

CHAPTER 2 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.

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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

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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.

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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).*

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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]

⁵ Resource Guidelines, p. 47.

⁶ Resource Guidelines, pp. 47, 48.

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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.

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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 Procedure

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.

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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

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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

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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.

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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

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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

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- 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

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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)]

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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).

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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**

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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).

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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).

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§ 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 should⁹

- 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.

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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).

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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 and 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.

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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).

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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.

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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.		

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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 _____
- _____
- _____
- _____

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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:			

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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

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§ 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.

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_____ 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.

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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.

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§ 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

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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

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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.

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(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.