

# Termination of Parental Rights: Cases and Statutes Related to Grounds and Best Interest\*

*Kella W. Hatcher, JD*

## I. Understanding the Basics of the Two-Stage Process of TPR Adjudication and Disposition

### A. 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).

### B. 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.*

### C. Separate hearings not required

Although the court is required to apply different evidentiary 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 (1986).

### D. Burden of Proof

**For adjudication in a termination hearing, the burden is on the petitioner [or movant,** pursuant to statutory amendments to 7B-1111(b) in the year 2000] to prove the facts justifying termination. Findings must be based on clear and convincing evidence. [See *In re Nolen*, 117 N.C. App. 693 (1995); *In re Montgomery*, 311 N.C. 101 (1984); 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. *In re Roberson*, 97 N.C. App. 277 (1990).

---

\* Prepared April, 2003, for Termination of Parental Rights Training, May 7<sup>th</sup>, 2003, in Chapel Hill, NC, updated August 11<sup>th</sup>, 2003. The majority of the content of this outline comes from Chapter 4 of the Guardian ad Litem Attorney Practice Manual, by Kella W. Hatcher; some information in that chapter (and therefore in this outline) was adapted or extracted from an outline by Janet Mason on Termination of Parental Rights, February 1999, with permission, Institute of Government, University of North Carolina at Chapel Hill.

## II. Grounds for Termination [7B-1111]<sup>1</sup>

### 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 utilization of this ground for termination: proceeding immediately to TPR with or without an underlying adjudication of abuse or neglect; or using a prior adjudication of abuse or neglect, along with an examination of present circumstances, to provide the basis for this ground.

#### 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 a review hearing that takes place fairly early in the case 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.<sup>2</sup> There is also nothing in the statute that requires one petitioning for termination under this ground to wait a certain period of time after an adjudication of abuse or neglect to petition or move for termination. In addition, 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. *A petition for TPR can be filed on grounds of abuse or neglect with no underlying petition or adjudication for abuse or neglect.* While some attorneys may not find this avenue to termination to be their first choice, it is a method of pursuing TPR that is within the law. (See, e.g., *In re Faircloth*, \_\_\_ N.C. App. \_\_\_, 571 S.E.2d 65 (2002)).

#### 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.

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.

##### 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*:

---

<sup>1</sup> The grounds for termination have been paraphrased for clarity. The reader should consult the statute for exact statutory language.

<sup>2</sup> *But see* the dissenting opinion in *In re Dula*, 143 N.C. App. 16 (2001), affirmed, 354 N.C. 356 (2001).

. . . [E]vidence of neglect by a parent prior to losing custody of a child – 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).

**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, id.*, 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 new 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, stating that no new evidence of neglect subsequent to the prior adjudication need be shown.

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 which brought the child into foster care.

v. *In re Pope*, 144 N.C. App. 32 (2001), *affirmed*, 354 N.C. 359 (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 the case of *In re Beasley*, 147 N.C.App. 399 (2001), the court of appeals affirmed the trial court's order stating that the trial court admitted into evidence the previous court files showing prior instances of neglect of the children which resulted in previous adjudications of neglect; that based on the evidence in the prior proceedings, the trial court made extensive findings of fact showing a clear pattern of neglect going back as far as 1992, and further found that "the probability of repetition of neglect is very great"; plus the trial court made findings that indicated it had considered evidence presented by respondents that conditions had changed since the previous adjudications of neglect.

vii. *In re Shermer*, \_\_\_ N.C. App. \_\_\_, 576 S.E. 2d 403 (2003), was a case in which the court noted numerous things that the father did to demonstrate his efforts to have a relationship with the children plus efforts he had made to improve his ability to parent the children and found that changed circumstances existed since the time of the neglect adjudication; that there was not sufficient evidence that neglect was likely to reoccur.

**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 (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. (*see, 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); *In re Shermer*, \_\_\_ N.C. App. \_\_\_, 576 S.E. 2d 403 (2003); *In re Yocum*, \_\_\_ N.C. App. \_\_\_ (June 2003).

- **parent’s efforts at improving the conditions that led to the removal and original adjudication** – 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 Brim*, 139 N.C. App. 733 (2000).
- **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 conditions leading to original neglect adjudication** (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 on a prior adjudication of abuse or neglect was not upheld:**

Appellate courts have overturned cases involving prior adjudications for (typically) one of the following three reasons:

- Factual insufficiency of the evidence concerning abuse or neglect.** *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).
- Failure of the trial court to examine changed circumstances** since the time of the prior adjudication. *Union County Dept. of Social Services. v. Mullis*; *In re Garner*, 75 N.C. App. 137 (1985).
- 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); *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994); *In re Shermer*, \_\_\_ N.C. App. \_\_\_, 576 S.E.2d 403 (2003).

**e. Remoteness in time of a prior adjudication**

Remoteness of the evidence goes to the weight of the evidence and not the admissibility. 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, thirteen years was too remote in one case although there were other problems in that case in addition to remoteness. *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 could be considered even where court found no best interest or later found no neglect in a later order.** *In re Stewart*, 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* 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. Also see *In re Reyes*, 136 N.C. App. 812 (2000).

ii. *In re Johnston*, 151 N.C. App. 728 (2002), was a case in which the court of appeals stated that the trial court properly considered evidence of how a parent treated another child as it related to the TPR ground of neglect (evidence concerning child’s special needs and parent’s inability to deal with them).

**3. Case notes on abuse or neglect**

*(Not all of the following cases are TPR cases; some are listed to provide examples of circumstances which have or have not been found to constitute abuse or neglect)*

**a. Neglect generally**

i. Neglect may be **present even when a parent shows love and concern for a child.** *In re Montgomery*, 311 N.C. 101 (1984). See also *Wilson v Wilson*, 269 N.C. 676 (1967) and *Santosky v. Kramer*, 455 U.S. 745 (1982).

ii. 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).

iii. 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 NC App. 449 (1986); Also see *In re Phifer*, 67 N.C. App. 16 (1984).

iv. 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).

v. **Nonfeasance, such as failure to protect**, as well as malfeasance, can constitute neglect. *In re Adcock*, 69 N.C. App. 222 (1984).

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

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

viii. **This statutory definition of neglect has been found to be constitutional and not void for vagueness**. *See In re Moore*, 306 N.C. 394 (1982); *In re Huber*, 57 N.C. App. 453, appeal dismissed and cert. denied, 306 N.C. 557 (1982); *In re Biggers*, 50 N.C. App. 332 (1981). [Note that there have been changes to the statutory definition of neglect since these cases.]

**b. Conduct constituting or contributing to a finding of neglect**

i. **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); *In re Yocum*, \_\_\_ N.C. App. \_\_\_ (June 2003).

ii. 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).

iii. 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).

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

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

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

*McMillan*, 30 N.C. App. 235 (1976).

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

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

ix. **Failure to make adequate efforts to see that the child receives prescribed medication** constituted neglect. *See State v. Harper*, 72 N.C. App. 471 (1985); *In re Webb*, 70 N.C. App. 345 (1984), *aff'd*, 313 N.C. 322 (1985).

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

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

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

xiii. **Disciplining a child so severely that bruises and internal abrasions result** constituted neglect. *See In re Thompson*, 64 N.C. App. 95, 99 (1983); see also *State v. Hunter*, 48 N.C. App. 656 (1980). [Under current definitions would no doubt be considered abuse.]

xiv. Neglect was found with **abandonment in which a parent withholds his presence, his love, his care**, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, or a parent "evinces a settled purpose and a willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child." *See Pratt v. Bishop*, 257 N.C. 486, 503 (1962); *In re Stroud*, 38 N.C. App. 373 (1978); *In re Humphrey*, \_\_\_ N.C. App. \_\_\_, 577 S.E. 2d 421 (2003); *In re Yocum*, \_\_\_ N.C. App. \_\_\_ (June 2003).

xv. Neglect was found for **failure to provide a stable home environment and indifference to the child's physical welfare**. *In re Adcock*, 69 N.C. App. 222, (1984). *See In re Black*, 76 N.C. App. 106 (1985). Also see *In the Matter of Brittny Nicole Helms*, 127 N.C. App. 505 (1997).

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

mother's severe alcohol abuse resulted in problems supporting a finding of neglect.

xvii. Evidence of abuse and drug use on the part of the father and grandfather of the child supported the conclusion that the child was at risk when exposed to them.

**Evidence of inability to maintain a secure living situation free of drugs, violence, and attempted sexual assaults supports a conclusion of neglect.** *In the Matter of Brittany Nicole Helms*, 127 N.C. App. 505 (1997). Also see *In re Blackburn*, 142 N.C. App. 607 (2001).

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

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

xx. For cases involving **treatment of other children** as evidence of neglect, see *In re Ellis*, 135 N.C. App. 338 (1999); *In re McLean*, 135 N.S. App. 387 (1999); *In re Nicholson and Ford*, 114 N.C. App. 91 (1994); *In re Johnston*, 151 N.C. App. 728 (2002).

### c. Casenotes on abuse

*[While there are many appellate cases discussing neglect, there are few appellate cases discussing abuse. Perhaps this disparity is due to the fact that the definition of "abuse" is more straightforward and raises fewer issues of interpretation than the definition of "neglect". For this reason, some of the cases which do discuss abuse have had little to no affect on the law relating to abuse and will therefore not be discussed in this outline.]*

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

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

iii. Where child was severely burned while in the care of the parent, no accidental cause was established, parent would not seek treatment for burns and child said parent had burned her, there was sufficient evidence of abuse. *In re Hayden*, 96 N.C. App. 77 (1989).

iv. *In re Greene*, 152 N.C. App. 410 (2002), was a case in which munchausen syndrome by proxy, where the parent has marked overreaction to child's imagined or, usually, minor medical problems, was found to constitute abuse.

**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<sup>3</sup> 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)]**

**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 at 669 (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); *In re McMillan*, 142 N.C. App. 379 (2001).
- 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 enough 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); *In re Baker*, \_\_\_ N.C. App. \_\_\_ (June 2003).
- d. **A parent's incarceration does not preclude 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). See subsection J. below for more information on incarcerated parents.
- e. **The court must properly apply the word "willful."** "Evidence showing a parents' ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must be apparent for willfulness to attach." *In re Matherly*, 149 N.C. App. 452 (2002).
- f. "The trial court must make specific findings of fact showing that a **minor parent's age-related limitations** as to willfulness have been adequately considered." *In re Matherly*, 149 N.C. App. 452 (2002).

---

<sup>3</sup> 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. . ."

g. Willfulness is established when the respondent has the **ability to show reasonable progress, but is unwilling to make the effort.** See, *In re Nesbitt*, 147 N.C. App. 349 (2001); *In re Nolen*, 117 N.C. App. 693 (1995); *In re Baker*, \_\_\_ N.C. App. \_\_\_ (June 2003).

h. A finding of **willfulness does not require a showing of fault** by the parent. See *In re Bishop*, 92 N.C. App. 662 ; *In re Fletcher*, 148 N.C. App. 228 (2002)

## **2. Reasonable progress under the circumstances in correcting those conditions that led to removal of the child**

a. In the case of *In re Nesbitt*, 147 N.C. App. 349 (2001), the court of appeals overruled the trial court's order for TPR which was based solely on this ground. The court of appeals did not feel that the examples in the trial court's findings relating to the mother's poor judgment with respect to certain safety issues (the court called some of the issues "trivial"), as well as housing issues, was enough to show clear, cogent, and convincing evidence of a failure to make reasonable progress.

b. 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. Related to the need for sufficient progress, also see *In re Harris*, 87 N.C. App. 179 (1987); *In re McMillan*, 142 N.C. App. 379 (2001); *In re Fletcher*, 148 N.C. App. 228 (2002); *In re Baker*, \_\_\_ N.C. App. \_\_\_ (June 2003); *In re Clark*, \_\_\_ N.C. App. \_\_\_ (July 2003).

**3. The twelve months in foster care need not be continuous.** *In re Taylor*, 97 N.C. App. 57 (1990).

## **4. Time period for analyzing parent's conduct**

*In re Pierce*, 356 N.C. 68 (2002), was decided under the old statute, which read ". . . that reasonable progress under the circumstances had been made *within 12 months* in correcting those conditions which led to the removal of the juvenile . . ." *Pierce* analyzed the phrase "within 12 months," which is no longer in the statute, and concluded that the conduct of the parent which is being assessed is the conduct which took place during the 12 months immediately preceding the filing of the TPR petition, and the analysis should be limited to that period. Conduct outside this 12 month period should come in for dispositional purposes only. This reasoning in *Pierce*, however, would *not* be applicable to cases governed by the new statute, a fact which was pointed out in a footnote in the *Pierce* opinion.

**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)), and the trial judge must make findings of fact concerning the amount of the child’s reasonable needs (*In re Phifer*, 67 N.C. App. 16 (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 fact that the parent is a minor herself should be taken into consideration when it comes to the parent’s ability to pay support. *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)]**

**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. **The petitioner or movant 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 NC App. 623 (2000).

#### **F. Ground Six: Incapable of providing care and supervision<sup>4</sup>**

**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.**

*Statutory language effective prior to June 4, 2003: 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.*

*Statutory language effective as of June 4, 2003: 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. [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). [Note that changes to this ground have been made since this case.]

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 Gynn*, 113 N.C. App. 114 (1993).

---

<sup>4</sup> Note: This ground was revised in 1997 and in 2003 and most of the cases noted in this subsection were decided prior to such revisions or do not relate to the changes made by such revisions.

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. Where parent is a minor, trial court must make findings as to whether minor parent's inevitable move into adulthood is likely to cure what would otherwise form the basis of incapability under ground six. *In re Matherly*, 149 N.C. App. 452 (2002).

**G. Ground Seven: Parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition or motion.<sup>5</sup> [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).

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).

c. **Incarceration and abandonment.** Where father had opportunity to attend TPR hearing but declined that opportunity for fear he would lose "personal privileges" in prison, court of appeals was not impressed with father's argument that incarceration prevented him from having more contact with child and negated the claim of "willful" abandonment. *In re Hendren*, \_\_\_ N.C. App. \_\_\_, 576 S.E. 2d 372 (2003). In the case of *In re Shermer*, \_\_\_ N.C. App. \_\_\_, 576 S.E. 2d 403 (2003), however, the court did not uphold the trial court's finding of evidence to support abandonment where the father had been incarcerated during the six months before DSS filed the TPR petition, had some contact with his child, had informed DSS that he did not want his rights terminated, and told DSS that he wished to maintain custody of this children.

---

<sup>5</sup> 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."

**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 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. Additional provision effective for actions pending or filed on or after January 1, 2002: 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)]**

**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)]**

**J. Incarcerated Parents and TPR**

**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); *In re Clark*, 151 N.C. App. 286 (2002).

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 grounds of 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*.]
- 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). See also *In re Yocum*, \_\_\_ N.C. App. \_\_\_ (June 2003).
  - 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*. 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.” *Blackburn, 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.

vii. In the case of *In re Williams, 149 N.C. App. 951 (2002)*, an incarcerated father had his rights terminated based on grounds two and six. At the time of the appeal of his TPR, he was to be incarcerated for another 20 years. In this case, the father had sent the child approximately \$125 worth of gifts and monies during the child’s lifetime. The father received approximately \$35-50 per month in wages for inmate labor, the entire amount of which was spent primarily on his "necessities and postage and photocopy expenses." The father had admitted paternity of the child; however, he had never seen or spoken with the child since his birth. The father had sent the child something less than twenty letters during the three years prior to the TPR. The court of appeals acknowledged that fact that the 20 years remaining on his sentence was a factor in its decision to uphold the trial court’s order to terminate the father’s parental rights.

viii. The court of appeals was not sympathetic to a father whose parental rights were terminated based on neglect and abandonment (grounds one and seven), putting emphasis on the fact that the father declined an opportunity to attend his TPR hearing for fear he would jeopardize “personal privileges” in prison. In this case, the child testified to having received one or two cards for birthdays and one letter from his father, and testified that he wished to have no further contact with his father and that he wanted to be adopted by his stepfather. In affirming the trial court’s order finding that it was in the child’s best interest to terminate parental rights, the court took into consideration the fact that the child currently enjoyed an “ideal situation” with his mother and stepfather, as well as the fact that the father had been sentenced to nineteen years with the sentence beginning in 1996. *In re Hendren, \_\_\_ N.C. App. \_\_\_, 576 S.E.2d 372 (2003)*.

### **3. Cases relating to ground six involving dependency**

In the case of *In re Williams, 149 N.C. App. 951 (2002)*, ground six was one of the grounds which formed the basis of the father’s termination of parental rights. The court of appeals affirmed termination on this ground as well as on ground two, emphasizing at the end of the opinion the fact that the father’s incarceration was likely to continue for another 20 years. In this opinion, the emphasis was on the father’s incapability to care for the child for the foreseeable future due to incarceration, and there was no discussion of the reasons for incapability listed in the statute (organic brain syndrome, substance abuse, etc. . .). However, in the case of *In re Clark, 151 N.C. App. 286 (2002)*, termination of parental rights of an incarcerated father was based on ground six as well, but the court of appeals overturned that

termination, stating that there was no evidence at trial to suggest that the father suffered from any physical or mental illness or disability that would prevent him from caring for the child, and that there was insufficient evidence to show that he could not arrange for alternative child care. The court of appeals in *Clark* acknowledged the *Williams, id.*, decision, but distinguished it, specifically interpreting the opinion in *Williams* as “holding that where clear and convincing evidence showed that the father was incarcerated and had no means of arranging alternative care, termination of parental rights was appropriate.” *In re Clark, id.* at 290.

## II. Best Interest and Disposition

### If Grounds Exist, Court Is to Terminate Unless Not in the Child’s Best Interest [7B-1110(a)]

The language in the statute relating to best interest says 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.

#### A. 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).

#### B. No separate hearings required

Separate hearings for grounds and best interest are not required, but can take place. See I.C. of this outline, above.

#### C. Disposition is discretionary

1. 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. (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).

2. 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).

#### D. Case Notes Related to Best Interest

1. 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).

2. For case relating to the examination of family’s religion as it relates to best interest, see *In re Huff*, 140 N.C. App. 288 (2000).

3. *In re Brim*, 139 N.C. App. 733 (2000), was a case in which the lower court's findings emphasized the fact that the mother was not able to demonstrate that she could adequately provide for the needs of the child after nearly two years of diligent efforts by DSS, as well as the detrimental effects of further delays on a permanent placement for the child in light of the child's age and bond to his foster family. The court of appeals upheld the trial court's finding that it was in the child's best interest for parental rights to be terminated.
4. In *Bost v. Van Nortwick*, 117 N.C. App. 1 (1994), the court of appeals details all of the facts which support the parent's position that it is not in the child's best interest for parental rights to be terminated. In this case, the court of appeals found that the trial court had abused its discretion in finding that termination was in the child's best interest.
5. Child's potential for adoption: factor in best interest determination?
  - a. 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). 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).
  - b. *In re Nesbitt*, 147 N.C. App. 349 (2001), was a case in which the court pointed out that "This was not a choice between Ms. Nesbitt and the foster parents. Rather, an independent decision of Ms. Nesbitt's fitness to parent should be made, and only if she is found to be either unwilling or unable to parent her child should the foster home then be considered under the best interests standard." *Id.* at 361.
6. It was not error for the GAL to give lay opinion regarding whether it was in the child's best interest for parental rights to be terminated. *In re Wheeler*, 87 N.C. App. 189 (1987).