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

---

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