Litem with his or her investigation and report to the court of my juvenile court case, which may include information found in my records. I understand that the information to be released may include information regarding drugs abuse, alcohol abuse, sickle cell anemia, or psychological or psychiatric impairments.

I certify that this authorization is made freely, voluntarily and without coercion. I understand that the information to be released is protected under state and federal laws and cannot be disclosed further than the scope of this release without my consent, or redisclosed without my further consent unless otherwise provided for by state or federal law. I understand that I may revoke this authorization at any time, except to the extent that action has already been taken to comply with it. Without my express revocation, this consent will automatically expire:

_____ upon satisfaction of the need for disclosure;
_____ within _____ days from the date signed;
_____ under the following conditions: _____
_____

A photocopy of this authorization may be considered as valid as the original.

_____ _____
Client Witness

_____
Date

This sample derived from draft provided by Judy Kornegay, Attorney Advocate, district 7

Consent for the Release of Confidential Alcohol or Drug Treatment Information

CONSENT FOR THE RELEASE OF
CONFIDENTIAL ALCOHOL OR DRUG TREATMENT INFORMATION

I, _____, authorize
(Name of patient)

_____
(Name or general designation of program making disclosure)

to disclose to _____ the
(Name of person or organization to which disclosure is to be made)

following information: _____
(Nature of the information, as limited as possible)

_____

_____

The purpose of the disclosure authorized herein is to: _____

_____
(Purpose of disclosure, as specific as possible)

_____

I understand that my records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2, and cannot be disclosed without my written consent unless otherwise provided for the regulations. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically as follows:

_____
(Specific of the date, event, or condition which this consent expires)

_____

Dated: _____

_____
Signature of participant

_____
Signature of parent, guardian or authorized representative when required

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APPENDIX

Prohibition on Redisclosure of Information Concerning Client in Alcohol or Drug Abuse Treatment

PROHIBITION ON REDISCLOSURE
OF INFORMATION CONCERNING CLIENT
IN ALCOHOL OR DRUG ABUSE TREATMENT

This notice accompanies a disclosure of information concerning a client in alcohol/ drug abuse treatment, made to you with the consent of such client. This information has been disclosed to you from records protected by federal confidentiality rules (42 CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for the release of medical or other information is **NOT** sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

Consent for the Release of Confidential Alcohol or Drug Treatment Information To Child Welfare Agency and Court Where Children Were Removed Due to Parent's Alcoholism or Drug Abuse

CONSENT FOR THE RELEASE OF CONFIDENTIAL
ALCOHOL OR DRUG TREATMENT INFORMATION
TO CHILD WELFARE AGENCY AND COURT
WHERE CHILDREN WERE REMOVED DUE TO
PARENT'S ALCOHOLISM OR DRUG ABUSE

I, _____ authorize

_____

to disclose to:

1. (e.g. volunteer/ attorney advocate/ GAL Program of x county)__
   (name of person or organization to which disclosure is to be made)

   to monitor my progress in treatment; and

2. the [x County Juvenile Court]_

and I also authorize the _____ to redisclose to the _____ the following information:

(Name of court to whom redisclosure is made)

(Nature of the information as limited as possible)

[* Initial each category that applies]

____ My name and other personal identifying information;

____ Information about status as a patient in [alcohol and/ or drug] treatment;

____ Initial evaluation;

____ Date of admission;

____ Assessment results and history;

____ Summary of treatment plan, progress and compliance;

____ Attendance;

____ Urinalysis results;

____ Date of discharge and discharge status;

____ Discharge plan;

____ Other: _____.

The purpose of these disclosures is to: Provide the [_____] and
(Purpose of disclosure as specific as possible)

the [Family Court] with the information they need to determine (e.g. progress in treatment/ what is in the best interest of my children)_____

I understand that my records are protected under the federal regulations governing Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2, and cannot be disclosed without my written consent unless otherwise provided for in the regulations. I also understand that I may revoke this consent at any time except to the extent that action has been taken in reliance on it, and that in any event this consent expires automatically as follows:
[*termination of the child abuse/neglect case against me] [or specify earlier date if required by state law*].

Date: _____ _____
Signature of patient

SAMPLE LETTERS ADVISING OF CHILD'S REPRESENTATION BY ATTORNEY

Sample Letter to Respondent Attorney Regarding Obtaining Consent to Talk to Child When Child Is Placed With Respondent Parent

Dear Attorney:

I am appointed in Johnson County case file number _____ as the Attorney Advocate and _____is appointed as the Guardian ad Litem for the minor child _____, who is the alleged victim of _____(sex abuse, physical abuse, neglect)____ in Johnson County Juvenile file number _____. My client remains placed in the home of your client, _____, her respondent mother. As you know, attorneys are not permitted to speak with represented persons without the consent of their attorney. This rule applies to children represented by a Guardian ad Litem attorney advocate, and an attorney wishing to speak to the child must obtain consent from the attorney advocate. This is a legal rule which is not commonly known or understood by parents. State Bar Ethics Opinions, including RPC 61 and RPC 249, support and clarify this rule, and a copy of each has been enclosed for your convenience.

I would appreciate it if you would be sure that your client clearly understands that because a Guardian ad Litem and attorney advocate have been appointed in this matter, she no longer has the parental prerogative to allow her child to talk to any attorney who is involved in this case or the criminal case arising out of the same circumstances. Further, the Guardian ad Litem and I specifically prohibit either the respondent father's attorney in the juvenile case, his attorney in the criminal case, you, or any agents or anyone on behalf of any attorney involved in this case or the criminal case from having any contact whatsoever with my client or discussing this case with him/her in any manner. If you have any question about this, please call me. Thank you for your assistance with this matter.

Sample Letter to Respondent Attorney Regarding Obtaining Consent to Talk to Child

Dear Attorney:

I am appointed in Johnson County case file number _____ as the Attorney Advocate and _____is appointed as the Guardian ad Litem for the minor child _____, who is the alleged victim of _____(sex abuse, physical abuse, neglect)____ in Johnson County Juvenile file number _____. You are named as attorney of record for your client, _____, who is named in the juvenile petition in this case (or is charged criminally in Johnson County criminal file number _____) as being the perpetrator of these acts. Enclosed is a copy of my court appointment order.

As you know, attorneys are not permitted to speak with represented persons without the consent of their attorney. This rule applies to children represented by a Guardian ad Litem attorney advocate, and an attorney wishing to speak to the child must obtain consent from the attorney advocate. State Bar Ethics Opinions, including RPC 61 and RPC 249, support and clarify this rule, and a copy of each has been enclosed for your convenience.

This letter is to inform you that the Guardian ad Litem and I specifically prohibit you, your agent, or anyone on your behalf from having any contact whatsoever with my client or discussing this case with him/her in any manner. If you have any question about this, please call me. Thank you.

Sample Letter to Unrepresented Parent Regarding Obtaining Consent to Talk to Child

Dear Parent:

I am the attorney, and _____ is the Guardian ad Litem appointed to represent your child, _____, in juvenile court because a juvenile petition has been filed alleging that she has been sexually abused by your husband, _____. A copy or our court appointment order is enclosed with this letter. Our job includes investigating the case and making recommendations to the court about what is in the best interest of your child. We spoke to you about this in court at the hearing which was held on _____. When you appeared in court, you did not want a court appointed attorney, so I am writing directly to you to let you know another important legal fact concerning your child which you may not be aware of.

Another part of our job is to decide if attorneys and people working with attorneys can talk to _____ and if she can talk to them. Legal rules give this authority to me as _____'s attorney for this case. Even though _____ is your child and is placed with you and you make most of the decisions about her, you cannot allow her to talk to any attorneys who are involved in either this juvenile case or the criminal case against your husband for sex abuse. This means that you cannot let her talk to your own attorney, If you choose to hire one. This means she cannot talk to your husband's attorney for the criminal case or his attorney for the juvenile case. This is true even if they also represent you. This means she cannot even talk to these attorneys if she wants to. You should not take her with you if you go to a lawyer's office concerning this case. You should not let her talk to any attorney other than me on the telephone. If any attorneys or anyone who works with an attorney wants to talk to your child, please have them contact me. If the District Attorney of Johnson County Department of Social Services attorney want to interview _____, I will give them permission to do so, but they will need to contact me first.

If you do not understand this letter or if you have questions about it, please call me. Thank you for your cooperation.

Sample provided by Judy Kornegay, Attorney Advocate, District 7

APPENDIX

ADMINISTRATIVE ORDER

Allowing GAL Supervisory Personnel to Act on Behalf of GAL

STATE OF NORTH CAROLINA
CHEROKEE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. 98-J-

ADMINISTRATIVE ORDER

In all child abuse, neglect and dependency cases in which a Guardian ad Litem is appointed pursuant to N.C.G.S 7B-601, 906 and/or 7B-1108, the Guardian ad Litem District Office administrative supervisory personnel, including the District Administrator and the Program supervisors, are hereby authorized to act on behalf of the Guardian ad Litem whenever deemed necessary by the Guardian ad Litem District Office; and all agencies and persons to whom the Guardian ad Litem appointment order and this administrative order are presented shall respond to the designated administrative supervisory personnel as though they were the appointed Guardian ad Litem.

This the _____day of _____.

_____
Chief District Court Judge
_____Judicial District

RESPONSE TO SUBPOENA DUCES TECUM & TESTIMONY

North Carolina	In the General Court of Justice District Court Division
_____ County	File No. _____
In the Matter of a minor child	MOTION TO QUASH / MODIFY SUBPOENA

HERE COMES _____, Guardian ad Litem Volunteer, by and through _____, Guardian ad Litem Attorney Advocate, and moves the Court to quash, or in the alternative, modify the subpoena to testify and subpoena *duces tecum* in the above captioned case pursuant to NCGS §1A-1, Rule 45(c)(5). In support of this motion, the Guardian ad Litem shows the Court as follows:

1. That the Guardian ad Litem, _____ (hereinafter "GAL"), was appointed to represent <minor child> under NCGS §7B-601 pursuant to a juvenile neglect petition filed on <date> in <county> <juvenile file number> alleging that the juvenile had a diagnosis of failure to thrive and was not receiving necessary medical care.

2. That pursuant to the appointment under NCGS §7B-601, the GAL commenced "an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs…to protect and promote the best interests of the juvenile until formally relieved of the responsibility of the court."

3. That despite the concerns of the GAL after investigating, <county> Department of Social Services as "Petitioner" took a voluntary dismissal on the juvenile neglect petition on <date> prior to the scheduled adjudication hearing. As a result of the petition dismissal, the Court terminated the GAL appointment.

4. That on <date> <county> Department of Social Services filed the juvenile neglect petition in this matter alleging that the juvenile has not received proper medical care for failure to thrive, and a guardian ad litem in this district was appointed to represent the juvenile pursuant to NCGS §7B-601.

5. That the respondent parent has served the GAL formerly appointed in the previous action with a subpoena to testify and subpoena *duces tecum* to produce all records concerning the juvenile; however, "the subpoena requires disclosure of privileged or other protected matter and no exception or exception or waiver applies to the privilege or protection." [NCGS §1A-1, Rule 45(c)(3)(b)]

6. That the guardian ad litem appointment statute specifically provides that information learned in the course of representing the child's best interest in the proceeding under Chapter 7B remain confidential: "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." [NCGS §7B-601(c)]

7. That before undertaking an appointment as Guardian ad Litem to represent a child in an abuse or neglect proceeding, the GAL took an oath of confidentiality. Despite the fact that this proceeding involves the same juvenile and similar allegations of neglect, the GAL is not appointed in this matter and the adjudication hearing is based on a subsequently filed juvenile petition in a different judicial district. As a result, the GAL must respect the duty of confidentiality and cannot testify regarding information learned in the course of the former appointment, absent a court order.

8. That the subpoena issued requests the production of all documents concerning the juvenile, and said documents were assembled in the course of the investigation and representation of the juvenile; therefore, the documents are confidential pursuant to NCGS § 7B-601. Further, information contained the Guardian ad Litem file is privileged as attorney-work product as it relates to the GAL and attorney advocates' impression of the case as a result of the investigation.

WHEREFORE, the Guardian ad Litem prays that the Court enter an order for the following relief:

1. That subpoena issued to the GAL to appear and testify, and to produce productions of documents concerning the child be quashed.

2. Alternatively, in the event that the Court determines the GAL testimony to be in the best interest of the juvenile, that the Court enter an order permitting the GAL to disclose confidential information.

3. Alternatively with respect to the GAL file and records, that the Court conduct an *in camera* inspection of the records in order to make findings of fact regarding whether the evidence is material and favorable to the respondent and is not merely duplicative of the juvenile court file to which respondent parent has access pursuant to NCGS §7B-2901(a); and seal the file in the event of appellate review.

4. For such further relief that the Court deems just and proper.

This the _____ day of _____, 200_.

By: _____
Attorney Advocate
State Bar #
Address & Phone #

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the persons listed below a copy of the MOTION TO QUASH/MODIFY SUBPOENA by depositing a copy of same in the United States Mail in Raleigh, North Carolina, postage prepaid, addressed as follows:

Attorney for DSS
Address

Respondent Mother Opposing Counsel

Address

Respondent Father Opposing Counsel

Address

This the _____ day of _____, 200_.

_____

GAL Attorney Advocate

APPENDIX

Motion to Quash Subpoena GAL Testimony

North Carolina
_____ County

In the General Court of Justice
District Court Division
File No. _____

[Case Caption]	)	MOTION TO QUASH SUBPOENA

HERE COMES _____, Guardian ad Litem Volunteer, by and through _____, Guardian ad Litem Attorney Advocate, and moves the Court to quash the subpoena to testify in the above captioned case pursuant to NCGS §1A-1, Rule 45(c)(5). In support of this motion, the Guardian ad Litem shows the Court as follows:

1. That the Guardian ad Litem, ___<insert name>___, was appointed to represent the juvenile pursuant to NCGS §7B-601 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…and to protect and promote the best interests of the juvenile until formally relieved of the responsibility of the court."

2. That the statute specifically provides that information learned in the course of representing the child's best interest in the proceeding under Chapter 7B remain confidential: "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." NCGS §7B-601(c).

3. That before becoming a Guardian ad Litem appointed to represent a child in an abuse or neglect proceeding, the individual must take an oath of confidentiality.

4. That the purpose of a Guardian ad Litem appointed pursuant to NCGS 7B-601 is to represent the child's best interest in the abuse or neglect proceeding, and in the above captioned case, the disclosure of information would not be in the child's best interest.

5. That if individuals were aware that information gathered by the Guardian ad Litem could be used in a proceeding not governed by Chapter 7B, there would be a chilling effect on information shared with the Guardian ad Litem that ultimately promotes the child's best interest.

6. Pursuant to NCGS §1A-1, Rule 45(c)(3)(b), the subpoena requires disclosure of privileged or other protected matter and no exceptions or waiver applies to the privilege or protection.

WHEREFORE, the Guardian ad Litem prays the Court for an Order quashing the subpoena to appear and testify.

This the _____ day of _____, 200__.

Attorney Advocate
Guardian ad Litem Program

By: _____
Attorney Name
State Bar #
Address & Phone #

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the persons listed below a copy of the MOTION TO QUASH SUBPOENA by depositing a copy of same in the United States Mail in Raleigh, North Carolina, postage prepaid, addressed as follows:

Opposing Counsel
Address

This the _____ day of _____, 200__.

_____
Signature of Movant

APPENDIX

Order Permitting GAL to Testify

North Carolina _____ County		In the General Court of Justice District Court Division File No. _____
[Case Caption]	))))))))	ORDER TO DISCLOSE CONFIDIENTIAL INFORMATION

Upon good cause shown, the Guardian ad Litem appointed pursuant to NCGS §7B-601 is hereby ordered to disclose confidential information to promote the best interests of the child represented. Such disclosure is limited to testimony elicited at this hearing, and does not permit continued disclosure.

This the _____ day of 200__.

_____
District Court Judge Presiding

Motion to Reappoint GAL

NORTH CAROLINA
_____COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO. -J-

IN RE: , A MINOR CHILD)
)
Date of Birth _____)
)

MOTION FOR REAPPOINTMENT
OF GUARDIAN AD LITEM

NOW COMES the Guardian ad Litem Attorney Advocate for the above captioned juvenile(s) and moves the Court for an order to reappoint the Guardian ad Litem to represent the best interest of the child in the above captioned case pursuant to N.C.G.S. § 7B-601.

In support of this Motion, the Guardian ad Litem states as follows:

1. That on or about _____, 200_, the undersigned was appointed Attorney Advocate to represent the juvenile(s) in this proceeding and a Guardian ad Litem was appointed in accordance with N.C.G.S. § 7B-601 to make an independent investigation and independent recommendations as to the best interests of the juvenile(s).

2. That on or about _____, 200_, the above captioned juvenile(s) was moved to an out-of-state placement. As a result of that placement and due to lack of access to the juvenile(s), the Guardian ad Litem was unable to adequately fulfill the statutory duties set forth in N.C.G.S. § 7B-601.

3. That on _____ an Order to Withdraw and Release Guardian ad Litem was filed with the Clerk of District Court in _____ County releasing both the Guardian ad Litem and the undersigned Attorney advocate for the minor child from their appointed roles because they were unable to adequately fulfill the statutory duties set forth in N.C.G.S. § 7B-601 due to the juvenile's out-of-state placement.

4. That N.C.G.S. §7B-601 states in pertinent part as follows: "The court may reappoint the guardian ad litem pursuant to a showing of good cause upon motion of any party, including the guardian ad litem, or of the court."

5. That the Order to Withdraw dated _____ stated that the Guardian ad Litem and Attorney Advocate were to be notified immediately if the juvenile(s) returned to North Carolina or if a Motion or Petition to Terminate Parental Rights was filed in this matter and stated that the Attorney Advocate and Guardian ad Litem may be reappointed to represent the juvenile(s) upon motion to the court.

6. That the juvenile(s) has returned to North Carolina, and the Guardian ad Litem is once again able to fulfill the statutory duties set out by N.C.G.S. § 7B-601. That a Motion or Petition to Terminate Parental Rights was filed on_____ and reappointment is appropriate under N.C.G.S. § 7B-1108(c). That the Guardian ad Litem has the ability to communicate with the juvenile(s) such that he or she is able to adequately fulfill the statutory duties set out in N.C.G.S. § 7B-601.

WHEREFORE, the movant prays the court to enter an order as follows:

1. That permits reappointment of the Attorney Advocate for further representation of the juvenile(s).

2. That permits the reappointment of the Guardian ad Litem for further representation of the juvenile(s) pursuant to N.C.G.S. § 7B-601.

This the _____ day of _____ 2005.

By: _____

GAL Attorney Advocate
State Bar #
ADDRESS, PHONE #S

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the persons listed below a copy of the MOTION TO REAPPOINT GUARDIAN AD LITEM by depositing a copy of same in the United States Mail in Raleigh, North Carolina, postage prepaid, addressed as follows:

Opposing Counsel
Address

This the _____ day of _____ 2005.

_____
Signature of Movant

Order Reappointing GAL

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION
_____COUNTY	FILE NO. -J-

IN RE: ,	)	
A minor child	)	
[or minor children]	)	ORDER TO REAPPOINT
	)	GUARDIAN AD LITEM
Date(s) of Birth _____	)	
	)	
	)	

THIS MATTER coming on before the undersigned Judge upon the motion of the Guardian ad Litem requesting permission for reappointment for further representation of the juvenile(s) in the above-captioned matter.

THE COURT finds as follows:

1. That the juvenile(s) has been placed out-of-state, and because of lack of access to the juvenile(s), the Guardian ad Litem and Attorney Advocate were released from their duties by order of this Court on _____.

2. That the juvenile(s) has returned to North Carolina, and the Guardian ad Litem is once again able to fulfill the statutory duties set out by N.C.G.S. § 7B-601./That a Motion or Petition to Terminate Parental Rights was filed on_____ and reappointment is appropriate under N.C.G.S. § 7B-1108(c). That the Guardian ad Litem has the ability to communicate with the juvenile(s) such that he or she is able to adequately fulfill the statutory duties set out in N.C.G.S. § 7B-601.

WHEREFORE, it is ordered as follows:

1. That the Attorney Advocate is hereby reappointed for further representation of the juvenile(s) at this time.

2. That the Guardian ad Litem is hereby reappointed for further representation of the juvenile(s).

3. That the Guardian ad Litem will fulfill the statutory duties as set out by N.C.G.S. § 7B-601.

This the _____ day of ____, 200__.

_____
District Court Judge Presiding

Special Immigrant Juvenile Status: An Overview

Application Requirements for Special Immigrant Juvenile Status & Preparation of Relevant Order

****See sample court order.****

1. The child must be under the jurisdiction of a juvenile court in juvenile court proceedings such as abuse, neglect, or dependency.
2. The child must have been "**deemed eligible for long-term foster care**."
    a. This term means the court has found that family reunification is not a viable option and the child would normally be placed in foster care, guardianship or adoption.
3. The court or some administrative agency must rule that it is **not in the child's best interest to be returned to his or her home county.**
    a. This finding must be based on evidence such as the written reports of social workers, probation officers or others discussing their efforts to determine the conditions for the child in the home country, the conditions for the child in the U.S., and their basis for their recommendation that it is not in the child's best interest to return.
    b. It is often easiest to have the juvenile court judge include this finding along with the others in the order that will be submitted to CIS. However, other judicial or administrative bodies authorized or recognized by the juvenile court may make such a determination.
4. The court should make it clear that it made its findings and orders **based on abuse, neglect or abandonment of the child**, as opposed to just to get the child immigration status.
    a. The child must have been the subject of juvenile court orders and deemed eligible for long-term foster care "due to abuse, neglect or abandonment."
    b. Judges must make this finding explicit. Every juvenile court order that will be submitted to Citizenship and Immigration Services ("CIS") should include a statement identifying the basis for the order.
    c. The judge's finding of abuse, neglect or abandonment should be based on applicable state law.
5. The juvenile court judge should sign an order making the above findings.
6. The juvenile court must retain jurisdiction over the child.
7. The child must be under the age of 21 and unmarried. If the child is between the ages of 18 and 21 and/or considering emancipation, please consult with an immigration specialist.

Adoption and SIJS

- Children who have been adopted may still apply for Special Immigrant Juvenile Status ("SIJS").
- Potential Issue: The federal immigration regulation imposes the requirement that the juvenile court retain jurisdiction until the SIJS case is approved.
    - Some juvenile courts have complied with this regulation by delaying completion of the final step of adoption until CIS has approved the application, or by retaining jurisdiction over the case despite the completion of adoption.

  - The above measures may not be necessary according to the most recent CIS policy commentary which provides that CIS will consider the child a juvenile court dependent based on the prior dependency order.

  - Please consult an immigration attorney regarding this issue if the child may be adopted before her SIJS application is filed or approved.

- If the child is under 16 years old when the adoption is completed, she may be able to immigrate through her adoptive parents rather than SIJS. It is important to discuss these options with an immigration attorney as immigration through adoptive parents may have various disadvantages as compared to immigrating through SIJS.

Family Member Benefits

If the child is granted SIJS, the natural parents cannot receive any immigration benefit based on their relationship to the child. Most likely, the child will be unable to assist a brother or sister to immigrate since he or she ceases to be the "child" of the original parents for immigration purposes.

Grounds of Inadmissibility

A foreign national can be denied a green card if she comes within a "ground of inadmissibility."

Waivable Grounds

The foreign national can ask for a discretionary waiver. Waivable grounds of inadmissibility that apply to special immigrant juveniles are:

- people who have been prostitutes or procurers ("pimps")
- people who were convicted as adults once of simple possession of 30 grams or less of marijuana
- people who are HIV positive
- people who were deported and did not remain outside the US for five (5) years before returning
- people who committed fraud to enter the US or to get a visa
- people who are alcoholics or have a mental or physical disorder that poses a risk to people or property
- people who are or have been drug addicts or abusers
- people who helped other aliens to enter the US illegally

It is possible the waiver will not be granted. Thus, the SIJS application will carry additional risk for children who fall under one of the above categories.

Nonwaivable Grounds

A child who falls within one of these grounds and submits an SIJS application may be subject to deportation proceedings. It is important to consult an immigration expert before submitting an application.
Nonwaivable grounds of inadmissibility are:

- people who CIS has "reason to believe" are or have been drug traffickers.
- People convicted as adults of a wide range of offenses or who have made a formal admission of any drug offense or a "crime involving moral turpitude" (such as shoplifting, assault with a deadly weapon, or sex crimes).

APPENDIX

Order for Special Immigrant Juvenile Status

NORTH CAROLINA _____ COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. _____

In the Matter of _____, A minor child Date of Birth:	ORDER REGARDING MINOR'S ELIGIBILITY FOR SPECIAL IMMIGRANT JUVENILE STATUS

The Court having reviewed the supporting material in the court file and heard arguments of counsel hereby makes the following

FINDINGS OF FACT

1. That the minor child became subject to the jurisdiction of juvenile court upon an adjudication of abuse/neglect/dependency entered _____.

2. That the minor child has been in the custody of the Department of Social Services since _____ and continues to remain in the custody of the Department of Social Services.

3. That the minor child is eligible for long term foster care as a result of the adjudication of abuse/neglect/dependency and subsequent review hearings held on _____ that held _____ (ex: that reunification efforts cease).

4. That it is not in the best interest of the minor child to be returned to his/her or his/her parents' previous country of nationality or country of last habitual residence, _____. It is in the best interest of the minor child to remain in the United States.

5. That the above findings were made due to abuse, neglect and/or dependency of the minor child as defined pursuant to NCGS §7B-101.

WHEREFORE IT IS ORDERED THAT THE MINOR CHILD IS ELIGIBLE FOR APPLIATION OF SPECIAL IMMIGRANT JUVENILE STATUS.

This the _____ day of _____, 200___.

_____
District Court Judge Presiding

Order to Allow Confidential Disclosure (SIJS)

North Carolina

_____ County

In the General Court of Justice
District Court Division
File No. _____

[Case Caption]	)	ORDER TO DISCLOSE CONFIDIENTIAL INFORMATION

Upon good cause shown, the Guardian ad Litem appointed pursuant to NCGS §7B-601 is hereby ordered to disclose confidential information to promote the best interests of the child represented. Such disclosure is limited to information necessary to assist the child in obtaining Special Juvenile Immigrant Status, and to the immigration attorney assisting in obtaining such status.

This the _____ day of 200__.

_____
District Court Judge Presiding

APPENDIX

PERMANENCY OPTIONS[2]

Explanation and Comparison of Custody, Guardianship, and Adoption

I. Permanency Defined

A. Permanency can best be defined as a positive, nurturing relationship with at least one adult that is characterized by mutual commitment and is legally secure. Permanency is the goal for every child in foster care.

B. Elements of permanency

1. Commitment: This is the most critical aspect of permanency. Everyone needs someone to step up and say, "I'll be there for you." This is commitment. Although the statutes require that placement with a relative be considered, you have to consider the best interests of the child, which means that you need to consider the "bond" between the child and the adult.

2. Positive, nurturing relationship

3. Legally secure

II. Permanency Options—An Overview

A. There are three permanency options outside of reunification with the parents:

1. Adoption—the most legally secure

2. Guardianship (pursuant to G.S. 7B-600) —less legally secure than adoption

3. Custody—least legally secure of the three options

B. Guardianship should only be sought as the permanent plan if adoption is not an option or would not in the best interests of the child.

C. Custody should only be sought as the permanent plan if neither adoption nor guardianship is available as an option or would not be in the best interests of the child.

III. Adoption

A. Adoption is the **most legally secure** relationship that can be established between a child and an adult who did not give birth to the child.

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[2] *This paper was compiled by Kella Hatcher and Debra Sasser, Associate Counsels for the North Carolina Guardian ad Litem Program, based on lectures and handouts presented in October 2000 by Chuck Harris, Chief of Children's Services, North Carolina Department of Health and Human Services, and Jane Thompson, J.D., Assistant Attorney General. It also incorporates information from the North Carolina Health and Human Services On-line Publications, Children's Services Manual, Chapter VI.*

B. Before adoption can occur, there would have to be **relinquishment** of the child by the parent(s) or a **termination** of parental rights.

1. **Relinquishment**: Where the parent of guardian voluntarily consents to permanently transfer legal and physical custody of his/her child to DSS (or a licensed child placing agency) for the purpose of adoption.

a. **Designated relinquishment**: Where the parent designates the individual who will adopt the child and DSS approves this selection, or where the parent retains the right to consent to the prospective adoptive parent selected by the agency. N.C. Gen. Stat. § 48-3-703(a)(5). Where the individual designated by the parent does not or cannot adopt, the parent may choose to revoke the relinquishment. N.C. Gen. Stat. § 48-3-703(c).

b. **General relinquishment**: Where the parent agrees that DSS may place the child with prospective adoptive parents selected by DSS.

2. **Termination of parental rights:** Where a petition is filed seeking the court to terminate parental rights. N.C. Gen. Stat. §§ 7B-1100 – 7B-1113. When a parent cannot be found or when the parent will not agree to voluntarily surrender (relinquish) the child for the purpose of adoption, then a proceeding to terminate parental rights must be brought.

Note: Adoptability and TPR. Proving adoptability is not required by case law in order to prove best interest in the dispositional phase of a TPR proceeding, but some judges are reluctant or may even refuse to find best interest unless an adoption option is presented. They do not want to create a "legal orphan." To "prove" adoptability:

a. Have foster parents who are ready to adopt the child and consider having one or both of them testify at disposition;

b. Plan for adoption from the very beginning (i.e., the foster-adopt program). Look for adoptive families as options even before adoption is a legal option;

c. Have the foster care workers or adoption workers testify as to the county's track record with adoption and that the child has been referred to the four private child-placing agencies which have contracted with the Division to help DSS find adoptive homes.

C. **DSS Custody and adoption assistance**: Adoption is not appropriate for everyone, but if one wants adoption to be available as an option down the road, remember that if the child was ever in DSS custody (for at least one day), adoption assistance is available (so long as the other eligibility requirements, including "special needs," are met).

1. **DSS Custody**. When a child is placed for adoption after having been in the custody or placement responsibility of an agency, it is likely that the child will be eligible for adoption assistance because of his special needs status.

2. **When to establish eligibility**. Eligibility for adoption assistance benefits *should be* established prior to a child's placement for adoption, but *must be* established prior to the issuance of the Decree of Adoption.

Note: No residency requirement. If a child is eligible for Adoption Assistance (including the requirement that the child be in the custody of DSS), the child remains eligible regardless of whether or not the child resides in North Carolina.

D. **Filing the adoption petition**

1. **Who petitions.** This is typically done by DSS. If the foster parent, relative, or other potential adoptive parent files it, they take on burden of the expense and other responsibilities. If DSS files it, they are responsible for the costs and related responsibilities.

2. **Post-adoption Services**

   a. **Post-adoption services** are required and should be available to children without regard to income to assure the stability of the adoption placement.

   b. **Post-adoption contact agreements** allow adoptive parents and biological parents to enter into agreements whereby contact between child and biological parents and/or siblings/grandparents are permitted under the terms of the agreement (note that such agreements are not currently addressed by North Carolina law).

   c. **In the event an adoption does disrupt** and cannot be repaired, the child can be relinquished to DSS or a licensed child placing agency and be immediately free for another adoptive home.

E. **Financial Assistance Available for adoption**

1. Availability of assistance, in general

   a. Adoption assistance is available for all "special needs" children when other certain criteria are met.

   b. The **federal** adoption assistance program is limited to those adoptive children who meet the eligibility criteria for the federal AFDC program as it existed as of July, 1996 (predates Work First Phase I) or the Supplemental Security Income (SSI) program.

   c. In addition, North Carolina counties use **state** and **local** funds (without federal reimbursement) to provide assistance to adoptive children with special needs who do not meet the federal eligibility criteria and to provide benefits that are not covered by the federal program.

2. **Conditions for Eligibility.** Eligibility for subsidy is determined by the **status** of the child involved and by that **child's special needs**. A child for whom adoption is the plan, or who has already been adopted, may be determined eligible for Adoption Assistance if all of the following conditions are met:

   a. **Child Removed from Parents**: The child has been removed from his parents by a Voluntary Placement Agreement subject to judicial review or by a court order that includes the language in reference to best interest and reasonable effort; and

   b. **A North Carolina Agency has Placement Responsibility:** The child is in the placement responsibility of a North Carolina agency (e.g., DSS) authorized to place children for

adoption, or was at the time of the filing of the adoption petition in the custody of a North Carolina agency or had been in the placement responsibility of an agency who subsequently placed the child in the custody of a person now pursuing adoption of that child.

In general, foreign-born children are not eligible for adoption assistance. However, if a foreign born child enters the foster care system due to abuse, neglect, dependency, adoption disruption or adoption dissolution, that child's eligibility is determined in the same way an any other child.

c. **Child Can/Should Not Return to Parents.** It has been determined that the child cannot or should not be returned to his parents. This means that the state must have reached that decision based on evidence by a court order legally clearing the child through TPR, or the existence of a petition for TPR, or a relinquishment by the parent to a child-placing agency, or, in the case of an orphan child, verification of the death of the parents, or the parent gives consent to adoption directly to a family approved by the agency that is legally responsible for placement (this is often the foster family or a relative); and

d. **Special Needs**. The child has "special needs." A child is considered a child with special needs when the state has determined:
   (i) That there exists, with respect to the child, a specific factor or "condition" because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance or medical assistance.
   (ii) Conditions:
   (a) Child's ethnic background;
   (b) Child's age;
   (c) Membership in a minority
   (d) Child in a sibling group that is being placed together; or
   (e) The presence of factors such as medical conditions or physical, mental, or emotional handicaps. Includes *potential* handicaps.
   (f) Child is in foster care (meets requirement that it would be difficult to place the child without payment of the subsidy.

e. **Reasonable Efforts Have Been Made to Place Child Without Adoption Assistance.** Finally, there must be a demonstration that a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption or medical assistance.

   Waiver of Requirement: This requirement is waived when it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child**.**

3. **Financial Circumstances as a Consideration for Eligibility**

a. **Circumstances of the Child**. The financial criteria for federal adoption assistance eligibility address the circumstances of the child rather than the adoptive parents.

b. **Circumstances of the Adoptive Parent**. The financial circumstances of the parents become relevant only in determining the *amount* of adoption assistance and should not be considered in determining whether the child is eligible for the program. An income requirement or a means test cannot be imposed to restrict eligibility for adoption assistance.

The agency may negotiate with the adoptive parents as to the amount of the monthly cash payment, partly on the basis of their income. In regard to children with an income, such as, but not limited to, Social Security benefits, Veteran's benefits, Supplemental Security benefits, this income may be a consideration in the negotiation of the amount of the Adoptive Assistance payment. However, receipt of such income shall not arbitrarily or automatically generate a denial, termination, or reduction in the receipt or amount of Adoption Assistance monthly cash payments.

4. **Who Establishes Eligibility:** Establishing the eligibility for adoption assistance is a task of the services staff of a child's resident agency. The agency is required to use the Adoption Assistance Eligibility Checklist (DSS-5012). Documentation sufficient to establish eligibility can be in the form of statements of diagnosis and/or prognosis from physicians, psychiatrists, speech and other therapists, etc. Documentation in reference to high-risk potential should be supported by information about the child's and birth parents' background. This documentation shall be attached to the DSS-5012.

5**. Funding Sources**

a. IV-E (Monthly Cash Payments):

(i) Children are eligible to receive assistance under the IV-E program if, at the time they are cleared for adoption either through TPR or relinquishment, they are eligible for or recipients of IV-E foster care assistance benefits, or are eligible for or recipients of SSI benefits, or are recipients of Family Assistance (TANF) benefits living in a relative's home who was given custody by a North Carolina child placing agency. (Note that IV-E cannot be used if the child came into foster care under relinquishment, but can be used if they came in under a non-secure and there was a subsequent relinquishment.)

(ii) Children who were eligible for SSI, but are no longer eligible because of new definitions, are entitled to adoption assistance up to the county's rate.

(iii) Funding for IV-E adoption assistance cash payments is a combination of federal, state and county funds.

b. **IV-B (Monthly Cash Payment):** Children found eligible for monthly cash benefits who are not IV-E eligible are eligible to receive monthly cash payments from IV-B funds. Funding is derived from federal IV-B funds, (which North Carolina has retained the discretion to use and has opted to make available for non IV-E children), and county funds.

c. **SAF (Monthly Cash Payment):** The State Adoptive Fund is available for children with special needs who are placed by private agencies. Funding for this category of children is provided from IV-B funds and state funds. No county funds are required as match, with the exception of the Medicaid.

d. **Vendor Payments**

Adoptive parents will be expected to explore and use available resources other than these benefits for payment of services related to alleviating the child's special needs. However, for children also approved for assistance after adoption from the Children's Special Health Services, Division of Maternal and Child Health, Department of Environment, Health and Natural Resources, benefits from the vendor categories of Adoption Assistance are to be exhausted before the family turns to children's Special Health Services for assistance. Vendor payments are not included in the requirements of PL 96-272 for a subsidy program. Therefore, whether the children are IV-E or IV-B

eligible, the funding source is IV-B and county funds and the county share is the same. SAF-eligible children receive vendor payments reimbursed through IV-B funds.

e. **Medicaid**

(i) For IV-E eligible children, Medicaid should automatically be triggered by an application filed by the social worker in the child's behalf.

(ii) For IV-B children, Medicaid coverage is available for special medical or rehabilitative needs. The child's Adoption Assistance worker in the county makes the determination of whether the child has special medical needs. Once the child is initially determined as Medicaid eligible under special needs criteria, the eligibility determination is binding as long as adoption assistance remains in effect (unless child begins receiving income other than adoption assistance, then a redetermination of eligibility is required to ascertain if the child remains eligible based on income). A redetermination of financial eligibility is not required. Coverage terminates at age 18 or whenever the adoption assistance is terminated.

f. **Non-recurring**

(i) Non-recurring adoption expenses are considered an administrative expenditure of the Title IV-E adoption assistance program.
(ii) Federal reimbursement is available at a 50% matching rate for state expenditures up to $2,000 for any adoption.
(iii) The child is eligible for this benefit and reimbursement is available under this program regardless of whether or not the child is IV-E eligible.
(iv) The county's share of these nonrecurring expenses is 25 %.

6. **Benefits Available**

a. **Adoption Assistance Agreement:** North Carolina offers benefits in several categories. In order to offer these benefits, an adoption assistance agreement with the adopting parents must be in place. Any individual child may qualify for all types. Also, if a subsidy is in place for one type of benefit, additional types may be added in the future if the circumstances warrant it.

b. **Categories**

(i) Monthly Cash Benefits: In an effort to assure permanency for children, most counties continue adoption assistance at the *state standard foster care rate*, including special costs. The maximum amount of payment may vary from child to child and may change for an individual child over time.
(a) Children who are HIV positive or who have AIDS may receive additional payments while in foster care and may receive these additional benefits as part of the adoption assistance payment.
(A) This amount varies and ranges from $800-$1600. This is all state money and there is no county match.
(B) With this supplemental payment, a child with HIV/AIDS who is adopted will receive the same benefits as if such child remained in foster care
(b) Other children may receive additional money for their therapeutic needs while in foster care, and the county may choose to continue this supplement when the child is adopted. **The county is responsible for**

all supplemental payments, except for children who are HIV positive. (Submit request for HIV payment on monthly basis on Form 5159.)

(c) Sources of monthly cash payment: IV-E, IV-B, & SAF funds.

(d) Some counties supplement these costs for both foster care and adoption

(e) The Adoption Assistance Monthly Cash Payment continues until the child turns 18

(f) Adoption assistance looks at the child's needs and not the adoptive parents' income

(g) Application for adoption assistance needs to be done prior to the final decree of adoption

(ii) **Vendor Payment to Medical or Therapeutic Providers**

(a) Handicapping Conditions: Vendor payments provide assistance for services or treatment for handicapping conditions that existed prior to the time of the child's placement for adoption. It is not necessary for these conditions to have been identified prior to the placement, but rather to have existed.

(b) Cap on payment: Medical care providers may be paid up to $1200 per child, per year for medical treatment of services not covered by any medical insurance; therapeutic care providers may be paid up to $1200 per child, per year for non-medical services (e.g., psychological, tutorial, therapy, etc.)

(c) Source of payment: Agencies make payments on behalf of the child and are then reimbursed by the Division through IV-B funds.

(d) Termination of payment: Adoption Assistance Vendor payments continue until the child turns 18

(iii) **Non-recurring expenses**

(a) Available only to parents adopting special needs children regardless of whether the child was in the foster care system.

(b) Although non-recurring costs covers attorneys' fees and preplacement assessments, these funds should not be used for these tasks since DSS should be doing this as part of its casework.

(c) Parents adopting special needs children are eligible for reimbursement of non-recurring costs of the adoption. The non-recurring expenses for the adoption of a special needs child must be reimbursed by the state agency responsible for the administration of the adoption subsidy program. This is true whether the adoption is an independent placement or one facilitated by a public or private agency.

(d) Eligibility requirement. The child is eligible under the criteria established for children receiving adoption assistance, with the exception of the requirement that the child be in the custody or placement responsibility of a child-placing agency.

(e) Reimbursable costs include *adoption fees, court costs, attorney fees, and other expense*s that are directly related to the **legal** adoption of a child with special needs, which are not incurred in violation of state or federal law and which are not reimbursed from other sources or other funds. These expenses can include such costs as the *preplacement assessment*, including *physical and psychological examinations*,

transportation and reasonable costs of lodging and food for the child and/or the adopting parents when necessary to complete the placement or adoption process and supervision of the placement.

(f) In cases where siblings are placed and adopted either separately or together, each child is treated as an individual with separate reimbursement for non-recurring adoption expenses up to the maximum amount allowable for each child.

(g) Foreign adoptions. Payments are available to parents participating in intercountry adoptions as long as the child meets the requirements as outlined above with the exception of the child being in the custody or placement responsibility of a child-placing agency.

(h) Parents' financial condition not relevant. If parents have reimbursable expenses that are allowable, the reimbursement of these expenses must not depend on the income and resources of the parents.

(i) There can be no limit placed on either the amount in any type of non-recurring expenses or the number of types of non-recurring expenses for which a child may be eligible. The only allowable limit is for the total amount of incurred expenses of $2,000 per child.

(j) Counties make direct payments and request reimbursement from the State on the 5095.

(iv) **Medicaid**

(a) In North Carolina, children who receive adoption assistance must be evaluated for eligibility for Medicaid benefits.

(b) IV-E eligible children are categorically eligible and the Medicaid should automatically be triggered by an application filed by social worker on the child's behalf.

(c) The county with custodial responsibility is responsible for the Medicaid application.

(d) Non IV-E (i.e., IV-B) children may be eligible for Medicaid coverage if they have special medical or rehabilitative needs (special needs) and the child's income is below allowable limits.

(1) If the child own income (e.g., SSA) exceeds the eligibility amount as determined by the Medicaid eligibility specialist, then Medicaid is not available.

(2) Financial eligibility is determined based upon the child's income and resources only. Income and resources of the adoptive parents are not counted. As federal requirements specify that these children meet Categorically Needy income and resource requirements, they must be eligible under M-AF criteria. **(Refer to Family and Children's Medicaid Manual, dated 10-1-94)**

(v) **Social Services Benefits:** Children who are recipients of adoption subsidy are eligible for services without regard to income. This provides an opportunity for the social worker and family to identify a set of post-adoption services that may be helpful in keeping the new family system intact. These services may be funded through Social Services Block Grant or Permanency Planning funds as well as all county money.

IV. Guardianship:

A. Guardianship, in general

1. This is a permanency option for children that is more secure than custody, but not as secure as adoption. It is appropriately used when reunification and adoption are not possible.

2. Juvenile court guardianship is governed by 7B-600 and is different from Chapter 35A guardianship.

3. With guardianship, the parents' rights do not have to have been terminated.

4. The guardian shall have the care, custody and control of the child and may represent the child in legal matters before the court. The guardian may consent to certain actions on the part of the child in place of the parent (example, consent to marriage, enlisting in the armed forces, enroll in school).

5. Guardianship awarded in the context of a permanent plan for a child shall continue unless the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest, that the guardian is unfit, the guardian has neglected its duties or the guardian is unwilling or unable to continue to assume the duties. N.C. Gen. Stat. § 7B-600(b).

6. A juvenile court order appointing a guardian is valid for as long as the juvenile court retains jurisdiction over the case, unless the court terminates the guardianship pursuant to G.S. § 7B-600(b). It is unsettled what happens to a court-ordered guardianship when the juvenile court terminates jurisdiction over the matter. To insure validity of the order creating the guardianship, it is therefore recommended that the juvenile court retain jurisdiction over the case until the guardianship is terminated by a subsequent order or until the child reaches 18 years or is otherwise emancipated.

7. For suggestions concerning a guardianship order under Chapter 7B, see section V.G, below.

B. **Kinship Assessment:** DSS utilizes a "kinship assessment tool" whereby they evaluate potential placements using specific criteria.

1. DSS is to assess whether the potential caregiver(s) have/has a lifetime commitment to the child and how they fit into the family system.

2. DSS is to assess such things as what kind of access the biological parent(s) would/should have, whether the caregivers believe that the alleged perpetrator (potentially their son/nephew, etc. . .) actually engaged in abuse/sexual abuse of the child they will care for (affecting the likelihood that the child will receive appropriate protection from this person).

C. Important steps at non-secure hearing to prepare for a potential guardianship placement

1. Identify the fathers

2. Identify all the relatives that are willing and able to take care of the child and with whom it would be in the child's best interest to reside

3. Identify any other individuals who are potential guardians

D. **Financial assistance available for guardianship**

1. **TANF**: Relatives who are appointed by the juvenile court as guardians under G.S. 7B-600 may qualify for TANF Child Only benefits. In addition, relatives who have a child placed with them when DSS retains legal custody may also qualify for Child Only benefits. It should be noted that eligibility for TANF is not automatic and anyone interested in learning if they would be eligible under particular circumstances should contact their county department of social services, Work First Program.

2. **Medicaid** or North Carolina Health Choice for Children.

3. **Child support**: Since the court case stays open, the parents can be obligated to pay child support to the guardian.

4. **County funds in the 19 IV-E Waiver Counties for Assisted guardianship**. The 19 IV-E waiver counties can opt to provide assisted guardianship at the same rate of payment as foster care and adoption assistance (there is no vendor payment for guardianship). A certain set of criteria must be met for a guardian to receive these funds. So far, only 5 of these counties have chosen to use assisted guardianship because those funds are scheduled to end July 2002; but there is the potential, now that guardianship will become more common with more statutory definition, that they could still opt to do assisted guardianship and anyone is free to try to convince them to do so. This waiver project may also be extended past July 2002.

5. **No federal child welfare funds** (i.e., IV-E) can be used for assisted guardianship. Note, however, that the IV-E waiver project may change this so that guardians receive the same level of support as foster parents or adoptive parents.

E. **Standard for modification of a 7B-600 Guardianship**

1. Pursuant to section 7B-600(b), the court may not terminate a 7B-600 guardianship or order that the juvenile be reintegrated into a parent's home unless the court finds one of the following:

- That the relationship between the guardian and the juvenile is no longer in the juvenile's best interest;
- That the guardian is unfit;
- That the guardian has neglected a guardian's duties; or
- That the guardian is unwilling or unable to continue assuming a guardian's duties.

2. At any hearing to review the appointment of the guardian, the court can order an assessment by DSS, even though DSS may no longer have any role in the case.

F. **DSS's Role Once the Court Appoints a 7B-600 Guardian for the Child.**

1. **Until review hearings are properly waived pursuant to 7B-906(b),** DSS's only role is to schedule the review hearings. *See* 7B-906(a) (DSS shall make a timely request to calendar each review). This is DSS's only *official* role after guardianship (or custody) is granted. DSS can work with the family and assist them in applying for "330 services," which is voluntary on the part of the custodian or guardian, but it allows DSS to remain involved with a family. This falls in line with the recommendation that the order granting guardianship or custody should also include what services are needed from DSS. See suggestions for custody orders below. See also custody section on DSS's role for possible way to require DSS supervision.

2. **After review hearings are waived**, DSS has no role at all in the case. This does not mean that the court should terminate jurisdiction over the case (i.e., should not close the court case). This simply means that there are no periodic reviews, but the court retains jurisdiction in the event that a party files a motion pursuant to 7B-906(b) or 7B-1000 seeking a review hearing.

G. **Permanence if Guardianship Ends**

Unlike adoption where the adoptive parent can relinquish the child to DSS, making him immediately free for adoption, if guardianship ends and the child returns to DSS custody, quick permanence will probably not be possible. The parents' rights have not been terminated, grounds for TPR may not exist and the parents may not be willing to relinquish the child to DSS now that guardianship, usually with a relative they approved of, has ended.

V. Custody

A. **An adult can be granted custody of a child**.

B. **This is the option with the least permanency** as a parent can file a motion for review and ask the court to return the child to him based on the parent's change in circumstance.

1. This is the first permanency plan that comes to mind; it is used the most; and it is the least secure.

2. This option should only be used when reunification, adoption, and guardianship have been ruled out.

C. **There is no termination of parental rights required**.

D. **Relative's rights over a child relative**

1. **Absent DSS involvement**:

a. Can get a Power of Attorney from the child's parents, which gives the relative a right to physical custody of the child, the right to seek medical treatment, and the right to enroll the child in school (if accepted by the school).

b. Can hire a private attorney and seek custody of the child via an action filed pursuant to Chapter 50.

c. Seek guardianship of the child under Chapter 35A, but only if there is no living natural parent. Note that guardianship pursuant to Chapter 35A is different from the guardianship that is available in a child protection proceeding pursuant to N.C. Gen. Stat. § 7B-600.

2. **With DSS involvement and the filing of a petition alleging abuse, neglect, or dependency:**

a. A relative can get Chapter 7B custody or guardianship of the child.
   (i) The court can grant custody to a relative or other individual at any time during the course of the child protection proceedings, but the court must continue to review the case until the child has resided with the relative or been in the custody of the other individual for a year. N.C. Gen. Stat. § 7B-906(b).
      (a) With a **relative**, the year can include any time the child *resided* with the relative prior to the filing of the petition.

(b) If the child is placed with a person who is *not a relative*, then the child MUST be *in the "custody" of* the non-relative for a full year before the court can waive the hearings.

(c) Once the year requirement is completed, the court can waive review hearings pursuant to 7B-906 so long as the other requirements of 7B-906 are met.

(ii) Even if the court waives further review hearings, the court MUST conduct a review hearing upon motion of a party.

b. A relative can hire an attorney and seek Chapter 50 custody of the child via a motion in the cause in the Chapter 7B action (so long as the relative is a party to the action or is allowed to intervene) or via a separate Chapter 50 action. In the latter event, the juvenile court could appropriately terminate its jurisdiction.

E. **Standard for modification of a 7B custody orde**r: In addition to those review hearings set by the court, there are two vehicles for any party in an abuse, neglect, or dependency case to get the court to reconsider a custody order. A party may make a motion pursuant to G.S. 7B-1000 or 7B-906(b)(4) to get the case back in front of the court. The court may not waive or refuse to conduct a review hearing if a party files a motion seeking review under 7B-906. N.C.G.S. § 7B-906. When a hearing is conducted as a review hearing under 7B-906, the judge's decisions are based on the *best interest* of the child standard, and pursuant to section 7B-903(a)(2)b the court has the authority to make orders relating to custody. N.C.G.S. §§ 7B-906 & 7B-903. When a hearing is conducted pursuant to a motion made pursuant to section 7B-1000, the judge may modify or vacate the order in light *of changes in circumstances or the needs of the juvenile. See In re Brenner*, 83 N.C. App. 242 (1986). This leads to some confusion as to the standard applied for modification of custody orders, depending upon the context in which the order is made and whether the party has made a motion pursuant to 7B-1000 or 7B-906.

It can be argued that when a hearing is conducted in an attempt by one party to change an order concerning the child's custody, there is a requirement of a finding of changed circumstances (*see, e.g*., *In re Williamson*, 77 N.C. App. 53 (1986)) for custody to be modified. However, when "changes in circumstances" is read along with the language of "or the needs of the juvenile," as is also stated in section 7B-1000, this appears to lead back to the *best interest* standard, which is the essentially the same standard in regular review hearings set by the court or held in response to a motion by a party. This may be a simple semantic difference; therefore when a party is seeking to change orders affecting custody, the judge would be prudent to refer, in the order, to whether there has been a "change in circumstances," to the "needs of the juvenile," and to the "best interests" of the juvenile. This way, it will be less likely that the order could be attacked for failure to apply the appropriate standard in determining whether to modify orders concerning custody of the child.

Because the standards for changing custody are less stringent that the standards for changing guardianship, custody is considered more "temporary" and less "secure" than guardianship.

F. **What happens if custody "disrupts"** (i.e., the custodian doesn't want custody of the child anymore):

1. There can be an "unofficial" return of the child to the parents.

2. The custodian may take the child to DSS and say that they can't do this anymore. The concern with this option is that when the child is returned to DSS, the child is probably not freed for another permanent plan and will go into foster care until such time as the child ages out.

3. If custody is out of county, there is no clear-cut answer on which county has jurisdiction over the child when the placement disrupts. Therefore, you need to be very clear when dealing with placing the child in the custody of an individual who resides in a different county.

G. **Suggestions concerning a custody order or guardianship under Chapter 7B**

1. Remember that the order will be shown to many third parties (e.g., health care providers, and schools), so "sanitize" the order as much as possible without sacrificing the required findings of fact and conclusions of law.

2. These orders should address the issue of visitation with the parents.

3. The order should include what services are needed from DSS in addition to granting custody. Before a custody order is entered, discuss the needs of the family that is taking custody (e.g., day care, transportation, and health care) and see what DSS can provide so this can be included in the custody order to help insure that custody is successful. Some services the relative has come to rely on from DSS may not be available, or may no longer be available at no cost to the relative, once DSS no longer is the child's custodian.

> Note, however, that when DSS does not have custody, services are available on a voluntary basis – the person receiving services can sign a service agreement. Another advantage to DSS providing services is that it keeps DSS involved, which is of tremendous benefit should the placement fall through.

H. **DSS's Role Once the Court Grants Custody of the Child to a Relative or other Person.**

1. **Until review hearings are properly waived pursuant to 7B-906(b),** DSS's only role is to schedule the review hearings. *See* 7B-906(a) (DSS shall make a timely request to calendar each review). This is DSS's only *official* role after custody (or guardianship) is granted. DSS can work with the family and assist them in applying for "330 services," which is voluntary on the part of the custodian or guardian, but it allows DSS to remain involved with a family. This falls in line with the recommendation that the order granting guardianship or custody should also include what services are needed from DSS. See suggestions for custody orders above.

There may be a way to extend DSS supervision of a case that would not be voluntary, a way that the court COULD order DSS to continue to supervise the child even after the court grants custody (and maybe even guardianship) to a relative or other person: Section 7B-906(d) authorizes the court at any review hearing (including the one at which further review hearings are waived) to make any disposition authorized by 7B-903. Since under section 7B-903(2)a the court has the authority to order DSS to supervise the child in his/her home—if the child needs more adequate care or supervision—then this is a way to try to get continued DSS supervision. This does not seem to address the question of services, but will at least provide a way to have continued supervision if review hearings are being waived, but there is some concern about whether this placement will work.

2. **After review hearings are waived,** DSS has no role at all in the case. This does not mean that the court should terminate jurisdiction over the case (i.e., should not close the court case). This simply means that there are no periodic reviews, but the court retains jurisdiction in the event that a party files a motion pursuant to 7B-906(b) or 7B-1000 seeking a review hearing.

I. Funding Sources

1. **TANF**: Custodians (persons who have been given legal responsibility but not guardianship to provide care and supervision for the child) may apply for TANF (Temporary Assistance for Needy Families, formerly AFDC) payments for the children as child(ren) only cases. One who is not a legal custodian may not be able to get child only benefits.

   a. Child Only benefits do not consider the income of the legal custodian in determining eligibility. However, if the child has other income (such as SSI), the child may not be eligible for TANF. If the child is not a U.S. citizen or a "qualified alien," he is not eligible for TANF benefits. Anyone interested in learning whether they qualify for TANF should contact their county department of social services, Work First Program.

   b. Payment for TANF is less than that for children in adoption or assisted guardianship

   c. The amount of payment may be reduced by any other income (e.g, SSI) of the child's.

2. **Medicaid**: If the child receives TANF there will be Medicaid.

   If there is no Medicaid, custodians are encouraged to apply for North Carolina Health Choice for Children.

3. **Child support**: Since the court case stays open, the parents can be obligated to pay child support to the custodian.