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TERMINATION OF PARENTAL RIGHTS
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TERMINATION OF PARENTAL RIGHTS

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(G.S. Chapter 7B, Article 11)

I. Purposes of the Law
(G.S. 7B-1100)

A. The general purpose is to provide judicial procedures for terminating the legal relationship between a child and the child's biological or legal parent (or parents), when parents demonstrate that they will not provide care that promotes the child's healthy and orderly physical and emotional well-being. *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008). (Procedures are described in Section IV, below.)

B. A further purpose is to recognize both the child's need to have a permanent plan of care at the earliest possible age and the need to protect children from the unnecessary severance of the parent-child relationship. *In re L.O.K*, 174 N.C. App. 426 (2005).

C. If the interests of the child and parents (or others) are in conflict, the child's interests control. *In re Montgomery*, 311 N.C. 101 (1984).

D. The article (Article 11 of G.S. Chapter 7B) should not be used to circumvent the provisions of G.S. Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act. (The act is described in Section II, below.)

II. Subject Matter Jurisdiction
(G.S. 7B-200(a)(4), -1101; G.S. Chapter 50A)

A. The district court has exclusive jurisdiction over proceedings to terminate parental rights. (District court jurisdiction also extends to adoption proceedings that are appealed from or transferred by the clerk. *See* G.S. 1-301.2; G.S. 7A-246; G.S. 48-2-303, -607.)

B. Proceedings must comply fully with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A.

1. A proceeding to terminate parental rights is a child custody proceeding for purposes of the UCCJEA. G.S. 50A-102(4). *In re N.R.M.*, 165 N.C. App. 294 (2004).

2. Evidence in the record must support the trial court's conclusion of law that it has subject matter jurisdiction under the UCCJEA. *In re E.X.J.*, 191 N.C. App. 34

(2008), *aff'd per curiam*, 363 N.C. 9 (2009); *In re T.J.D.W.*, 182 N.C. App. 394, *aff'd per curiam*, 362 N.C. 84 (2007).

a. Although the statute does not require the court to make findings of fact to support its conclusion that it has jurisdiction, making findings is the better practice. *E.X.J.*; *T.J.D.W.*

b. In earlier cases stating that the trial court must make findings of fact it was not clear from the record that the trial court had subject matter jurisdiction.

(1) When another state has entered a custody order relating to the child, an order terminating parental rights constitutes a "modification" of that order, and the court must make findings sufficient to conclude that it has jurisdiction to modify the other state's order. *In re N.R.M.*, 165 N.C. App. 294 (2004).

(2) Where the record was devoid of evidence from which an appellate court could ascertain whether the trial court had subject matter jurisdiction, the case was remanded for findings of fact based on competent evidence to support the trial court's conclusion that it had subject matter jurisdiction under the UCCJEA. *In re J.B.*, 164 N.C. App. 394 (2004).

3. When a custody order has been entered in another state and a party still resides there, that state's determination (pursuant to G.S. 50A-203) that it no longer has exclusive continuing jurisdiction (under G.S. 50A-202) or that a court in N.C. would be a more convenient forum (under G.S. 50A-207) must be reflected in a court order from the other state filed in the N.C. action. *In re J.A.P.*, ___ N.C. App. ___, 721 S.E.2d 253 (Jan. 17, 2012); *In re K.U.-S.G.,* 208 N.C. App. 128 (2010).

4. Information about the child's status, required by G.S. 50A-209, must be set out in the petition or motion or an attached affidavit. However, failure to attach the affidavit does not divest the court of jurisdiction and can be cured by the court's requiring that the affidavit be filed within a specified time. *In re Clark*, 159 N.C. App. 75 (2003).

   Note: A form affidavit, AOC-CV-609, is available on the web site of the North Carolina Administrative Office of the Courts (AOC), at http://www.nccourts.org/Forms/Documents/269.pdf.

5. Under the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, jurisdiction of a court that has made a child custody determination consistent with the PKPA continues as long as that court has proper jurisdiction under its state's laws and remains the residence of the child or any party. *In re Bean*, 132 N.C. App. 363 (1999) (holding that the trial court, after finding that Florida retained

jurisdiction over the child, properly dismissed for lack of jurisdiction) (decided under the UCCJA, which was replaced by the UCCJEA effective October 1, 1999). *See also* Quets v. Needham, 198 N.C. App. 241, 252 (2009) (stating that Congress enacted the Parental Kidnapping Prevention Act pursuant to the Full Faith and Credit Clause, "to prescribe the effect of child custody and visitation orders entered into in other States").

C. The child must reside or be found in the district or be in the legal or actual custody of a county department of social services (hereinafter, DSS) or licensed child-placing agency in the district when the petition or motion is filed. G.S. 7B-1101.

1. This requirement does not apply when the court has exclusive continuing jurisdiction under the UCCJEA. *In re H.L.A.D*., 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

   a. The court in *H.L.A.D*. distinguished *In re Leonard*, 77 N.C. App. 439 (1985) (holding that the trial court did not have jurisdiction when the mother and child had left the state days before DSS filed a petition) because (i) the Uniform Child Custody and Jurisdiction Act (UCCJA), which was in effect at the time, did not provide for exclusive continuing jurisdiction and (ii) DSS lacked standing to file the petition because the record in *Leonard* did not show that DSS had custody of the child. (Standing is discussed in Sections II.G and VI, below.)

   b. The court in *H.L.A.D.* also distinguished *In re D.D.J*., 177 N.C. App. 441 (2006) (holding that the trial court lacked jurisdiction because when DSS filed the petition the child was not in the state or in DSS custody) because (i) DSS lacked standing to file the petition because the child was not in DSS custody and (ii) the trial court had terminated its jurisdiction in the juvenile case.

2. When there has been no prior custody determination and the court has jurisdiction under the UCCJEA to make an initial custody determination, the requirement of G.S. 7B-1101 regarding the child's location may be at odds with the UCCJEA, which provides that physical presence of a party or a child is neither necessary nor sufficient to establish jurisdiction. *See* G.S. 50A-201(c). (This circumstance could arise, for example, if (i) a mother and child moved from N.C. to Virginia; (ii) the father continued to reside in N.C.; and (iii) within 6 months, while N.C. was still the child's home state, the mother filed an action in N.C. to terminate the father's rights.)

3. Where the petitioner in a private termination action filed the petition in the county where respondent was incarcerated, not the county in which the petitioner and child resided, the issue was one of venue, not jurisdiction. There was no error because respondent made no objection to venue. Also, the child was "present" at

the courthouse with her mother when the petition was filed. *In re J.L.K.*, 165 N.C. App. 311 (2004).

D. Failure to initiate a termination of parental rights action properly can deprive the trial court of subject matter jurisdiction.

1. Verification is essential. Failure to verify the petition or motion deprives the court of subject matter jurisdiction. *In re T.R.P.*, 360 N.C. 588 (2006).

   a. Signing and notarization do not constitute verification. *In re Triscari*, 109 N.C. App. 285 (1993).

   b. For cases relating to proper signatures in DSS cases, see Section II.G.3, below.

2. The trial court does not have jurisdiction in the absence of a valid pleading.

   a. A termination action could not be initiated by one parent's filing a counterclaim for termination in the other parent's civil action for visitation. *In re S.D.W.*, 187 N.C. App. 416 (2007).

   b. A motion in the cause containing no prayer for relief was not sufficient to initiate a termination action. *In re McKinney*, 158 N.C. App. 441 (2003). *But see In re Scearce*, 81 N.C. App. 531 (1986) (holding that the district court had jurisdiction when a petition alleged that the mother had placed the child with DSS, that the father was unknown, that N.C. was the child's home state and no other state had jurisdiction, and that the child's best interest would be served by the court's assuming jurisdiction).

E. The trial court may not proceed in a termination of parental rights case when an appeal from an underlying abuse, neglect, or dependency case is pending. G.S. 7B-1003(b)(1). *See In re P.P.,* 183 N.C. App. 423 (2007); *In re Z.J.T.B.*, 183 N.C. App. 380 (2007). However, filing a motion to terminate parental rights while an appeal in the underlying case is pending does not deprive the trial court of jurisdiction in the termination case, when the trial court takes no action "exercising jurisdiction" before the appellate court's mandate issues. *In re M.I.W.*, ___ N.C. ___, 722 S.E.2d 469 (Jan. 27, 2012).

F. The parent's age is immaterial.

Note: G.S. 7B-1101.1(b) requires the appointment of a guardian ad litem under G.S. 1A-1, Rule 17, for a parent who is an unemancipated minor.

G. The court does not have subject matter jurisdiction if the petition or motion is filed by someone who does not have standing. (See Section VI, below, for further discussion of standing.)

1. For DSS to have standing, DSS must have custody of the child, so DSS does not have standing to file a termination petition after the court awards custody to someone other than DSS. *In re Miller*, 162 N.C. App. 355 (2004).

2. The trial court lacked subject matter jurisdiction when DSS did not attach to the petition or include in the record a copy of the order giving DSS custody of the child, thus failing to establish that DSS had standing. *In re T.B.*, 177 N.C. App. 790 (2006).

   Note: *T.B.* should not be read as holding that failing to attach a copy of a custody order, by itself, deprives the court of subject matter jurisdiction. *See* Section II.K.3, below.

3. If the trial court lacked subject matter jurisdiction in the underlying action in which custody was awarded to DSS, the order giving DSS custody is void and DSS does not have standing to file a termination action.

   a. Orders giving DSS custody were void when verifications of the underlying petitions were signed by a DSS employee who signed the director's name "per [the employee's initials or name]." *In re S.E.P.*, 184 N.C. App. 481 (2007); *In re A.J.H-R.*, 184 N.C. App. 177 (2007).

   b. Verification of the petition was sufficient when it was signed by an identified employee of DSS and there was no assertion that the employee was not the authorized representative of the director of social services. *In re Dj.L.*, 184 N.C. App. 76 (2007).

   c. The trial court's jurisdiction in the underlying dependency case was not affected by the fact that (i) the petition did not state specifically that the social worker who signed it was the director's authorized representative or (ii) the social worker signed only the verification, not the signature line for the petitioner. *In re D.D.F.*, 187 N.C. App. 388 (2007).

H. Subject matter jurisdiction cannot be conferred by consent, waiver, stipulation, estoppel, or failure to object. *In re T.R.P.*, 360 N.C. 588 (2006); *In re K.U.-S.G.,* 208 N.C. App. 128 (2010).

I. The lack of subject matter jurisdiction can be raised at any point in the proceeding, including for the first time on appeal or after judgment. *In re T.R.P.*, 360 N.C. 588 (2006).

J. The Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963, applies to termination proceedings.

1. A parent who seeks to invoke the Indian Child Welfare Act has the burden of showing that the act applies. *In re A.D.L.*, 169 N.C. App. 701 (2005); *In re Williams*, 149 N.C. App. 951 (2002).

2. The act applies only to federally recognized tribes, not tribes that are recognized only by the state. *A.D.L.*

3. Where the putative father was a registered member of the Cherokee Nation of Oklahoma and the child was eligible for membership, the Indian Child Welfare Act applied and the trial court properly proceeded only after the Cherokee Nation declined jurisdiction or intervention. *In re Bluebird*, 105 N.C. App. 42 (1992).

K. Appellate courts have rejected arguments that certain actions or errors deprive the trial court of subject matter jurisdiction in termination actions.

1. Defect in or absence of summons

"[T]he summons is not the vehicle by which a court obtains subject matter jurisdiction over a case, and failure to follow the preferred procedures with respect to the summons does not deprive the court of subject matter jurisdiction." *In re K.J.L.*, 363 N.C. 343, 346 (2009).

a. The fact that no valid summons was issued, because the summons was not dated or signed by the clerk, did not affect subject matter jurisdiction and related only to personal jurisdiction. *K.J.L.*

b. Several months before deciding *K.J.L.,* the supreme court stated in *In re J.T.*, 363 N.C. 1 (2009), that the trial court obtained subject matter jurisdiction when a petition was filed and a summons was issued, and that any defect in the summons related only to personal jurisdiction. In *K.J.L.,* the court acknowledged that its language in *J.T.* could be construed as conditioning subject matter jurisdiction on the issuance of a valid summons and went on to expressly disavow that interpretation. *In re K.J.L.*, 363 N.C. 343, 347.

c. Expiration of and failure to renew a summons relate to personal, not subject matter, jurisdiction. *In re N.E.L.*, 202 N.C. App. 576 (2010) (holding that lack of a valid summons did not deprive the court of subject matter jurisdiction); *In re J.D.L.*, 199 N.C. App. 182 (2009).

d. The supreme court's decisions in *K.J.L.* and *J.T.* either overruled or rejected the reasoning of a series of court of appeals decisions that related the summons to subject matter jurisdiction. *See, e.g.*, *In re I.T.P-L.*, 194 N.C. App. 453 (2008) (holding that the court lacked jurisdiction when no summons was issued to the child); *In re N.C.H.*, 192 N.C. App. 445 (2008), *aff'd but criticized, per curiam*, 363 N.C. 116 (2009); *In re I.D.G.*, 188 N.C. App. 629 (2008); *In re K.A.D.*, 187 N.C. App. 502 (2007); *In re C.T.*, 182 N.C. App. 472 (2007) (holding that the court lacked jurisdiction when the child was not named in caption of the summons).

2. Statutory timelines

   The timeline for initiating a termination proceeding is not jurisdictional. *In re B.M.*, 168 N.C. App. 350 (2005) (holding that DSS's failure to initiate a termination proceeding within 60 days after the permanent plan was changed to adoption was not reversible error).

3. Attachment of custody order

   When custody is clear from the record, failure to attach a copy of the custody order to the petition or motion to terminate parental rights does not deprive the trial court of subject matter jurisdiction. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008); *In re D.J.G.*, 183 N.C. App. 137 (2007); *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re W.L.M.*, 181 N.C. App. 518 (2007). *Cf. In re T.B.*, 177 N.C. App. 790 (2006) (holding that the trial court lacked subject matter jurisdiction when DSS did not attach to the petition or include in the record a copy of the order giving DSS custody of the child, thus failing to establish that DSS had custody).

4. Pending custody action

   The fact that a court in another district has continuing jurisdiction in a custody action under G.S. Chapter 50 does not affect the jurisdiction of the court in the district in which the child resides to proceed in an action to terminate parental rights. *In re Humphrey*, 156 N.C. App. 533 (2003). (For a case in which a grandmother's civil action for custody and DSS's action to terminate parental rights were consolidated, see *Smith v. Alleghany County Department of Social Services*, 114 N.C. App. 727 (1994).)

5. Guardian ad litem representation in underlying action

   The trial court's jurisdiction was not affected by failure to appoint guardians ad litem for the children when the initial neglect and dependency petitions were filed or to ensure consistent representation of the children by guardians ad litem

in those proceedings, when the children were represented by a guardian ad litem and attorney advocate throughout the termination proceeding. *In re J.E.*, 183 N.C. App. 217 (2007) (Hunter, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 362 N.C. 168 (2008); *In re N.B.*, 195 N.C. App. 113 (2009).

6. Contents of petition

   Where the contents of the petition complied substantially with the statute and respondent had access to all of the required information, the trial court did not lack subject matter jurisdiction. *In re T.M.H.*, 186 N.C. App. 451 (2007).

III. Personal Jurisdiction

[*See also* Section IX (Summons) and Section X (Notice).]

A. A parent may waive the defenses of lack of personal jurisdiction or insufficiency of service of process by making a general appearance or by filing an answer, response, or motion without raising the defense. G.S. 1A-1, Rule 12. *In re K.J.L.*, 363 N.C. 343 (2009); *In re J.T.*, 363 N.C. 1 (2009); *In re S'N.A.S.*, 201 N.C. App. 581 (2009) (holding that expiration of the summons before service on respondent did not affect jurisdiction where respondent made a general appearance without objecting to service); *In re J.D.L.*, 199 N.C. App. 182 (2009); *In re H.T.*, 180 N.C. App. 611 (2006); *In re J.W.J.*, 165 N.C. App. 696 (2004) (holding that a respondent who mailed a handwritten response to the clerk of court and later filed formal answers, without raising the defense of lack of personal jurisdiction, had waived the defense).

B. A parent was not an aggrieved party for purposes of raising the issue of sufficiency of service on the juvenile. *In re J.A.P.*, 189 N.C. App. 683 (2008); *In re B.D.*, 174 N.C. App. 234 (2005).

   Note: These cases were decided before the requirement for service on the juvenile was deleted from the statute.

C. When an out-of-state parent is a respondent, a special issue of personal jurisdiction may arise. N.C. appellate courts have not addressed the conflict between (i) statutory provisions saying that personal jurisdiction is not required and (ii) case law holding that in some termination cases the court must have personal jurisdiction over the respondent parent.

   1. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), at G.S. 50A-201(c), states that personal jurisdiction is neither necessary nor sufficient to give a court authority to make a child custody determination.

2. G.S. 7B-1101 provides that the court has jurisdiction to terminate a parent's rights, without regard to the parent's state of residence, if

    a. the court finds it would have jurisdiction to make an initial custody determination under G.S. 50A-201 or to modify another state's custody determination under G.S. 50A-203 and

    b. the non-resident parent was served with process pursuant to G.S. 7B-1106, which requires the issuance and service of a summons upon the filing of a petition to terminate parental rights.

3. The court of appeals has held that a court in this state may terminate the rights of an out-of-state parent of a legitimate child (or of an illegitimate child if that parent is involved with the child) only if the parent (i) has minimum contacts with N.C., (ii) submits to the court's jurisdiction, or (iii) is served while physically present in the state. Because these holdings are based on the Due Process Clause of the Fourteenth Amendment, the effect of the legislation described in 1 and 2, immediately above, is unclear.

    a. Although termination proceedings are *in rem*, to satisfy due process a non-resident 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), *overruled in part on other grounds*, Bryson v. Sullivan, 330 N.C. 644 (1992).

        (1) The non-resident parent may raise the defense of lack of personal jurisdiction in an answer, response, or motion as provided in G.S. 1A-1, Rule 12(b)(2). *Trueman*.

        (2) Where the non-resident parent had no contacts with North Carolina and made no appearance in the action, the termination order was void and could be set aside at any time under G.S. 1A-1, Rule 60(b)(4). *Finnican*.

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

    c. Courts in some states have held that minimum contacts are never required, on the basis that termination of parental rights proceedings fall within the "status" exception recognized by the U.S. Supreme Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). *See, e.g.*, *In re R.W.*, 39 A.3d 682 (VT Sup.

Ct., 2011); *In re Thomas J.R.*, 663 N.W.2d 734 (WI Sup. Ct., 2003); S.B. v. State of Alaska, 61 P.3d 6 (AK Sup. Ct., 2002).

d. Personal service of process while respondent is temporarily in the state will confer personal jurisdiction without regard to any other contacts with the state. Burnham v. Cal. Super. Ct., 495 U.S. 604 (1990).

IV. Procedure

(G.S. 7B-1102 through -1110)

A. When the Juvenile Code provides a procedure, that procedure prevails over the Rules of Civil Procedure. *In re L.O.K.*, 174 N.C. App. 426 (2005) (stating that the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that they advance the purposes of the Juvenile Code).

1. A proceeding for termination of parental rights may be initiated only by (i) filing of a petition and issuance of a summons or (ii) filing of a motion in a pending abuse, neglect, or dependency proceeding.

   a. Parents cannot unilaterally and extra-judicially terminate their own parental rights. *In re Jurga*, 123 N.C. App. 91 (1996) (holding that a written declaration of voluntary termination of parental rights contravened statutory procedures and was ineffective).

   b. A claim for termination of parental rights could not be asserted by one parent as a counterclaim in the other parent's civil action for visitation. *In re S.D.W.*, 187 N.C. App. 416 (2007).

2. If termination of parental rights is necessary in order to accomplish the permanent plan for a child, G.S. 7B-907(e) requires that DSS file a termination petition or motion within 60 days after the permanency planning hearing unless the court makes findings about why that cannot be done.

   a. The requirement is "directory," not "mandatory," and DSS's failure to file within the 60-day period is not reversible error absent a showing of prejudice. *In re B.M.*, 168 N.C. App. 350 (2005).

   b. DSS's failure to file within the 60-day period was not reversible error where continuances had been necessary, respondent objected to none of them, and respondent did not assert or establish any prejudice resulting from the continuances. *In re W.L.M.*, 181 N.C. App. 518 (2007). *See also In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007).

3. Any person or agency with standing to file a petition for termination of parental rights may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a motion for termination of parental rights.

4. Any respondent may file a written answer to a petition, or a written response to a motion,

   a. within 30 days after service of the summons and petition or the notice and motion, or

   b. within the time established for a defendant's reply by G.S. 1A-1, Rule 4(j1), if service is by publication.

5. If a county DSS, which is not the petitioner or movant, is served with a petition or motion seeking termination of parental rights, the DSS director must file a written answer or response and is deemed a party to the proceeding.

6. Appointment of a guardian ad litem for the juvenile is required only when an answer or response is filed contesting a material allegation of the petition or motion.

7. Discovery in termination of parental rights cases is governed by G.S. 7B-700.

B. The Juvenile Code sometimes states that a particular Rule of Civil Procedure, or part of a Rule, applies in termination cases. In addition, the Rules will apply to fill procedural gaps when a procedure is required but not provided by the Juvenile Code. *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008) (holding that Rule 15 of the Rules of Civil Procedure did not apply to allow amendment of the petition to conform to the evidence and assert a new ground).

   1. When a proceeding is initiated by petition in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same child, the court on its own motion or motion of a party may consolidate the actions pursuant to G.S. 1A-1, Rule 42. [G.S. 7B-1102(c)]

   2. Entry of judgment is governed by G.S. 1A-1, Rule 58. [G.S. 7B-1001(b)]

   3. G.S. 1A-1, Rule 43(a), applies to termination proceedings and requires that "[i]n all trials the testimony of witnesses shall be taken orally in open court[.]" Therefore, the petitioner was required to present some live testimony, and the court could not terminate parental rights based solely on documentary evidence. *In re A.M.*, 192 N.C. App. 538 (2008). *See also In re N.B.*, 195 N.C. App. 113 (2009).

4. Under G.S. 1A-1, Rule 52, the court in a termination action must find the facts specially and state its conclusions separately. *In re T.P.,* 197 N.C. App. 723 (2009).

5. G.S. 1A-1, Rule 5(a), required that all papers and notices be served on respondent father even though he waived his right to counsel and did not attend all hearings. *In re H.D.F.*, 197 N.C. App. 480 (2009).

6. It was not error for the trial court to conduct consolidated adjudication and disposition hearings on both the abuse and neglect petition and a motion to terminate parental rights; however, when hearings are consolidated the court should enter two orders or distinguish within an order the components of the hearing. *In re R.B.B*., 187 N.C. App. 639 (2007).

7. Juvenile proceedings generally are governed by the Rules of Civil Procedure. *In re J.B*., 172 N.C. App. 1 (2005) (holding that the trial court had authority to limit discovery pursuant to G.S. 1A-1, Rule 26, and did not abuse its discretion by denying respondent's motion to interview the child).

8. Finding that the termination statute contained no provision for serving a known but unlocatable parent, the court held that the due diligence requirement in G.S. 1A-1, Rule 4(j1), for service by publication applies to termination cases. *In re Clark*, 76 N.C. App. 83 (1985).

9. The Rules of Civil Procedure, while not to be ignored, are not super-imposed on termination hearings. *In re Allen*, 58 N.C. App. 322 (1982) (finding no error in the trial court's entry of an order under [former] G.S. 7A-289.31 but going on to discuss and find no error under G.S. 1A-1, Rule 58).

10. The N.C. Supreme Court, in dicta, concluded that the Rules of Civil Procedure apply to termination proceedings, stating: "A proceeding to terminate parental rights is . . . either a civil action or a special proceeding. . . . If this is a civil action, the Rules apply, G.S. 1A-1, Rule 2; if this is a special proceeding, the Rules apply, G.S. 1-393, except where a different procedure may be prescribed by statute." *In re Clark*, 303 N.C. 592, 598 n.3 (1981).

11. See the concurring opinion in *In re Quevedo*, 106 N.C. App. 574, 585 (1992), emphasizing the appropriateness of the court's use of the Rules of Civil Procedure in a termination case.

C. The Rules of Civil Procedure will not apply to provide parties with procedural rights the Juvenile Code does not explicitly grant. *In re B.L.H*., 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008).

1. G.S. 1A-1, Rule 15, does not apply in a termination proceeding to permit amendment of the petition or motion to conform to the evidence presented at the adjudication hearing and to assert a new ground. *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam*, 362 N.C. 674 (2008). *See also In re G.B.R.*, ___ N.C. App. ___, 725 S.E.2d 387 (May 1, 2012) (holding that allowing petitioner's motion to amend to conform to the evidence was not prejudicial error because the petition already put respondent on notice that his rights might be terminated on the basis of neglect, and the court made no findings based on the subject matter of the amendment).

2. A parent does not have a right to file a counterclaim in a termination action. *In re Peirce*, 53 N.C. App. 373 (1981). *See also In re S.D.W.*, 187 N.C. App. 416 (2007).

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

4. G.S. 1A-1, Rule 41, did not apply to bar DSS from filing another petition to terminate parental rights after voluntarily dismissing an earlier petition. *In re L.O.K.*, 174 N.C. App. 426 (2005).

D. In a number of termination cases the courts have applied one or more of the Rules of Civil Procedure without specifically discussing their applicability. *See, e.g.*, *In re Williams*, 149 N.C. App. 951 (2002) (motion for medical examination under Rule 35); Hill v. Hill, 121 N.C. App. 510 (1996) (motion to intervene of right under Rule 24); *In re Saunders*, 77 N.C. App. 462 (1985) (motion for relief from a judgment or order under Rule 60).

E. Technical errors and violations of the Juvenile Code in conducting termination proceedings are reversible error only when the appellant shows that the errors resulted in prejudice. *In re H.T.*, 180 N.C. App. 611 (2006).

V. Appointment and Payment of Counsel and Guardian ad Litem

(G.S. 1A-1, Rule 17; G.S. 7A-450, *et seq.*; G.S. 7B-601, -603, -1101.1, -1106(b), -1106.1(b), -1108)

A. Parent's right to counsel. A respondent parent in a termination of parental rights action has a right to counsel, and to appointed counsel if indigent, but may waive the right.

1. If the proceeding is initiated by petition:

   a. An attorney who was appointed previously to represent the parent in an underlying abuse, neglect, or dependency case, and who is still representing the parent in that proceeding, will continue to represent the parent in the termination proceeding unless the court orders otherwise. [G.S. 7B-1106(b)]

   b. If a respondent parent named in the petition is not already represented by counsel, the clerk must appoint provisional counsel for the parent and indicate the appointment on the summons. At the first hearing after the parent is served, the court must dismiss provisional counsel if the parent

      - does not appear at the hearing,
      - does not qualify for court-appointed counsel,
      - has retained counsel, or
      - waives the right to counsel.

      Otherwise, the court affirms the appointment.

      (1) Appointment of provisional counsel for an unknown parent who is not "named in the petition" probably is not required, although that is not altogether clear from the wording of the statute.

      (2) Note that the court acts on the status of provisional counsel at the first hearing after respondent is served, not at the first hearing that is held as in an underlying abuse, neglect, or dependency case.

   [G.S. 7B-1101.1]

2. If the proceeding is initiated by motion in a pending abuse, neglect, or dependency proceeding, an attorney appointed to represent the parent in that proceeding will continue to represent the parent in the termination case unless the court orders otherwise. [G.S. 7B-1106.1(b)]

3. The statute does not provide for the appointment of provisional counsel for a parent who is unrepresented when a termination proceeding is initiated by motion, but the notice served with the motion must inform the parent that if he or she is indigent and not already represented by counsel, the parent may contact the clerk to request counsel. [G.S. 7B-1106.1(b)]

4. If respondent appears at the adjudication hearing and is not represented by counsel, the court must inquire whether the parent wants counsel and is indigent. If the parent wants counsel and is indigent, the court must appoint counsel in accordance with rules of the Office of Indigent Defense Services. [G.S. 7B-1109(b)] The parent's failure to file an answer or response or to ask for counsel before the hearing does not constitute waiver of the right to counsel. Little v. Little, 127 N.C. App. 191 (1997); *In re Hopkins,* 163 N.C. App. 38 (2004) (holding that a parent cannot waive the right to counsel by inaction), *overruled on other grounds, In re R.T.W.*, 359 N.C. 539 (2005).

5. A respondent's waiver of the right to counsel in a termination action is not governed by G.S. 15A-1242, which applies only in criminal cases. *In re P.D.R.*, ___ N.C. ___, 723 S.E.2d 335 (Apr. 13, 2012).

6. A respondent who neither contacts the clerk to request counsel nor attends the hearing waives the right to appointed counsel. *In re R.R.*, 180 N.C. App. 628 (2006).

7. The parent has a right to effective assistance of counsel. To establish a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and that, as a result, respondent did not receive a fair hearing. *See In re K.J.L.*, 206 N.C. App. 530 (2010); *In re S.N.W.*, 204 N.C. App. 556 (2010) (holding that when the respondent did not appear at the hearing, the trial court should have made further inquiries about the attorney's efforts to contact the respondent, protect the respondent's rights, and ably represent the respondent); *In re J.A.A.*, 175 N.C. App. 66 (2005). *See also In re Dj.L.*, 184 N.C. App. 76 (2007); *In re L.C.*, 181 N.C. App. 278 (2007); *In re S.W.*, 175 N.C. App. 719 (2006); *In re D.Q.W.*, 167 N.C. App. 38 (2004); *In re Oghenekevebe*, 123 N.C. App. 434 (1996).

B. Guardian ad litem for minor parent. The court must appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, to represent any parent who is an unemancipated minor. [G.S. 7B-1101.1(b)]

Failure to appoint a guardian ad litem for respondent mother in an earlier dependency proceeding, even though she was a minor at the time and the statute required that one be appointed, could not be considered in the termination of parental rights proceeding. *In re E.T.S.*, 175 N.C. App. 32 (2005).

C. Guardian ad litem for parent based on possible incompetence. The court may appoint a guardian ad litem for a parent pursuant to G.S. 1A-1, Rule 17, if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot act adequately in his or her own interest. [G.S. 7B-1101.1(c)]

1. The parent's attorney may not also serve as the parent's guardian ad litem.

2. There is no requirement that the guardian ad litem be an attorney.

3. Communications between the guardian ad litem and the parent or the parent's attorney are privileged and confidential.

4. The guardian ad litem is appointed pursuant to Rule 17 of the Rules of Civil Procedure.

    a. Before October 1, 2009, the statute did not specify that appointment of a guardian ad litem for a parent was pursuant to Rule 17 of the Rules of Civil Procedure, and the appellate courts considered that omission significant. *See In re L.B.*, 187 N.C. App. 326 (2007), *aff'd per curiam*, 362 N.C. 507 (2008) (holding that the signature of a parent's guardian ad litem on the notice of appeal did not satisfy the requirement in Rule 3A (now Rule 3.1) of the Rules of Appellate Procedure that the parent sign the notice).

    b. The statute now states that appointment of a guardian ad litem for a parent pursuant to G.S. 7B-1101.1(c) is "in accordance with G.S. 1A-1, Rule 17." *See In re A.S.Y.*, ___ N.C. App. ___, 703 S.E.2d 797 (Dec. 21, 2010), in which the court of appeals discusses the statutory change that added a reference to Rule 17.

5. Whether to conduct a hearing on the need for a guardian ad litem for a parent is in the trial court's discretion. *See, e.g.*, *In re A.R.D.*, 204 N.C. App. 500, *aff'd per curiam*, 364 N.C. 596 (2010); *In re C.G.A.M.*, 193 N.C. App. 386 (2008) (holding that the mere allegation of the incapacity ground for termination did not require that the court conduct a hearing or appoint a guardian ad litem for the parent).

    a. The trial court may abuse its discretion by failing to hold a hearing to determine whether a respondent needs a guardian ad litem when circumstances raise a substantial question as to whether the respondent is incompetent or has diminished capacity. *In re N.A.L.*, 193 N.C. App. 114 (2008); *In re J.A.A.*, 175 N.C. App. 66 (2005). *Cf. In re S.R.*, 207 N.C. App. 102 (2010) (holding that respondent's substance abuse, mental health, and anger issues did not automatically require appointment of a guardian ad litem when there was no indication of incompetence).

    b. It is important to distinguish cases decided under current law from those decided under the law that applied to actions filed before October 1, 2005. Under that law, the court was required to appoint a guardian ad litem to

represent any parent whose incapability to provide proper care and supervision for the child was alleged as a ground for termination, when the incapability was alleged to be due to substance abuse, mental retardation, mental illness, or a similar cause. In some cases, the courts held that appointment of a guardian ad litem was required even if that ground was not alleged, if mental health, substance abuse, or similar issues were central to the case. Because there was a statutory duty (rather than discretion, as in current law) to appoint guardians ad litem in some cases, a number of cases were reversed for failure to appoint a guardian ad litem when the statute required one.

6. The role of a guardian ad litem appointed for a parent pursuant to G.S. 7B-1101.1(c) is not altogether clear.

   a. In the case *In re P.D.R.*, ___ N.C. ___, 723 S.E.2d 335 (Apr. 13, 2012), the state supreme court remanded a termination of parental rights case to the court of appeals for a determination of whether the role of the parent's guardian ad litem is one of assistance or substitution.

   b. The statute specifies both that the guardian ad litem is appointed pursuant to G.S. 1A-1, Rule 17, and that the guardian ad litem is authorized to help the parent enter appropriate consent orders; facilitate service of process on the parent; assure that necessary pleadings are filed; and, at the request of the parent's attorney, assist in ensuring that procedural due process requirements are met.

   c. In a case decided before the reference to Rule 17 was added to the statute, the court held that the role of a parent's guardian ad litem was to provide assistance, not to substitute his or her judgment or decisions for those of the parent. *In re L.B.*, 187 N.C. App. 326 (2007), *aff'd per curiam*, 362 N.C. 507 (2008). *See also In re L.A.B.*, 178 N.C. App. 295 (2006) (stating that a guardian ad litem does not serve as a type of social worker for the parent); *In re Shepard*, 162 N.C. App. 215 (2004) (stating that case law offers little guidance regarding specific duties of a parent's guardian ad litem in a termination proceeding).

   d. In a case decided after the reference to Rule 17 was added to the statute, the court said that "while in many cases the guardian ad litem may fulfill his or her duties in a termination proceeding by merely assisting the parent, at times it will be necessary for the GAL to take further action during the proceeding in order to represent the parent to the fullest extent feasible and to secure a judgment favorable to that parent." *In re A.S.Y.*, ___ N.C. App. ___, 703 S.E.2d 797, 802 (Dec. 21, 2010).

7. Before relieving a respondent's guardian ad litem, the court must make findings about what has changed since the court determined that the respondent needed a guardian ad litem. *In re A.S.Y.*, ___ N.C. App. ___, 703 S.E.2d 797 (Dec. 21, 2010).

D. Guardian ad litem for the child. Unless a guardian ad litem for the child has been appointed pursuant to G.S. 7B-601 and has not been released, the court must appoint a guardian ad litem for the child whenever (i) an answer or response is filed denying any material allegation of the petition or motion and (ii) the petition or motion was filed by someone other than the child's guardian ad litem. [G.S. 7B-1108]

1. If a guardian ad litem has been appointed to represent the child in an earlier juvenile proceeding, that guardian ad litem will also represent the child in any termination proceeding, unless the court determines that the child's best interests require otherwise. [G.S. 7B-1108(d)]

2. In every case, the court has discretion to appoint a guardian ad litem for the child to assist the court in determining the child's best interest. Appointment may be made before or after the court adjudicates a ground for termination. [G.S. 7B-1108(c)]

3. Where the court of appeals could not determine from the record when or for what purpose respondent filed a letter he later claimed was an "answer," the court refused to assume trial court error and held that appointment of a guardian ad litem for the child was not required. *In re Tyner*, 106 N.C. App. 480 (1992).

4. When a respondent parent files an answer to a termination petition, the trial court's failure to appoint a guardian ad litem for the child is reversible error. *In re J.L.H.*, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2011) (*originally reported as unpublished*); *In re J.L.S.*, 168 N.C. App. 721 (2005) (holding that although respondent waited until the day of the hearing to file an answer, the court was required to appoint a guardian ad litem for the child).

5. In a private termination action, the court's failure to appoint a guardian ad litem for the child, when the father filed an answer denying material allegations, required reversal despite the father's failure to object or assign error to the trial court's violation of the statutory requirement. *In re Fuller*, 144 N.C. App. 620 (2001).

6. If the child's guardian ad litem is not an attorney, an "attorney advocate" must be appointed to assure protection of the child's legal rights in the proceeding. Appointment of an attorney advocate does not affect the requirement that a guardian ad litem be appointed for the child because the two have different roles and statutory duties. *In re J.H.K.*, 365 N.C. 171 (2011); *In re J.L.H.*, ___ N.C.

App. ___, ___ S.E.2d ___ (Nov. 15, 2011) (*originally reported as unpublished*); *In re R.A.H.*, 171 N.C. App. 427 (2005).

Note, however, that if the court appoints an attorney as the child's guardian ad litem, appointment of an attorney advocate is not required.

7. Where the record showed that the children were represented by a guardian ad litem at the termination hearing, absence from the record of an order appointing a guardian ad litem was not error. *In re D.W.C.*, 205 N.C. App. 266 (2010).

8. The person appointed as guardian ad litem for the child may be a guardian ad litem trained and supervised by the state guardian ad litem program only if
   a. the child is or has been the subject of an abuse, neglect, or dependency petition; or
   b. the local guardian ad litem program, for good cause, consents to the appointment.

   [G.S. 7B-1108(b)]

9. Presence of the child's guardian ad litem during a hearing is not always required. *In re J.H.K.*, 365 N.C. 171 (2011) (holding that the trial court did not err in conducting a termination hearing when the child's guardian ad litem was not present and stating that the duties of the guardian ad litem and the attorney advocate are the duties of the Guardian ad Litem Program, as set out in G.S. 7B-601).

E. Fees of appointed counsel and guardians ad litem should be paid as follows:

1. Fees of counsel or a guardian ad litem appointed for an indigent parent are to be paid by the Office of Indigent Defense Services. [G.S. 7B-1101.1(a), (f)] (See 5, below, for an alternate source of fees when the parent is a minor or dependent.)

2. If a parent's rights are terminated, the court may order the parent to reimburse the state for some or all of the fees for the parent's counsel, taking into account the parent's ability to pay. If the parent does not comply at disposition, the court must file a judgment against the parent for the amount ordered. [G.S. 7B-603(b1)]

3. If the parent is not indigent and does not secure private counsel, the fee of a guardian ad litem appointed for the parent is a proper charge against the parent. [G.S. 7B-1101.1(f)]

4. The child's (non-volunteer) guardian ad litem or attorney advocate

   a. most often will be paid by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts;

b. in a private termination proceeding or when the guardian ad litem program has a conflict, must be paid a reasonable fee fixed by the court.

[G.S. 7B-603(a)]

5. Whenever an attorney or guardian ad litem is appointed for a person under age eighteen, or eighteen or over but dependent on and domiciled with a parent or guardian, the court may require the parent, guardian, or trustee to pay the fee. If a parent is ordered to pay attorney fees and does not comply at disposition, the court must file a judgment against the parent for the amount ordered. [G.S. 7A-450.1, -450.2, -450.3; G.S. 7B-603(a1)]

6. Attorney fees for retained counsel are not awardable in termination of parental rights actions. Burr v. Burr, 153 N.C. App. 504 (2002).

VI. Standing to File Petition or Motion

(G.S. 7B-1103)

Only the following may file a petition or motion to terminate a parent's rights:

A. Either parent seeking termination of the other parent's rights; except, the child's father may not file a petition and has no rights under Subchapter I of the Juvenile Code, if

1. the father has been convicted of rape under G.S. 14-27.2 or G.S. 14-27.3 for a rape that occurred on or after December 1, 2004, and the child was conceived as a result of the rape; or

2. the father has been convicted of rape of a child under G.S. 14-27.2A, for a rape that occurred on or after December 1, 2008, and the child was conceived as a result of the rape.

B. Any judicially appointed guardian of the person of the child. *See In re B.O.*, 199 N.C. App. 600 (2009) (explaining that the Juvenile Code does not equate custody and guardianship and does not give legal custodians standing to petition for termination of parental rights).

C. Any county DSS or licensed child-placing agency to which (i) a court has given custody of the child or (ii) a parent or guardian of the person of the child has relinquished the child for adoption pursuant to G.S. Chapter 48.

1. Custody pursuant to a valid nonsecure custody order is sufficient to confer on DSS standing to file a petition to terminate parental rights. *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007).

2. Where the court had placed the child in the legal custody of an individual before DSS filed its petition, DSS did not have standing to petition for termination of parental rights. *In re D.D.J.*, 177 N.C. App. 441 (2006); *In re Miller*, 162 N.C. App. 355 (2004).

3. When DSS did not attach to the petition or include in the record a copy of the order giving DSS custody of the child, thus failing to establish that DSS had standing, the trial court lacked subject matter jurisdiction. *In re T.B.*, 177 N.C. App. 790 (2006).

4. DSS does not have standing if the order that gave DSS custody is void.

    a. DSS did not have standing because orders giving DSS custody were void, when verifications of the underlying petitions were signed by a DSS employee who signed the director's name "per [the employee's initials or name]." *In re S.E.P.*, 184 N.C. App. 481 (2007); *In re A.J.H-R.*, 184 N.C. App. 177 (2007).

    b. The underlying custody order was valid and social services did have standing where the petition was signed by a social worker, the petition did not state that the social worker was the social services director's "authorized representative," but the record contained information from which the court could determine that the social worker was authorized to file the petition, and no party offered evidence or argued that she lacked authority. *In re D.D.F.*, 187 N.C. App. 388 (2007); *In re Dj.L.*, 184 N.C. App. 76 (2007).

5. A petition brought by a county social services director was valid because it was apparent that he brought it not in his individual capacity but on behalf of the county social services department. *In re Manus*, 82 N.C. App. 340 (1986).

D. Any person with whom the child has resided for a continuous period of two years or more immediately before the filing of the termination petition or motion. *See In re B.O.*, 199 N.C. App. 600 (2009) (holding that petitioners did not have standing because, when the petition was filed, the child had not resided with them for two years).

E. A guardian ad litem appointed under G.S. 7B-601 to represent the child in an abuse, neglect, or dependency proceeding.

F. Any person who has filed a petition to adopt the child.

VII. Contents of Petition or Motion
(G.S. 7B-1104)

A. The petition or motion must be entitled "In re (*last name of child*), a minor child," and either include the following facts or state that the facts are unknown:

1. The child's name as it appears on the child's birth certificate, the date and place of the child's birth, and the county of the child's residence.

2. The petitioner's or movant's name and address and facts sufficient to show that the petitioner or movant has standing to file a petition or motion. *See* Section VI, above.

3. The name and address of the child's parents.

   a. If a parent's name or address is unknown, the petition or motion, or an attached affidavit, must describe efforts that have been made to determine the parent's name and address.

   b. A father need not be named if the father has been convicted of first- or second-degree rape that occurred on or after December 1, 2004, or of rape of a child by an adult offender that occurred on or after December 1, 2008, and the child was conceived as a result of the rape. *See* G.S. 7B-1104(3); G.S. 14-27.2(c), -27.2A(d), and -27.3(c).

4. Name and address of any court-appointed guardian of the child's person and of any person or agency to which a court of any state has given custody of the child. A copy of any custody or guardianship order must be attached.

   a. When custody is clear from the record, failure to attach a copy of the custody order to the petition or motion does not deprive the trial court of subject matter jurisdiction. *In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008); *In re D.J.G.*, 183 N.C. App. 137 (2007); *In re T.M.*, 182 N.C. App. 566, *aff'd per curiam*, 361 N.C. 683 (2007); *In re W.L.M.*, 181 N.C. App. 518 (2007); *In re B.D.*, 174 N.C. App. 234 (2005) (holding that DSS's failure to attach the custody order was not reversible error where respondent showed no prejudice).

   b. The trial court lacked subject matter jurisdiction when DSS did not attach to the petition or include in the record a copy of the order giving DSS custody of the child, thus failing to establish that DSS had standing. *In re T.B.*, 177 N.C. App. 790 (2006).

c. In a private termination action, petitioner's failure to include a prior custody order with the petition and failure to include the name and address of an appointed guardian rendered the petition fatally defective. *In re Z.T.B.*, 170 N.C. App. 564 (2005).

5. Facts sufficient to support a determination that one or more grounds for terminating parental rights exist.

   a. The court cannot adjudicate a ground that is not alleged in the petition. *See, e.g.*, *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam* 362 N.C. 674 (2008) (holding that a petition could not be amended to conform to the evidence and allege a new ground); *In re S.R.G.*, 195 N.C. App. 79 (2009); *In re C.W.,* 182 N.C. App. 214 (2007). *Cf. In re A.H.*, 183 N.C. App. 609 (2007) (holding that although the petition did not specifically reference G.S. 7B-1111(a)(6), the allegations gave respondent sufficient notice that termination would be sought on the ground that she was incapable of providing proper care and supervision of child).

   b. Although a motion [which the opinion refers to as a petition] asserted only barebones legal bases as grounds for terminating parental rights, it was sufficiently detailed because it incorporated by reference the entire juvenile file in the matter. *In re H.T.*, 180 N.C. App. 611 (2006).

   c. A bare allegation that the parent neglected the child and willfully abandoned the child for six months did not comply with this pleading requirement, but an attached custody decree incorporated into the petition did contain sufficient facts. *In re Quevedo*, 106 N.C. App. 574 (1992).

   d. Allegations need not be exhaustive or extensive, but they must put a party on notice as to acts, omissions, or conditions that are at issue and must do more than recite the statutory wording of the ground. *In re Hardesty*, 150 N.C. App. 380 (2002). *See also In re Humphrey*, 156 N.C. App. 533 (2003) (holding that the allegations were sufficient to put respondent on notice even though the petition did not specifically allege neglect).

6. A statement that the petition or motion has not been filed to circumvent the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

   a. While the petition should include this statement, its omission did not result in prejudice to respondent and was not reversible error. *In re Humphrey*, 156 N.C. App. 533 (2003). *See also In re B.D.*, 174 N.C. App. 234 (2005); *In re J.D.S.*, 170 N.C. App. 244 (2005) (holding that omission of the statement did not deprive the trial court of jurisdiction).

b. In addition, the proceedings must fully comply with the UCCJEA. *See* Section II.B, above, and B, immediately below.

B. Information about the child's status, as required by G.S. 50A-209, must be set out in the petition or motion or an attached affidavit.

1. A termination proceeding is a child-custody proceeding and must comply with the UCCJEA. G.S. 50A-102(4).

2. Failure to attach the affidavit does not divest the court of jurisdiction and can be cured by requiring that the affidavit be filed within a specified time. *In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Clark*, 159 N.C. App. 75 (2003).

3. A form affidavit, AOC-CV-609, is available on the website of the AOC, http://www.nccourts.org/Forms/Documents/269.pdf.

C. The petition or motion must be verified. *In re T.R.P.*, 360 N.C. 588 (2006) (involving a petition in a neglect proceeding); *In re T.R.M.*, 208 N.C. App. 160 (2010); *In re C.M.H.*, 187 N.C. App. 807 (2007); *In re Triscari*, 109 N.C. App. 285 (1993) (holding that the fact that a petition is signed and notarized is not sufficient to constitute verification).

D. A motion or petition that neither contains a prayer for relief nor requests the entry of any order is not a proper pleading, and the court does not have jurisdiction to proceed. *In re McKinney*, 158 N.C. App. 441 (2003). *Cf. In re Scearce*, 81 N.C. App. 531 (1986) (holding that the district court had jurisdiction when a petition alleged that the mother had placed the child with social services, the father was unknown, N.C. was the child's home state, no other state had jurisdiction, and the child's best interest would be served by the court's assuming jurisdiction).

VIII. Unknown Parent; Preliminary Hearing and Notice
(G.S. 7B-1105)

A. If the name or identity of a parent/respondent is unknown when a petition is filed, the court must conduct a hearing to determine the parent's name or identity. *See In re M.M.*, 200 N.C. App. 248 (2009).

1. The hearing must be held within 10 days after the petition is filed or at the next term of court in the county if there is no court within 10 days.

2. Notice of the preliminary hearing need be given only to the petitioner, but the court may summons others to testify.

3. The court may inquire of any known parent about the identity of the unknown parent and may order the petitioner to conduct a diligent search for the parent.

4. If the parent's identity is determined, the court must enter a finding and summons the parent to appear.

5. The court must make findings or issue a publication order (*see* B, below) within 30 days of the preliminary hearing unless additional time is required for investigation.

6. These 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 (1985).

B. If the court is not able to identify an unknown parent, the court must order service by publication by means that are most likely to identify the child to the unknown parent.

1. Notice must be published in a newspaper qualified for legal advertising under G.S. 1-597 and 1-598 and published weekly, for three successive weeks, in counties specified by the court.

   a. The notice must

      (1) be directed to the unknown parent of (male) (female) child born at specified time and place.

      (2) designate the court, docket number, and name of the case (at the direction of the court, "In re Doe" may be substituted).

      (3) specify the type of proceeding.

      (4) direct the respondent to answer the petition within 30 days after the specified date of first publication.

      Note: For combined service on both a known and an unknown parent, the time to respond must be 40 days, as required by G.S. 1A-1, Rule 4(j1), which applies to service on a known parent.

      (5) follow the form set out in G.S. 1A-1, Rule 4.

      (6) state that parental rights will be terminated if no answer is filed.

   b. After service, the petitioner must file a publisher's affidavit with the court.

2. If an unknown parent served by publication does not answer within the prescribed time, the court "shall" issue an order terminating the parent's rights.

Note: In several cases involving known parents, the court of appeals has said that the trial court is never required to terminate parental rights. *See, e.g.*, Bost v. Van Nortwick, 117 N.C. App. 1 (1994); *In re Tyson*, 76 N.C. App. 411 (1985).

C. When a parent was identified as a result of the hearing required by G.S. 7B-1105, amendment of the petition to allege his identity did not constitute the filing of a new action such that actions taken by respondent between the filing of the original and amended petitions would serve to defeat termination under G.S. 7B-1111(a)(5) (failure of a putative father to take certain steps before the filing of the petition). *In re M.M.*, 200 N.C. App. 248 (2009).

IX. Summons—When Proceeding Is Initiated by Petition (G.S. 7B-1106)

A. Except as provided in the case of an unknown parent, upon filing of the petition, the following must be named as respondents and summons must be directed to them:

1. The child's parents, except any parent who has

   a. surrendered the child to a county DSS or licensed child-placing agency for adoption, or

   b. consented to adoption of the child by the petitioner.

2. Any judicially appointed custodian or guardian of the person of the child.

3. Any county DSS or licensed child-placing agency to which a parent has relinquished the child for adoption under G.S. Chapter 48.

4. Any county DSS to which a court of competent jurisdiction has given placement responsibility for the child.

Note: Although the child's guardian ad litem is not listed, if the child has a guardian ad litem appointed under G.S. 7B-601 or the court appoints one after the petition is filed, a copy of all pleadings and other papers required to be served must be served on the guardian ad litem or the attorney advocate pursuant to G.S. 1A-1, Rule 5. [G.S. 7B-1106(a1)]

B. Failure to issue a summons, or defects or irregularities in the summons or in service of process, relate to personal, not subject matter, jurisdiction and can be waived. *In re K.J.L.*, 363 N.C. 343 (2009); *In re S'N.A.S.*, 201 N.C. App. 581 (2009) (holding that expiration of the summons before service on the respondent did not affect jurisdiction where the respondent made a general appearance without objecting to service). *See also* Section II.K.1, above.

C. The summons must include the child's name and notice that

1. a written answer must be filed within 30 days or the parent's rights may be terminated;

2. any counsel appointed previously and still representing the parent in an abuse, neglect, or dependency proceeding will continue to represent the parent unless the court orders otherwise;

   Note: Despite this provision, the statute makes no provision for notifying the parent's counsel of the filing of the petition.

3. if the parent is indigent and not already represented by appointed counsel, (i) the parent is entitled to appointed counsel, (ii) provisional counsel has been appointed, and (iii) the court will review the appointment at the first hearing after the parent is served;

4. after an answer is filed, or 30 days from the date of service if no answer is filed, the petitioner will mail notice of the date, time, and place of any pretrial hearing and the hearing on the petition;

5. the purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated;

6. the parent may attend the termination hearing.

   Note: See cases holding that a parent does not have an absolute right to be present at a termination hearing, *e.g.*, *In re Murphy*, 105 N.C. App. 651, *aff'd per curiam*, 332 N.C. 663 (1992); *In re Quevedo*, 106 N.C. App. 574 (1992).

D. Issuance of a second or subsequent summons, without an extension or alias and pluries summons, begins a new action as of the date of issuance of the new summons. *In re D.B.*, 186 N.C. App. 556 (2007), *aff'd per curiam*, 362 N.C. 345 (2008).

1. Failure to obtain an extension or an alias and pluries or new summons may defeat personal jurisdiction. The part of *D.B.* that relates to subject matter jurisdiction was superseded by *In re K.J.L.*, 363 N.C. 343 (2009).

2. When an alleged ground relates to a specific period of time before the filing of the petition, it is not clear what effect the issuance of a new summons that "begins a new action" may have on those grounds.

E. Summons must be served pursuant to G.S. 1A-1, Rule 4(j).

1. A certified mail receipt signed by someone other than respondent created a presumption of proper service. *In re T.D.W.*, 203 N.C. App. 539 (2010).

2. A parent is not deemed to be under a disability even if a minor; however, G.S. 7B-1101.1 requires appointment of a guardian ad litem for any parent under the age of eighteen who is not emancipated.

3. Petitioner must comply with Rule 4(j1) regarding service by publication and specifically with the due diligence requirement. *In re Clark*, 76 N.C. App. 83 (1985) (holding that service by publication was void and an order for termination could be overturned where the petitioner did not use diligence in trying to ascertain the respondent/parent's whereabouts). *See also In re Clark*, 327 N.C. 61 (1990) (affirming the trial court's dismissal of an adoption proceeding when the order terminating the father's rights was reversed because of insufficient service and the father had filed a legitimation proceeding).

4. When respondent/parent's whereabouts are unknown, service must comply with both Rule 4(j1) and G.S. 7B-1106(b) (setting out the required contents of a summons). *In re C.A.C.*, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2012) (holding that published notice was insufficient because it did not include notice of respondent's right to appointed counsel if indigent). *See* Section IX.C, above. *See also In re Joseph*, 122 N.C. App. 468 (1996) (holding that failure to comply fully with [former] G.S. 7A-289.27(b) was error but did not prejudice the respondent).

5. The court of appeals rejected respondent's argument that he had not received proper notice, as he had not challenged the trial court's finding of fact that he was personally served by certified mail on a specific date. *In re A.R.H.B.*, 186 N.C. App. 211 (2007).

6. Where the record failed to show that respondent was given proper notice, her appearance in court after the conclusion of the hearing did not constitute a waiver of notice. Facts surrounding the case and respondent's failure to respond or appear rebutted any presumption of proper service. *In re K.N.*, 181 N.C. App. 736 (2007).

X. Notice—When Proceeding Is Initiated by Motion in the Cause (G.S. 7B-1106.1)

A. Upon the filing of a motion for termination of parental rights, the movant must prepare and serve with the motion a notice. Issuance of a summons is neither

necessary nor appropriate when a termination action is initiated by motion in a pending abuse, neglect, or dependency case. *In re D.R.S.*, 181 N.C. App. 136 (2007).

B. The notice must be directed to and served on each of the following who is not a movant:

1. The child's parents, except any parent who has

   a. surrendered the child to a county DSS or licensed child-placing agency for adoption, or

   b. consented to adoption of the child by the movant.

2. Any court-appointed custodian or guardian of the person of the child.

3. Any county DSS or licensed child-placing agency to which the parent has relinquished the child for adoption under G.S. Chapter 48.

4. Any county DSS to which a court of competent jurisdiction has given placement responsibility for the child.

5. The child's guardian ad litem, if one has been appointed under G.S. 7B-601 and has not been relieved of responsibility.

C. The notice must include the child's name and notice that

1. written response must be filed within 30 days after service of the motion and notice, or the parent's rights may be terminated;

2. any attorney appointed previously and still representing the parent in the abuse, neglect, or dependency proceeding will continue to represent the parent unless the court orders otherwise;

3. the parent, if indigent, is entitled to appointed counsel and, if not already represented by appointed counsel, may contact the clerk immediately to request counsel;

4. when a response is filed, or 30 days after service if no response is filed, the moving party will mail notice of the date, time, and place of any pretrial hearing and the hearing on the motion;

5. the purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated;

6. the parent may attend the termination hearing.

   Note: See cases holding that parent does not have absolute right to be present at termination hearing, *e.g.*, *In re Murphy*, 105 N.C. App. 651, *aff'd per curiam*, 332 N.C. 663 (1992); *In re Quevedo*, 106 N.C. App. 574 (1992).

D. The motion and notice must be served pursuant to G.S. 1A-1, Rule 4, if

   1. the person or agency to be served

      a. was not served originally with a summons or

      b. was served originally by publication that did not include notice, substantially in conformity with G.S. 7B-406(b)(4)(e), that the court would have jurisdiction to terminate parental rights; or

   2. a period of two years has elapsed since the date of the original action; or

   3. the court in its discretion orders that service be pursuant to G.S. 1A-1, Rule 4.

   If the motion and notice are served on the parent pursuant to Rule 4 and the parent has an attorney of record in the case, the movant also must send a copy of the motion and notice to the parent's attorney.

E. Except as provided in D, above, a motion and notice may be served pursuant to G.S. 1A-1, Rule 5(b).

   1. As rewritten effective October 1, 2011, Rule 5(b) requires service on a party's attorney of record if there is one. Service on the party himself or herself is required only if the party does not have an attorney of record or the court requires service on the party as well as on the attorney. Provisions relating to the certificate of service are in Rule 5(b1).

   2. Respondents' contention that more than two years had passed since initiation of the proceeding, thus triggering a requirement for service pursuant to G.S. 1A-1, Rule 4, was not supported by the record, so service of the motion and notice pursuant to G.S. 1A-1, Rule 5, was proper. *In re H.T.*, 180 N.C. App. 611 (2006).

   3. Service pursuant to Rule 5 was proper when the motion was filed within two years after the filing of the most recent neglect petition. *In re P.L.P.*, 173 N.C. App. 1 (2005), *aff'd per curiam*, 360 N.C. 360 (2006).

F. A minor parent is not deemed to be under a disability; however, G.S. 7B-1101.1 requires appointment of a guardian ad litem for any parent under the age of eighteen who is not emancipated.

G. An attorney's failure to object to notice at a hearing at which respondent was not present constituted a waiver of respondent's right to object to the sufficiency of the notice. *In re T.D.W.*, 203 N.C. App. 539 (2010).

H. The court of appeals has said that failure to give a respondent notice that complies fully with G.S. 7B-1106.1

1. is reversible error, *In re D.A.*, 169 N.C. App. 245 (2005); *In re Alexander*, 158 N.C. App. 522 (2003);

2. is not reversible error where respondent waives the defense of insufficiency of service or insufficiency of process by making a general appearance or filing an answer, response, 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);

3. is error but does not deprive the court of subject matter jurisdiction, *In re C.S.B.*, 194 N.C. App. 195 (2008) (holding that respondent waived any objection to insufficiency of notice by filing a response and participating in the hearing).

XI. Answer or Response

(G.S. 7B-1107, -1108)

A. A respondent's answer to a petition or response to a motion must admit or deny the allegations and provide the name and address of the respondent or respondent's attorney.

B. If a respondent fails to file a timely answer or response, the court must order a hearing on the petition or motion and may issue an order terminating respondent's parental rights. At the hearing, the court may examine the petitioner or movant or others on facts alleged in the petition or motion.

C. Absence of an answer denying material allegations of the petition does not authorize a "default type" order terminating parental rights, since the statute requires a hearing on the petition. *In re Tyner*, 106 N.C. App. 480 (1992). *See also In re A.M.*, 192 N.C. App. 538 (2008) (holding that the court must hear some oral testimony).

D. If a county DSS, not otherwise a party petitioner or movant, is served with a petition or motion to terminate parental rights, the DSS must file a written answer or response and is deemed a party to the proceeding.

XII. Pretrial and Adjudicatory Hearings
(G.S. 7B-1108.1, -1109)

A. The court must conduct a pretrial hearing in every termination case but may combine the pretrial and adjudicatory hearings.

1. The petitioner or movant must give written notice of the date, time, and place of the pretrial hearing when an answer or response is filed or, if none is filed, 30 days after the date of service.

2. At a pretrial hearing the court considers

a. retention or release of provisional counsel;

b. whether a guardian ad litem for the juvenile should be appointed if not already appointed;

c. sufficiency of process, service, and notice;

d. any pretrial motions;

e. issues, including any affirmative defense, raised by an answer or response;

f. anything else that can be addressed properly as a preliminary matter.

3. If the pretrial and adjudicatory hearings are combined, no separate pretrial hearing order is required.

B. A hearing on a termination petition or motion must be held within 90 days after the petition or motion is filed unless the court orders that it be held at a later time.

1. For good cause, the court may continue the hearing for up to 90 days from the date of the initial petition to receive additional evidence or allow parties to conduct expeditious discovery. The court may grant a continuance that extends beyond that 90-day period only in extraordinary circumstances when necessary for the proper administration of justice and must issue a written order stating grounds for the continuance. Granting or denying a motion for a continuance is in the trial court's discretion. *In re D.Q.W.*, 167 N.C. App. 38 (2004).

2. The statutory timeline for conducting the termination hearing is not jurisdictional, and failure to comply with the time requirements is reversible error only if appellant shows prejudice resulting from the delay. *In re A.R.D.*, 204 N.C. App. 500, *aff'd per curiam*, 364 N.C. 596 (2010); *In re Dj.L.*, 184 N.C. App. 76 (2007);

In re D.J.G., 183 N.C. App. 137 (2007); *In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).

3. The appropriate remedy for a court's failure to comply with statutory timelines is mandamus. *In re T.H.T.*, 362 N.C. 446 (2008) (holding that mandamus, not appeal, was the appropriate way to address a trial court's delay in entering an order); *In re E.K.*, 202 N.C. App. 309 (2010) (holding that where none of the review hearings were held within the statutorily prescribed time periods, the appropriate remedy was to file a petition for a writ of mandamus, not to wait and raise the issue on appeal).

C. The adjudicatory hearing is before a judge, without a jury. There is no constitutional right to a jury trial in termination of parental rights proceedings. *In re Clark*, 303 N.C. 592 (1981); *In re Ferguson*, 50 N.C. App. 681 (1981).

1. Knowledge of evidentiary facts from earlier proceedings does not require a judge's disqualification. *In re M.A.I.B.K.*, 184 N.C. App. 218 (2007) (holding that the judge who presided over an action to terminate one parent's rights was not precluded from presiding over a later hearing to terminate the other parent's rights); *In re Faircloth*, 153 N.C. App. 565 (2002); *In re LaRue*, 113 N.C. App. 807 (1994) (holding that the fact that the judge conducted a review hearing, found that the children should remain with DSS, and recommended that termination of parental rights be pursued was not sufficient to show bias).

2. Although different evidentiary standards apply at the adjudicatory and dispositional stages, it is not necessary for the two stages to be conducted at two separate hearings. *In re F.G.J.*, 200 N.C. App. 681 (2009); *In re Carr*, 116 N.C. App. 403 (1994); *In re White*, 81 N.C. App. 82 (1986).

3. The hearing is reported as provided for civil trials.

    a. If recording equipment fails to function, the record must be reconstructed. To show prejudicial error, a party must show (i) that the party was prejudiced by loss of specific testimony and (ii) what the content of any gaps or lost testimony was. *In re Clark*, 159 N.C. App. 75 (2003); *In re Caldwell*, 75 N.C. App. 299 (1985); *In re Peirce*, 53 N.C. App. 373 (1981).

    b. The fact that a recording is incomplete or inadequate, by itself, is not a ground for reversal. There is a presumption of regularity in a trial, and the appellant must make a specific showing of probable error. *In re Howell*, 161 N.C. App. 650 (2003); *In re Bradshaw*, 160 N.C. App. 677 (2003) (finding no error where the respondent took no steps to reconstruct the record and alleged only general prejudice).

4. The court must inquire whether parents are present and, if so, whether they are represented by counsel or desire counsel.

   Note: Cases cited below were decided under the law in effect before October 1, 2009, the effective date of amendments to G.S. 7B-1101.1 that require the appointment of provisional counsel for unrepresented parents when a termination petition is filed. Even with that provision, a parent may appear unrepresented at an adjudicatory hearing and request counsel if, for example, provisional counsel was released at a pretrial hearing that the parent failed to attend.

   a. If a parent is not represented, desires counsel, and is indigent and unable to obtain counsel, the court must appoint counsel for the parent, according to the rules of the Office of Indigent Defense Services, and grant an extension of time to permit counsel to prepare.

      (1) Even if the parent has not filed an answer [or response] or taken other action, if the parent is present at the hearing the court must inquire about counsel and appoint counsel for an indigent parent unless the court finds that the parent knowingly and voluntarily waives the right. *In re Hopkins*, 163 N.C. App. 38 (2004) (holding that a parent cannot waive the right to counsel by inaction), *overruled on other grounds, In re R.T.W.*, 359 N.C. 539 (2005); Little v. Little, 127 N.C. App. 191 (1997).

      (2) 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) (holding that the failure to appoint separate counsel for respondent parents was not error where they did not object when the appointment was made, the record showed that evidence was sufficient to terminate both parents' rights, and there was no indication that the court treated respondents as a couple rather than as individuals).

   b. If the parent declines counsel, the court must examine the parent and make findings to support a conclusion that the parent's waiver is knowing and voluntary. The examination must be reported as provided in G.S. 7A-198. *See* AOC-J-143, "Parent's Wavier of Counsel," *at* www.nccourts.org/Forms/Documents/482.pdf. A parent's waiver of the right to counsel in a termination action is not governed by G.S. 15A-1242, which applies only in criminal cases. *In re P.D.R.*, ___ N.C. ___, 723 S.E.2d 335 (Apr. 13, 2012).

5. The court, upon finding reasonable cause, may order the child examined by a psychiatrist, psychologist, physician, or other expert to ascertain the child's psychological or physical conditions or needs. The court may order a parent similarly examined if the parent's ability to care for the child is in issue.

D. A parent does not have an absolute right to be present at the termination hearing.

1. Although a summons or notice must inform the parent that the parent may attend the termination hearing, a parent's right to be present at the hearing may be limited in some circumstances.

2. Respondent's due process rights were not violated and the trial court did not abuse its discretion when it ordered respondent removed from the courtroom and did not provide him a means to testify, after respondent repeatedly cursed, disrupted the proceedings, and ignored the court's warnings. *In re Faircloth*, 153 N.C. App. 565 (2002). In *Faircloth* the court of appeals applied the balancing test articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976), examining (i) the private interest affected, (ii) the risk of error, and (iii) any countervailing governmental interest.

3. The trial court's denial of respondent's motion to be brought to the hearing from a state correction facility did not violate respondent's state or federal constitutional rights. *In re Murphy*, 105 N.C. App. 651, *aff'd per curiam*, 332 N.C. 663 (1992).

4. The parent's due process rights were not violated by the court's refusal to order his transportation from an out-of-state prison for the hearing or to pay for his attorney to go there to take his deposition. *In re Quevedo*, 106 N.C. App. 574 (1992). The court stated, however, that "when an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent." *In re Quevedo*, 106 N.C. App., at 582.

5. The trial court's denial of a motion for funds to depose an incarcerated parent did not violate the parent's due process rights. *In re K.D.L.*, 176 N.C. App. 261 (2006) (applying the balancing test from *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

6. A mother's failure to appear for the termination hearing was not excusable neglect when she had received proper notice and did not seek appointment of counsel or a continuance. *In re Hall*, 89 N.C. App. 685 (1988). *See also* Mitchell Cnty. Dep't of Soc. Servs. v. Carpenter, 127 N.C. App. 353 (1997), *aff'd per curiam*, 347 N.C. 569 (1998).

7. Whether to grant a continuance is in the trial court's discretion. *See, e.g.*, *In re D.W.*, 202 N.C. App. 624 (2010) (holding that denial of a motion to continue the adjudicatory hearing was an abuse of discretion); *In re C.D.A.W.*, 175 N.C. App. 680 (2006), *aff'd per curiam*, 361 N.C. 232 (2007); *In re Mitchell*, 148 N.C. App. 483 (holding that respondent's absence was voluntary or the result of her own

negligence in failing to obtain adequate transportation), *rev'd on other grounds*, 356 N.C. 288 (2002).

8. The trial court did not err in allowing the child to testify in closed chambers, over the 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).

9. Respondent's due process rights were not violated when the court excluded her from the courtroom during the child's testimony where respondent 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).

E. The rules of evidence for civil cases apply at adjudication. G.S. 7B-1109(f).

1. The Sixth Amendment does not apply in civil cases to bar evidence of out-of-court testimonial statements in termination proceedings. *In re D.R.*, 172 N.C. App. 300 (2005).

   Note: The court of appeals referred to the holding in *Crawford v. Washington*, 541 U.S. 36 (2004), that out-of-court testimonial statements are barred by the Sixth Amendment unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. In *D.R.*, the appellant apparently did not raise, and the court did not address, the issue of whether testimony that would be barred under *Crawford* on Sixth Amendment grounds in a criminal case might be barred in a termination proceeding on due process grounds.

2. Earlier proceedings

   a. The court of appeals has held many times that a trial court did not err in taking judicial notice of or admitting into evidence prior orders in the case or other parts of the file because in a bench trial the trial court "is presumed to have disregarded any incompetent evidence." In *re W.L.M.*, 181 N.C. App. 518, 523 (2007). *See also In re H.L.A.D.*, 184 N.C. App. 381 (2007) (holding that respondent failed to show prejudice resulting from admission of the DSS file into evidence), *aff'd per curiam*, 362 N.C. 170 (2008); *In re S.N.H.*, 177 N.C. App. 82 (2006); *In re J.W.*, 173 N.C. App. 450 (2005), *aff'd per curiam*, 360 N.C. 361 (2006); *In re J.B.*, 172 N.C. App. 1 (2005) (holding that the trial court did not err in admitting prior orders that were based on a lower standard of proof).

   b. A court's judicially noticing the record or a prior order does not mean that the court can safely base adjudicatory findings on everything in the record or prior order. More important than knowing that the court may take judicial notice of prior orders (or other parts of the file) is discerning what "taking judicial

notice" means and for what purposes the trial court may consider various parts of prior orders or other parts of the case file.

c. Judicial notice is almost certainly appropriate and the judicially noticed matter may be the basis for findings of fact if the intent is to show that the court ordered a party to do certain things, that a summons was returned unserved, that a hearing was held on a certain date, etc. In instances like those, the court should take judicial notice of the specific facts, not the whole file or order.

d. When other kinds of requests that the court take judicial notice are made in an adjudicatory hearing, questions the court and parties might consider include these:

(1) Is the request really an attempt to offer the order or other material into evidence? If so, for what purpose is it being offered, and what if any hearsay or other issues exist as to its admissibility?

(2) If a prior order is being offered for the purpose of asking the trial court to adopt specific findings of fact from that order, is that more appropriately treated as a question of collateral estoppel? If so, can that doctrine be applied in relation to prior orders that involved a lower standard of proof or resulted from hearings at which the rules of evidence did not strictly apply? And, of course, are all the elements of collateral estoppel present? *See* Section XII.E.10, below.

e. These issues are discussed in much more detail in John Rubin, "Prior Orders and Proceedings and Judicial Notice," Section 11.7 in Kella W. Hatcher, Janet Mason, and John Rubin, *Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina* (Chapel Hill: School of Government, 2011), which is available at no cost online at http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4228/.f.

3. Mental health records and information

a. The trial 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).

b. The trial court did not err by admitting respondent's mental health records when respondent made only a general objection and did not file a motion *in limine* or ask for in camera review of the records. *In re J.S.L.*, 177 N.C. App. 151 (2006).

c. A social worker's testimony about what the respondent's drug counselor had said was admissible because it was offered to show respondent's awareness of the terms of a case plan. Respondent did not establish that the statements were offered for their truth or that, even if the testimony was impermissible hearsay, respondent was prejudiced by its admission. *In re S.N.*, 180 N.C. App. 169 (2006).

d. Even if children's mental health records that were admitted into evidence contained inadmissible hearsay, respondent failed to show that the court had relied on inadmissible evidence in making its findings. *In re L.C.*, 181 N.C. App. 278 (2007).

4. Opinions and expert testimony

a. The trial court did not err in refusing to allow an expert witness to testify about the mother's mental health and parenting capacity where the witness was an expert in clinical social work specifically dealing with adolescents and there was no evidence that she was an expert in mental health issues. *In re Carr*, 116 N.C. App. 403 (1994).

b. It was not error for the court to admit expert testimony of witnesses who were tendered as experts in juvenile protective services, infant development, and permanency planning. *In re Byrd*, 72 N.C. App. 277 (1985).

c. It was not error for the court to permit a social worker to give an opinion as to the parents' capacity to provide a stable home environment, even though the witness was not tendered as an expert. *In re Pierce*, 67 N.C. App. 257 (1984).

d. It was not error for the trial court to allow a social worker to give an expert opinion about whether the 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).

5. Guardian ad litem report

a. Admission into evidence of the report of the guardian ad litem was error, but the error was harmless because the report did not contain information that was not properly before the court from another witness. *In re Quevedo*, 106 N.C. App. 574 (1992).

b. In a neglect proceeding, where respondent did not object to admission of the report or request that its use be limited, the report constituted substantive evidence and, along with a DSS report, was sufficient to support the trial

court's findings of fact. *In re A.S.*, 190 N.C. App. 679 (2008), *aff'd per curiam*, 363 N.C. 254 (2009).

Note, however, that a termination of parental rights hearing must include some oral testimony. *In re N.B.*, 195 N.C. App. 113 (2009); *In re A.M.*, 192 N.C. App. 538 (2008).

6. Child's testimony and statements

   a. It was not error to allow a ten-year-old child to testify. Any inability she had to remember relevant events went to the weight, not the admissibility or competence, of her testimony. *In re Quevedo*, 106 N.C. App. 574 (1992).

   b. The trial court did 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).

   c. The trial court did not err in requiring respondent to leave the courtroom and participate through video and audio hook-up during the child's testimony. *In re J.B.*, 172 N.C. App. 1 (2005).

   d. A nine-year-old's statements to a detective in response to questions 16 hours after the child's observation were properly admitted as excited utterances. *In re J.S.B.*, 183 N.C. App. 192 (2007).

   e. *See* Jessica Smith, "Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses," *Administration of Justice Bulletin* No. 2008/07, December 2008, *at* http://shopping.netsuite.com/s.nl/c.433425/it.I/id.369/.f.

7. Criminal conviction

   In reversing a case because the trial court improperly granted partial summary judgment based on the parent's criminal conviction, the court of appeals stated, in dicta, "Properly admitted evidence of the father's conviction of first-degree sexual offense against the minor child constitutes sufficient, clear, cogent, and convincing evidence of the respondent's abuse of the child. The child's testimony will not be necessary at the adjudicatory stage." Curtis v. Curtis, 104 N.C. App. 625, 628 (1991).

8. Privileges

   a. The respondent may be called to testify as an adverse party, and 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).

Note: In *McKillop v. Onslow County*, 139 N.C. App. 53, 63–64 (2000), the court of appeals said, "The finder of fact in a civil cause may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him. *Fedoronko v. American Defender Life Ins. Co*., 69 N.C. App. 655, 657–58, 318 S.E.2d 244, 246 (1984)." *See also* Davis v. Town of Stallings Bd. of Adjustment, 141 N.C. App. 489 (2000).

b. The husband–wife or physician–patient privilege is not grounds for excluding evidence regarding grounds for termination. G.S. 7B-1109(f).

9. Hearsay exceptions (See 6, above, for children's statements.)

a. DSS records were admissible under the business records exception to the hearsay rule; testimony of social workers who had familiarized themselves with the records was competent even though the social workers had no contact with the case before the petition was filed. *In re Smith*, 56 N.C. App. 142 (1982).

b. An autopsy report and medical examiner's report were properly admitted as public records. *In re J.S.B*., 183 N.C. App. 192 (2007).

c. A social worker may testify to statements made by a respondent under the hearsay exception for admissions of a party opponent. *In re S.W*., 175 N.C. App. 719 (2006).

d. Reports of drug screen results and a letter from alcohol and drug services were admissible under the business records exception after a social worker's testimony laid a proper foundation. *In re S.D.J*., 192 N.C. App. 478 (2008).

10. Collateral estoppel

a. Collateral estoppel precludes the retrying of a fully litigated issue that (i) was decided in a prior determination and (ii) was necessary to that determination. *In re N.G.*, 186 N.C. App. 1 (2007), *aff'd per curiam*, 362 N.C. 229 (2008) (holding in a neglect case that respondents were estopped from arguing that they were not responsible for another child's injuries where that had been determined in a prior action to terminate the respondents' rights in relation to that child).

b. A prior adjudication that the child was dependent did not bar the later assertion of neglect as a ground for terminating parental rights. A prior

adjudication is binding only with respect to facts found to exist at the time of the adjudication. Thus, it is rare that a prior adjudication, though binding, would be sufficient to establish a ground for termination. *See, e.g.*, *In re J.N.S.*, 165 N.C. App. 536 (2004); *In re Wheeler*, 87 N.C. App. 189 (1987); *In re Wilkerson*, 57 N.C. App. 63 (1982).

11. *Res judicata*

    a. After an earlier petition had been dismissed for delay in holding the hearing, *res judicata* did not require dismissal of a subsequent petition when evidence related only to events that occurred after the filing of the first petition. *In re I.J.*, 186 N.C. App. 298 (2007).

    b. 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. The court did not rely solely on the prior adjudication in terminating parental rights. *In re Wheeler*, 87 N.C. App. 189 (1987).

12. Events since filing of petition or motion

    a. When termination is sought on the basis of willfully leaving the child in foster care without making sufficient progress to correct conditions that led to the child's placement, the court may consider evidence relating to events up to the time of the hearing. *See In re Pierce*, 356 N.C. 68 (2002) (reaching a contrary conclusion based on the earlier wording of the statute but noting that under a recent amendment "there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's 'reasonable progress' or lack thereof"). *Pierce*, 356 N.C. at 75, 1.

    b. In reviewing cases involving the neglect ground, the appellate courts have regularly referred to the determination of "whether neglect authorizing the termination of parental rights existed at the time of the hearing." *See, e.g.*, *In re N.B.*, 195 N.C. App. 113 (2009); *In re J.W.*, 173 N.C. App. 450 (2005), *aff'd per curiam*, 360 N.C. 361 (2006); *In re Allred*, 122 N.C. App. 561 (1996).

    c. Note, however, that several grounds for termination refer specifically to a period of time preceding the filing of the petition or motion. *See* G.S. 7B-1111(a)(3), (4), (5), and (7).

    d. Even if not admissible at adjudication, relevant evidence of events that occurred after the filing of the petition is admissible at the disposition stage. *In re J.A.O.*, 166 N.C. App. 222 (2004).

F. Whether to grant an indigent respondent's motion for funds to pay for an expert or other litigation expenses is in the trial court's discretion. *In re J.B.*, 172 N.C. App. 1 (2005); *In re D.R.*, 172 N.C. App. 300 (2005).

G. The court must find facts and adjudicate the existence or nonexistence of grounds set forth in G.S. 7B-1111(a). (Grounds for terminating parental rights are described in Section XIII, below.)

1. Findings must be based on clear, cogent, and convincing evidence. G.S. 7B-1109(f). *In re Young*, 346 N.C. 244 (1997) (reversing an order adjudicating the neglect and abandonment grounds on the basis that there was not clear, cogent, and convincing evidence to support the trial court's findings); *In re Montgomery*, 311 N.C. 101 (1984); *In re J.K.C.*, ___ N.C. App. ___, 721 S.E.2d 264 (Jan. 17, 2012) (holding that the unchallenged findings of fact supported the trial court's conclusion that none of the five alleged grounds for terminating parental rights had been proved by clear and convincing evidence); *In re C.W.*, 182 N.C. App. 214 (2007) (reversing a termination order where none of the grounds was supported by clear and convincing evidence and a number of findings were supported by no evidence).

2. The order must recite the standard of proof. *In re Anderson*, 151 N.C. App. 94 (2002); *In re Matherly*, 149 N.C. App. 452 (2002); *In re Lambert-Stowers*, 146 N.C. App. 438 (2001); *In re Church*, 136 N.C. App. 654 (2000).

   a. There is no requirement as to where or how the standard is recited in the order. *In re J.T.W.*, 178 N.C. App. 678 (2006), *rev'd on other grounds*, 361 N.C. 341 (2007).

   b. A termination order was deficient where it did not state the standard of proof and did not indicate which ground(s) the court was adjudicating. *In re D.R.B.*, 182 N.C. App. 733 (2007).

   c. The trial court did not commit prejudicial error in stating in its order a standard of proof of "clear and cogent," rather than "clear, cogent, and convincing," where the trial judge had stated the correct standard in open court, the main issues were not in sharp dispute, and the respondent had not challenged the sufficiency of the evidence to support any of the findings. *In re M.D.*, 200 N.C. App. 35 (2009).

3. The order must include findings of fact and conclusions of law. Findings of fact are determinations from the evidence concerning facts averred by one party and denied by another; conclusions of law are findings by a court as determined through the application of rules of law. *In re Johnston*, 151 N.C. App. 728 (2002).

a. Insufficient findings of fact required reversal where the findings were not sufficiently specific, mainly quoted statutory language, and were not adequate for meaningful appellate review. *In re T.P.*, 197 N.C. App. 723 (2009).

b. Findings of fact must do more than merely repeat the allegations in the petition. *In re S.C.R.*, ___ N.C. App. ___, 718 S.E.2d 709 (Nov. 15, 2011); *In re Anderson*, 151 N.C. App. 94 (2002).

c. Where findings did little more than restate the statutory grounds and discuss DSS's efforts to reunify, the order was not sufficient to establish a ground for termination. *In re Locklear*, 151 N.C. App. 573 (2002).

d. It is not proper for the court to exercise discretion in making findings at adjudication where the issue is whether there is proof, by clear and convincing evidence, that a ground for termination exists. *In re Carr*, 116 N.C. App. 403 (1994).

e. The court must adjudicate the existence or nonexistent of each ground alleged in the petition or motion. Failure to address an alleged ground at all constitutes a conclusion that it does not exist. *In re S.R.G.*, 195 N.C. App. 79 (2009).

H. The order must be entered within 30 days after the hearing is completed. *See* Section XV.D, below.

XIII. Grounds for Termination
(G.S. 7B-1111)

A. The parent has abused or neglected the child within the meaning of G.S. 7B-101. [G.S. 7B-1111(a)(1)]

1. Although this ground refers to the definitions of "abused juvenile" and "neglected juvenile" that apply in an underlying proceeding, proof of this ground requires establishing that a particular respondent parent neglected or abused the child, not that the child is an abused or neglected juvenile.

2. A prior adjudication of abuse or neglect is not a precondition to a termination proceeding based on those grounds. *In re R.B.B.*, 187 N.C. App. 639 (2007); *In re Faircloth*, 153 N.C. App. 565 (2002).

3. Evidence of a prior adjudication of neglect is admissible. However, the court must consider evidence of changed conditions and the probability of a repetition of neglect. *See, e.g.*, *In re C.G.R.* ___ N.C. App. ___, 717 S.E.2d 50 (Oct. 18, 2011) (affirming an adjudication of the neglect ground when there was evidence of past neglect and continued instability in housing and employment after respondent's release from prison); *In re J.H.K.*, ___ N.C. App. ___, 715 S.E.2d 563 (Sept. 6, 2011) (holding that where respondent made progress in substance abuse treatment only when incarcerated or in a residential program, evidence supported the finding of a reasonable probability of a repetition of neglect).

4. A prior adjudication of neglect, standing alone, is unlikely to be sufficient to support termination when the parents have been deprived of custody for a significant period before the termination proceeding. *In re Ballard*, 311 N.C. 708 (1984). *See also In re Young*, 346 N.C. 244 (1997) (holding that evidence was not sufficient to establish neglect at the time of the hearing or a probability of future neglect). The principles stated in *Ballard* and *Young* have been repeated numerous times, and only a few examples are included here. *See, e.g.*, *In re A.K.*, 360 N.C. 449 (2006); *In re R.T.W.*, 359 N.C. 539 (2005); *In re J.W.*, 173 N.C. App. 450 (2005), *aff'd per curiam*, 360 N.C. 361 (2006); *In re J.G.B.*, 177 N.C. App. 375 (2006); *In re C.C.*, 173 N.C. App. 375 (2005); *In re Beasley*, 147 N.C. App. 399 (2001); Bost v. Van Nortwick, 117 N.C. App. 1 (1994); *In re Byrd*, 72 N.C. App. 277 (1985).

   a. Even if there is no evidence of neglect at the time of the termination proceeding, the court may terminate parental rights if there is a prior adjudication of neglect and the court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to the parent. It is not necessary for petitioner to present evidence of neglect subsequent to the prior adjudication. *In re Pope*, 144 N.C. App. 32, *aff'd per curiam*, 354 N.C. 359 (2001). *See also In re Caldwell*, 75 N.C. App. 299 (1985); *In re Johnson*, 70 N.C. App. 383 (1984).

   b. 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 his release; there was no evidence of a likelihood of repetition of prior neglect because the earlier neglect was due solely to the mother's failure to provide proper care and supervision. *In re Shermer*, 156 N.C. App. 281 (2003). *See also In re G.B.R.*, ___ N.C. App. ___, 725 S.E.2d 387 (May 1, 2012) (holding that the neglect ground was not established where the evidence and findings focused almost solely on respondent's incarceration and there was no evidence of his circumstances since his release or that would show a likelihood of a repetition of neglect).

c. Cases in which the court has affirmed termination on the basis that an incarcerated parent neglected the child include *In re A.J.M.P.*, 205 N.C. App. 144 (2010) (affirming an adjudication of the neglect ground when the incarcerated parent never wrote to the child or sent him anything, never paid support, and never challenged a court order that had ceased his visitation rights); *In re D.M.W.*, 173 N.C. App. 679 (2005) (Hunter, J., dissenting), *rev'd per curiam for reasons stated in the dissenting opinion*, 360 N.C. 583 (2006); *In re Yocum*, 158 N.C. App. 198, *aff'd per curiam*, 357 N.C. 568 (2003).

d. The court of appeals affirmed a termination order based on "evidence of past neglect in conjunction with the special needs of the children and the evidence that respondent-mother [had] made no advancements in confronting and eliminating her problem with alcohol." *In re Leftwich*, 135 N.C. App. 67, 73 (1999).

e. It was not error for the court to consider evidence of a neglect adjudication in a prior termination proceeding in which the court found that, even though the neglect ground existed, termination was not in the child's best interest; but the court also was required to consider evidence of changed conditions and the probability of repeated neglect. *In re Stewart*, 82 N.C. App. 651 (1986).

f. Neglect was properly established where the order was based in part on a prior adjudication to which the parties had stipulated, but the trial judge also had reviewed the entire file, including at least twelve detailed orders regarding the parents' lack of progress between the initial juvenile petition and the termination order. *In re Johnson*, 70 N.C. App. 383 (1984). *See also In re Davis*, 116 N.C. App. 409 (1994) (holding that failure to correct the conditions that led to the earlier finding of neglect constituted a failure to provide "proper care, supervision, or discipline" and a failure to correct an environment that was "injurious" to the child's welfare).

g. It was not error for the court to consider evidence of a prior neglect adjudication even though a later order had found that the child was no longer neglected. *In re Castillo*, 73 N.C. App. 539 (1985).

h. The reasoning of *Ballard* also applies to prior abuse. *In re Beck*, 109 N.C. App. 539 (1993) (holding that the court did not err in admitting a prior order finding the child to be abused since the court did not rely solely on that order); Alleghany Cnty. Dep't of Soc. Servs. v. Reber, 75 N.C. App. 467 (1985) (holding that the court's findings about prior abuse, the probability of a repetition of abuse, and the child's best interests were not based on clear, cogent and convincing evidence sufficient to support termination on the ground of abuse), *aff'd per curiam*, 315 N.C. 382 (1986). *See also In re McMillon*, 143 N.C. App. 402 (2001).

i. A prior adjudication of abuse was *res judicata* on the question of whether the father had abused the children, and the parties were estopped from relitigating that issue. The court did not rely solely on the prior adjudication in terminating parental rights. *In re Wheeler*, 87 N.C. App. 189 (1987).

5. When the child has not been in respondent's custody for long period of time, the neglect ground cannot be established without evidence of prior neglect and a likely repetition of neglect. *In re J.G.B*., 177 N.C. App. 375 (2006) (holding that the ground was not established where DSS took custody soon after the child's birth and the child had been adjudicated only dependent).

6. Evidence of respondent's substance abuse, inadequate supervision, failure to follow treatment recommendations, failure to meet the child's needs during a trial home placement, and failure to comply with DSS recommendations was sufficient to establish that respondent had neglected the child. *In re C.T.*, 182 N.C. App. 472 (2007).

7. There is a substantive difference between the quantum of proof of neglect required for termination and that required for mere removal of the child from a parent's custody. *In re Evans*, 81 N.C. App. 449 (1986).

   a. Parental rights may not be terminated for threatened future harm. *Evans*; *In re Phifer*, 67 N.C. App. 16 (1984) (holding that the parent's abuse of alcohol, without proof of adverse impact on the child, was insufficient for an adjudication of neglect as a ground for termination).

   b. A showing of risk of future neglect, absent proof of actual harm to the child, is insufficient to establish neglect. If the petitioner seeks termination based on the parent's failure to correct conditions that led to the child's removal from the home, it must do so within the statutory provisions that require a two-year [now, twelve-month] trial period, when there is no showing of harm to the child. *Phifer*.

   c. The trial court's failure to make findings about the "impairment" prong of the neglect ground was not reversible error when evidence in the record supported such a finding. *In re Ore*, 160 N.C. App. 586 (2003).

8. An earlier adjudication that the child was dependent was not inconsistent with a finding that the parent neglected the child for purposes of termination. It was not error for the court to consider the parent's incarceration and criminal conduct along with other factors. *In re Williamson*, 91 N.C. App. 668 (1988).

9. For a finding of neglect, it is not necessary to find a failure to provide the child with physical necessities. *In re Black*, 76 N.C. App. 106 (1985); *In re Apa*, 59 N.C. App. 322 (1982).

10. Determinative factors are the child's circumstances and conditions, not the parent's fault or culpability; the fact that the parent loves or is concerned about the child will not necessarily prevent the court from making a determination that the child is neglected. *In re Montgomery*, 311 N.C. 101 (1984).

11. Parent's nonfeasance, as well as malfeasance, can constitute neglect. *In re Adcock*, 69 N.C. App. 222 (1984) (affirming adjudication of the neglect ground based on the mother's failure to intervene to protect the child from another person's physical abuse).

12. This ground is not unconstitutionally vague. *In re Moore*, 306 N.C. 394 (1982) (citations omitted); *In re Clark*, 303 N.C. 592 (1981); *In re Allen*, 58 N.C. App. 322 (1982); *In re Biggers*, 50 N.C. App. 332 (1981).

13. The statute does not apply only to the poor and thus violate equal protection. *In re Johnson*, 70 N.C. App. 383 (1984); *In re Wright*, 64 N.C. App. 135 (1983).

14. Lack of involvement with the children for more than two years established a pattern of abandonment and neglect. The fact that the parent was incarcerated much of that time did not justify the parent's failure to communicate with or inquire about the children. *In re Graham*, 63 N.C. App. 146 (1983). *See also In re J.L.K.*, 165 N.C. App. 311 (2004) (affirming an order terminating the rights of an incarcerated father on the basis of neglect); *In re Bradshaw*, 160 N.C. App. 677 (2003) (holding that although the incarcerated parent's lack of contact with the child was beyond his control, other evidence and findings supported the conclusion that the neglect ground existed).

15. It was error to admit evidence of the father's failure to participate in the underlying neglect proceeding when there was no evidence that he was served in that action. *In re Mills*, 152 N.C. App. 1 (2002).

16. Neglect in the form of abandonment does not require findings regarding the six-month period immediately preceding the filing of the petition, as does the separate ground of abandonment. The court may examine the parent's conduct over an extended period of time. *In re Humphrey*, 156 N.C. App. 533 (2003). *See also In re Apa*, 59 N.C. App. 322 (1982) (holding that the father's willful failure to support or visit the child for an eleven-year period constituted neglect in the form of abandonment).

17. The trial court did not err in admitting evidence of the mother's surrender of her rights to another child, since the way another child in the same home was treated and that child's status clearly were relevant to whether children in the present action were neglected. *In re Johnston*, 151 N.C. App. 728 (2002).

18. Evidence of the child's four years in DSS custody and the mother's conduct and conditions during that time, even though the mother made some progress, was sufficient to establish that the neglect ground existed at the time of the hearing. *In re Allred*, 122 N.C. App. 561 (1996).

19. Evidence was sufficient to establish the abuse ground (creation of substantial risk of serious non-accidental physical injury and probability of repeated abuse if the child returned home) where the court found that the mother was diagnosed with Munchausen Syndrome by Proxy, had violated various court orders, and had not benefited from treatment, and that 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).

20. Where an infant suffered serious non-accidental injury, the court properly found that both parents, the child's sole care providers, were responsible for the abuse or neglect of the child. *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010). *See also In re L.C.*, 181 N.C. App. 278 (2007) (affirming termination of the father's rights based on findings that he had abused the children, causing them emotional and behavioral problems, and that the abuse was likely to recur if the children were returned to his custody because he had made insufficient progress with anger management).

21. "The determination of neglect, requiring application of legal principles, is a conclusion of law." *In re Reyes*, 136 N.C. App. 812, 814 (2000) (citing *In re Everette*, 133 N.C. App. 84, 86 (1999)).

22. Findings supporting the conclusion that an incarcerated parent neglected the child were supported by clear, cogent, and convincing evidence. *In re P.L.P.*, 173 N.C. App. 1 (2005), *aff'd per curiam*, 360 N.C. 360 (2006).

B. 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 in correcting the conditions that led to the child's removal; provided, parental rights may not be terminated for the sole reason that the parents are unable to care for the child on account of their poverty. [G.S. 7B-1111(a)(2)]

1. This ground is not contingent on the child's being in DSS custody. *In re D.H.H.*, ___ N.C. App. ___, 703 S.E.2d 803 (Dec. 21, 2010).

2. It is not necessary that the eighteen [now, twelve] months in foster care be continuous. *In re Taylor*, 97 N.C. App. 57 (1990).

3. The one year in foster care or other placement must occur during the period between (i) the time the child was removed from the home pursuant to a court order and (ii) the filing of the petition or motion to terminate parental rights. *In re A.C.F.*, 176 N.C. App. 520 (2006). *See also In re H.L.A.D.*, 184 N.C. App. 381 (2007), *aff'd per curiam*, 362 N.C. 170 (2008) (holding that the fact that after the court placed the child respondent consented to the petitioners being named guardians, did not preclude use of this ground based on respondent's failure to make reasonable progress before entry of the consent order).

4. Willfulness, for purposes of this ground, is something less than willful abandonment and does not require a showing of parental fault. *In re N.A.L.*, 193 N.C. App. 114 (2008). *See also In re Clark*, 159 N.C. App. 75 (2003); *In re Fletcher*, 148 N.C. App. 228 (2002) (affirming termination of the mother's rights, but not the father's rights, on this ground); *In re Nolen*, 117 N.C. App. 693 (1995); *In re Bluebird*, 105 N.C. App. 42 (1992); *In re Bishop*, 92 N.C. App. 662 (1989) (holding that evidence was sufficient to support the ground even though the parent had made some effort and some progress).

5. For willfulness to attach, evidence must show a parent's ability (or capacity to acquire the ability) to overcome factors that resulted in the child's placement. *See In re C.C.*, 173 N.C. App. 375 (2005) (holding that evidence and findings were not sufficient to establish that respondent "willfully" left the children in care); *In re Baker*, 158 N.C. App. 491 (2003) (involving evidence of willfulness that included parents' refusal to inquire about or complete parenting classes, sign a reunification plan, or use mental health services); *In re S.N.*, 180 N.C. App. 169 (2006) (holding that evidence was sufficient to support this ground against the father when the child was removed due to the mother's substance abuse and the father continued to live with the child's mother even though she continued to abuse drugs).

6. In the case of a minor parent, the court must make specific findings showing that the parent's age-related limitations as to willfulness have been adequately considered. *In re J.G.B.*, 177 N.C. App. 375 (2006); *In re Matherly*, 149 N.C. App. 452 (2002).

7. A parent's incarceration, standing alone, neither requires nor precludes a finding that the parent willfully left the child in foster care. The parent's failure to contact DSS or the child is evidence of willfulness. *In re Harris*, 87 N.C. App. 179 (1987). *See also In re Shermer*, 156 N.C. App. 281 (2003) (holding that evidence was insufficient to establish that the incarcerated parent willfully left the children

in foster care where he wrote to and called his sons while in prison and made progress on a case plan after his release); Whittington v. Hendren, 156 N.C. App. 364, 370 (2003) (affirming termination where the court found that the incarcerated parent "could have made more of an effort to maintain contact with his child" and respondent had foregone the opportunity to attend the termination hearing).

8. The fact that a parent makes some efforts does not preclude a finding of willfulness. *See, e.g.*, *In re B.S.D.S.*, 163 N.C. App. 540 (2004) (holding that although evidence showed some efforts and some progress by respondent, evidence was sufficient to support the trial court's finding that respondent's prolonged inability to improve her situation was willful); *In re Oghenekevebe*, 123 N.C. App. 434 (1996); *In re Tate*, 67 N.C. App. 89 (1984).

9. For a discussion of the elements of "willfulness" and "substantial progress" [now, "reasonable progress under the circumstances"], *see In re Wilkerson*, 57 N.C. App. 63 (1982). *See also In re Nesbitt*, 147 N.C. App. 349 (2001) (reversing a termination order on the basis that even if the mother had failed to make reasonable progress, her failure was not willful).

10. This ground is not unconstitutionally vague. *In re Moore*, 306 N.C. 394 (1982) (citations omitted).

C. The child has been placed in the custody of DSS, a licensed child-placing agency, a child-caring institution, or a 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. [G.S. 7B-1111(a)(3)]

1. A finding that the parent is able to pay support is essential to termination on this ground. *In re Ballard*, 311 N.C. 708 (1984).

2. 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) (citations omitted); *In re Bradley*, 57 N.C. App. 475 (1982).

3. A finding as to the cost of foster care can establish the child's reasonable needs. *In re Montgomery*, 311 N.C. 101 (1984).

4. The trial judge must make findings of fact concerning both the parent's ability to pay and the amount of the child's reasonable needs. *See, e.g.*, *In re Clark,* 151 N.C. App. 286 (2002); *In re Anderson*, 151 N.C. App. 94 (2002); *In re Matherly*, 149 N.C. App. 452 (2002) (holding that in the case of a minor parent, the findings

must show appropriate consideration of the respondent's age); *In re Phifer*, 67 N.C. App. 16 (1984).

5. Neither the absence of notice of the support obligation nor the father's lack of awareness that support was required of him was a defense to termination on this ground. *In re Wright*, 64 N.C. App. 135 (1983).

6. A parent cannot assert lack of ability or means to contribute to the child's support when the opportunity to do so is lost due to the parent's own misconduct. *In re Tate*, 67 N.C. App. 89 (1984); *In re Bradley*, 57 N.C. App. 475 (1982).

7. This ground is not unconstitutionally vague. *In re Moore*, 306 N.C. 394 (1982) (citations omitted); *In re Clark*, 303 N.C. 592 (1981); *In re Allen*, 58 N.C. App. 322 (1982); *In re Bradley*, 57 N.C. App. 475 (1982).

8. A termination order was upheld where neither parent paid support during the six-month period or until over a year after the termination petition was filed; neither offered specific reasons for failing to pay support; both signed agreements committing to pay support; both were employed during at least half of the six-month period; and neither offered evidence of sickness or disability that prevented them from being employed. *In re Huff*, 140 N.C. App. 288 (2000).

9. The trial court's findings and evidence in the record were not sufficient to support a conclusion that this ground existed where there was not specific evidence or findings as to the mother's employment, earnings, or other financial means during the relevant six-month period. *In re Faircloth*, 161 N.C. App. 523 (2003).

D. One parent has custody of the child pursuant to a court order or an agreement of the parents, and the other parent (respondent), for one year or more immediately before the filing of the petition or motion, has willfully failed without justification to pay for the child's care, support, and education as required by a court order or custody agreement. [G.S. 7B-1111(a)(4)]

1. This ground requires proof of a court order or agreement that requires the payment of child support. *In re D.T.L.*, ___ N.C. App. ___, 722 S.E.2d 516 (Feb. 21, 2012).

2. It is not necessary for the petitioner to prove or for the court to find that the respondent had the ability to pay support since proof of a valid court order or support agreement is required. However, the failure to pay must be "willful." *In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Roberson*, 97 N.C. App. 277 (1990) (holding that the father's evidence of emotional difficulties was not sufficient to rebut evidence that his failure to pay was willful).

3. The parent may present evidence sufficient to prove that he or she was unable to pay child support to rebut a finding of willful failure to pay. Bost v. Van Nortwick, 117 N.C. App. 1 (1994) (involving evidence of financial status and alcoholism).

E. The 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 filed in a central registry maintained by the N.C. Department of Health and Human Services, or
- legitimated the child pursuant to G.S. 49-10 or filed a petition to do so, or
- legitimated the child by marriage to the mother, or
- provided substantial financial support or consistent care with respect to the child and mother.

[G.S. 7B-1111(a)(5)]

1. The court must inquire of the Department of Health and Human Services to determine whether an affidavit has been filed and must incorporate the certified reply in the case record.

2. When a question of paternity arises in a termination of parental rights case, on motion of a party the court is required to order paternity testing pursuant to G.S. 8-50.1. *In re J.S.L.*, ___ N.C. App. ___, 723 S.E.2d 542 (Feb. 7, 2012).

3. Even if paternity test results show a high likelihood that respondent is not the child's father, the court may consider those results only if they are properly introduced into evidence. The test results at most create a rebuttable presumption, and respondent must be allowed an opportunity to rebut the presumption. *In re L.D.B.*, 168 N.C. App. 206 (2005).

4. A father's name on a child's birth certificate, when the father and mother were not married, creates a rebuttable presumption that the person named on the birth certificate established paternity of the child either judicially or by affidavit. *In re J.K.C.*, ___ N.C. App. ___, 721 S.E.2d 264 (Jan. 17, 2012).

5. Petitioner must prove that respondent failed to take any of the four listed actions. *In re S.C.R.*, 198 N.C. App. 525 (2009); *In re M.A.I.B.K.*, 184 N.C. App. 218 (2007) (holding that the record clearly established that the respondent failed to take any of the required steps); *In re I.S.*, 170 N.C. App. 78 (2005); *In re Harris*, 87 N.C. App. 179 (1987) (holding that the allegation of respondent's "putative" fatherhood in a DSS affidavit for publication was not clear, cogent, and convincing evidence of a ground for termination).

6. The statute does not require a finding that the respondent had the ability to support the child. *In re J.D.S.*, 170 N.C. App. 244 (2005); *In re Hunt*, 127 N.C. App. 370 (1997).

7. The fact that the putative father did not know of the child's existence is not a defense to termination on this ground. *In re T.L.B*., 167 N.C. App. 298 (2004).

8. For a case in which the trial court determined that the ground had not been established and the court of appeals reversed, *see A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006) (holding that the evidence supported termination of the putative father's rights even though he 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 that she had miscarried).

9. For adoption cases dealing with a similar ground in G.S. Chapter 48 for determining that a parent's consent to adoption is not required, *see In re Adoption of Baby Girl Anderson*, 360 N.C. 271 (2006); *In re Adoption of Byrd*, 354 N.C. 188 (2001); *In re Adoption of K.A.R.*, 205 N.C. App. 611 (2010) (affirming the trial court's determination that the putative father's consent to adoption was required because he had acknowledged the child and provided reasonable and consistent support in accordance with his means). For a case decided under the same wording in the former adoption statute, holding that a 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).

F. The parent is incapable of providing for the proper care and supervision of the child such that the child is a "dependent juvenile" as defined in G.S. 7B-101; there is a reasonable probability that the parent's incapability will continue for the foreseeable future; and the parent does not have an appropriate alternative child care arrangement. The parent's incapability may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the child. [G.S. 7B-1111(a)(6)]

1. This ground does not violate the equal protection clause or deny due process. *In re Montgomery*, 311 N.C. 101 (1984).

2. The parent's incapability may be due to *any* "cause or condition that renders the parent unable or unavailable to parent the child."

   Note: Before 2003, this ground required that the parent's incapability be due to "substance abuse, mental retardation, mental illness, organic brain syndrome, or *any other similar* cause or condition." (emphasis added) Relying on an older case that had applied that standard, the court of appeals in 2012 affirmed a trial court's determination that the ground had not been established because there was no

evidence that the incarcerated respondent's incapability was due to a condition specified in the statute or any similar cause or condition. *In re J.K.C.,* __ N.C. App. __, 721 S.E.2d 264 (Jan. 17, 2012).

3. This ground cannot be established without findings supporting a conclusion that the parent lacks an appropriate alternative child care arrangement. *In re N.B*., 195 N.C. App. 113 (2009). *See also In re L.H.*, ___ N.C. App. ___, 708 S.E.2d 191 (Mar. 15, 2011) (holding that a parent does not have an "appropriate alternative child care arrangement" if he merely consents to a placement arranged by DSS); *In re C.N.C.B.*, 197 N.C. App. 553 (2009).

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. 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).

6. This ground was not established by clear and convincing evidence where evidence was that the father was incarcerated and his release date was 17 months away; evidence did not show that he was incapable of arranging for the child's care; and father testified that he had told DSS about several close relatives whom DSS had not contacted. *In re Clark*, 151 N.C. App. 286 (2002).

Note: Before a 2005 amendment, the trial court was required to appoint a guardian ad litem for the parent when this ground for termination was alleged, and a number of cases were reversed because the court failed to appoint a guardian ad litem when the statute required one. Under current law, appointment of a guardian ad litem for the parent is discretionary, except when the parent is a minor. [G.S. 7B-1101.1]

G. The parent has willfully abandoned the child for at least six consecutive months immediately before the filing of the termination petition or motion. [G.S. 7B-1111(a)(7)]

1. The state supreme court, in an adoption case, defined abandonment essentially as a parent's willful or intentional conduct that "evinces a settled purpose to forego all parental duties." Pratt v. Bishop, 257 N.C. 486, 501 (1962). The court went on to say, in language that has been quoted frequently, "Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt*, 257 N.C. at 501.

2. The court's findings did not "clearly show that the parent's actions [were] wholly inconsistent with a desire to maintain custody of the child," and the evidence was not sufficient to establish the abandonment ground when it showed that the mother had visited the child eleven times during the relevant six-month period. *In re S.R.G.*, 195 N.C. App. 79, 87 (2009). *See also In re D.T.L.*, ___ N.C. App. ___, 722 S.E.2d 516 (Feb. 21, 2012) (holding that abandonment did not exist when, during the relevant six-month period, respondent was ordered not to contact the children and he filed an action seeking visitation); *In re F.G.J.*, 200 N.C. App. 681 (2009).

3. Neither a parent's history of alcohol abuse nor a parent's incarceration, standing alone, necessarily negates a finding of willfulness for purposes of abandonment. *In re McLemore*, 139 N.C. App. 426 (2000).

4. Willful abandonment under this subsection connotes more than mere neglect. *In re Bluebird,* 105 N.C. App. 42 (1992). *See also In re T.C.B.*, 166 N.C. App. 482 (2004) (reversing a termination order where evidence showed that respondent's attorney advised him not to have contact with the mother or child while criminal charges were pending, the petitioner/mother entered a protection plan with DSS providing that there would be no visitation with respondent, and respondent paid child support while the petition was pending).

5. Failure to pay support, in and of itself, does not constitute abandonment. Bost v. Van Nortwick, 117 N.C. App. 1 (1994).

6. Whether a parent has the willful intent to abandon the child is an issue of fact. The fact that a 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).

7. In an adoption case, the superior court erred in instructing the jury to consider the six-month period preceding the filing of the petition since the 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).

8. In an adoption proceeding, the court erred in finding that the mother willfully abandoned the child where the court made no findings in support of its conclusion that her failure to communicate with the child was willful and where the record revealed that she had introduced substantial evidence that her actions in not communicating with child were not willful. Clark v. Jones, 67 N.C. App. 516 (1984).

9. The critical period for a 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, 252 (1997) (reversing a termination order on the basis that the findings did not manifest "a willful determination to forego all parental duties and relinquish all parental claims to the child").

H. The parent has voluntarily abandoned an infant pursuant to the "safe surrender" law, G.S. 7B-500 (abandonment of an infant within seven days after the child's birth), for at least 60 consecutive days immediately preceding the filing of the petition or motion. [G.S. 7B-1111(a)(7)]

I. The parent has
- committed murder or voluntary manslaughter of another child of the parent or other child residing in the home;
- aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child in the home;
- committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home; or
- committed murder or voluntary manslaughter of the child's other parent; provided, the court must consider whether the killing was committed in self-defense or in defense of others or whether there was substantial evidence of other justification.

[G.S. 7B-1111(a)(8)]

1. The petitioner has the burden of proving the criminal offense by proving either (i) the elements of the offense or (ii) that a court of competent jurisdiction has convicted the parent of the offense, whether by jury verdict or any kind of plea.

2. The ground of a parent's commission of voluntary manslaughter of another child requires proof of the elements of the offense by clear and convincing evidence, not beyond a reasonable doubt. *In re J.S.B.*, 183 N.C. App. 192 (2007).

3. To prove that respondent committed a felony assault resulting in serious bodily injury by proving that respondent was convicted of the offense, a petitioner would have to show a conviction under G.S. 14-32.4(a) (assault inflicting serious *bodily* injury) or G.S. 14-318.4(a3) (felony child abuse inflicting serious *bodily* injury). *See In re T.J.D.W.*, 182 N.C. App. 394, *aff'd per curiam*, 362 N.C. 84 (2007). A conviction under G.S. 14-318.4(a) (felony child abuse inflicting serious *physical* injury) would not be sufficient.

   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-

32.4(a). State v. Downs, 179 N.C. App. 860 (2006); State v. Hannah, 149 N.C. App. 713 (2002).

J. A court of competent jurisdiction has terminated the rights of the parent with respect to another child of the parent and the parent lacks the ability or willingness to establish a safe home. [G.S. 7B-1111(a)(9)]

See In re D.J.E.L., 208 N.C. App. 154 (2010); *In re L.A.B.*, 178 N.C. App. 295 (2006); *In re V.L.B.*, 168 N.C. App. 679 (2005).

K. The child has been relinquished to a county department of social services or licensed child-placing agency or placed for adoption with a prospective adoptive parent, and
1. the parent's consent to or relinquishment for adoption is irrevocable (except for fraud, duress, or other circumstances set out in G.S. 48-3-609) and
2. termination of the parent's rights is required in order for the adoption to occur in another jurisdiction where an adoption proceeding has been or will be filed and
3. the parent does not contest the termination of parental rights.

[G.S. 7B-1111(a)(10)]

L. The parent has been convicted of a sexually related offense under G.S. Chapter 14 that resulted in the conception of the child. [G.S. 7B-1111(a)(11)]

Note: This ground was enacted by S.L. 2012-40. The act states that it becomes effective October 1, 2012, but is silent with respect to whether it applies based on the date of the criminal offense or the date of the conviction or without regard to either.

A person who is convicted of one of three specified criminal offenses that results in the conception of the child loses parental rights as a direct result of the conviction, without the necessity of a termination of parental rights action. Those offenses are:
1. first-degree rape, under G.S. 14-27.2 (if the offense occurred on or after December 1, 2004);
2. second-degree rape, under G.S. 14-27.3 (if the offense occurred on or after December 1, 2004); and
3. rape of a child by an adult offender, under G.S. 14-27.2A (if the offense occurred on or after December 1, 2008).

Each of those criminal statutes states that a person convicted under the statute "has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 [adoption] or Subchapter 1 of Chapter 7B of the General Statutes [abuse, neglect, dependency, and termination of parental rights]." The session laws enacting these provisions specified that they appy only with respect to offenses committed on or after the legislation's effective date—December 1, 2004, for first-

and second-degree rape and December 1, 2008, for rape of a child by an adult offender. [*See* S.L. 2004-128 and S.L. 2008-117.]

North Carolina courts have stated many times that a statute is presumed to apply only prospectively unless the legislation clearly states or necessarily implies that it should apply retroactively. *See, e.g*., Gardner v. Gardner, 300 N.C. 715 (1980); *In re Protest of Atchison*, 192 N.C. App. 708 (2008). Analyzing retroactivity in *Twaddell v. Anderson*, 136 N.C. App. 56 (1999), the court distinguished substantive amendments, which apply prospectively only, from those that are interpretive, procedural, or remedial. *See also* Ray v. N.C. Dep't of Transp., ___ N.C. ___, 727 S.E.2d 675 (June 14, 2012) (analyzing the applicability of an amendment to the State Tort Claims Act in terms of whether the amendment clarified or substantively altered existing law).

The similarity between the new ground for termination and the effect of the rape convictions described above, when the rape results in the conception of a child, might suggest that the new law applies only when the sexually related offense occurs on or after October 1, 2012. However, because the ground for termination is the conviction, not the criminal act itself, it is possible and seems more likely that prospective application means the ground is available when the conviction occurs on or after October 1, 2012.

XIV. Disposition

(G.S. 7B-1110)

A. Adjudication of a ground for termination of parental rights results in forfeiteiture of the parent's constitutionally protected status and allows the court to apply the "best interest" standard. *In re A.C.V.*, 203 N.C. App. 473 (2010). 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).

B. At disposition, the court must determine whether termination of parental rights is in the child's best interest, considering

1. the child's age;
2. the likelihood of the child's being adopted;
3. whether termination will help achieve the permanent plan for the child;
4. the bond between the child and the parent;
5. quality of the relationship between the child and the proposed adoptive parent, guardian, or custodian; and
6. any other relevant factor.

See In re E.M., 202 N.C. App. 761 (2010) (holding that the trial court's findings, when they did not reflect consideration of all the statutory factors, were not sufficient to support a conclusion that termination of parental rights was in the child's best interest.

Note: Before October 1, 2005, the statute provided that if the trial court found grounds for terminating parental rights, the court was required to issue an order terminating the parent's rights, unless the court further determined that the child's best interests required that rights not be terminated.

C. The court must make written findings about any of the statutory factors that are relevant.

Note: Before October 1, 2011, the statute required only that the court consider the relevant factors. *See* S.L. 2011-295, s. 16.

1. A finding that DSS made diligent efforts to provide services to a parent is not a condition precedent to terminating a parent's rights. *In re J.W.J.*, 165 N.C. App. 696 (2004); *In re Frasher*, 147 N.C. App. 513 (2001).

2. At the best interest stage, the court is not required to consider the parents' compliance with the case plan. *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010).

3. At disposition in a termination case, the court may, but is not required to, consider the availability of a relative placement. *In re M.M.*, 200 N.C. App. 248 (2009).

D. 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 court makes a discretionary determination as to whether to terminate parental rights. *See In re C.I.M.*, ___ N.C. App. ___, 715 S.E.2d 247 (Aug. 2, 2011); *In re Mitchell*, 148 N.C. App. 483 (Hunter, J., dissenting in part), *rev'd per curiam for reasons stated in the dissenting opinion*, 356 N.C. 288 (2002).

1. Even cases decided before the 2005 amendment to the statute (described in B, above) held that upon finding grounds for termination, the trial court was not required to terminate parental rights but was merely given the discretion to do so. *See, e.g.*, *In re Montgomery*, 311 N.C. 101 (1984); *In re McMillon*, 143 N.C. App. 402 (2001); *In re Parker*, 90 N.C. App. 423 (1988); *In re Tyson*, 76 N.C. App. 411 (1985); *In re Webb*, 70 N.C. App. 345 (1984), *aff'd per curiam*, 313 N.C. 322 (1985).

2. Although appellate courts defer greatly to the trial court's judgment, they will find an abuse of discretion if the record does not support the court's

determination. *See, e.g.*, *In re J.A.O.*, 166 N.C. App. 222 (2004) (holding that where there was only a "remote chance" that a troubled teenager would be adopted and there was a possible benefit from his having a continued relationship with his mother and other relatives, the trial court abused its discretion in terminating parental rights); Bost v. Van Nortwick*,* 117 N.C. App. 1 (1994).

E. Although the court must apply different evidentiary standards at each stage, there is no requirement that adjudicatory and dispositional stages be conducted at two separate hearings. *In re F.G.J.*, 200 N.C. App. 681 (2009); *In re White*, 81 N.C. App. 82 (1986).

F. At disposition the court may consider any evidence, including hearsay, that the court finds relevant, reliable, and necessary to determine the child's best interests.

1. 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 interests for parental rights to be terminated. *In re Wheeler,* 87 N.C. App. 189 (1987).

2. The trial court did not commit constitutional error in permitting questions and testimony about the parents' religious beliefs and practices where (i) the inquiry was brief; (ii) the inquiry related primarily to practices that might affect the child, not to beliefs; (iii) the inquiry was directed to the father, not an "expert" or minister; and (iv) the court made no findings about the parties' religious practices. *In re Huff*, 140 N.C. App. 288 (2001).

3. The trial court did not err in concluding that termination was in the child's best interest where the record included overwhelming evidence that the parents had not accepted responsibility for ways their actions affected the family and created a significant likelihood of future neglect. The court pointed to the parents' failures to maintain a sanitary, hygienic home; visit or otherwise contact the child for an extended period; follow medical advice regarding one child's health needs; or obtain counseling. *In re Huff*, 140 N.C. App. 288 (2001). *See also In re Howell,* 161 N.C. App. 650 (2003); *In re Brim*, 139 N.C. App. 733 (2000) (holding that despite some evidence of improvement in the mother's mental condition, the trial court did not abuse its discretion in concluding that terminating the mother's rights was in the child's best interest).

4. 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). It is not error, though, for the court to consider the child's adjustment in a foster–adopt home as one factor in determining best interest. *In re V.L.B.*, 168 N.C. App. 679 (2005).

G. If the Indian Child Welfare Act applies because of the child's status as a Native American, "[n]o termination of parental rights may be ordered in such proceeding in

the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian Custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1012(f). *In re Bluebird*, 105 N.C. App. 42 (1992).

H. The Americans with Disabilities Act (ADA) did not preclude termination of respondent's rights. The court reviewed other courts' treatment of the issue and adopted the rule followed by other states, *i.e.*, termination of parental rights proceedings are not services, programs, or activities within the meaning of Title II of the ADA. At the same time, the court found that the requirements for and the trial court's findings about reasonable efforts constituted compliance with the ADA. *In re C.M.S.*, 184 N.C. App. 488 (2007).

I. 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 motion after setting forth findings and conclusions.

J. The court may tax the costs to any party, but attorney fees for retained counsel are not awardable in termination of parental rights actions. Burr v. Burr, 153 N.C. App. 504 (2002).

XV. Entry and Effect of Order

(G.S. 7B-1109(e), -1110(a), -1112)

A. It was reversible error for a judge other than the one who presided at the hearing to sign the order terminating parental rights. (The presiding judge had stated that a ground for termination existed and that the child's best interest would be served by termination and had asked the guardian ad litem, an attorney, to prepare an order with appropriate findings.) G.S. 1A-1, Rule 52, requires the judge in a non-jury proceeding to find facts, make conclusions of law, and enter judgment accordingly. Rule 63 would allow another judge to sign the order, but only as a ministerial act, if the presiding judge were disabled and had already made findings of fact and conclusions of law. *In re Whisnant*, 71 N.C. App. 439 (1984).

B. Nothing prevents the trial court from directing the prevailing party to draft an order on the court's behalf. *In re J.B.*, 172 N.C. App. 1 (2005). *See also In re H.T.*, 180 N.C. App. 611 (2006); *In re S.N.H.*, 177 N.C. App. 82 (2006) (holding that the trial court did not err in directing the petitioner's attorney to draft an order after enumerating in court specific findings of fact to be included in the order).

C. An order terminating parental rights should include findings of fact and conclusions of law relating to the ground(s), and, for certain grounds, the order must include findings of willfulness. *In re T.M.H.*, 186 N.C. App. 451 (2007).

D. The order (whether adjudicatory or dispositional) must be entered within 30 days following completion of the hearing. "Entered" means reduced to writing, signed by the judge, and filed with the clerk.

1. If the order is not entered within 30 days after the hearing, the juvenile clerk is required to schedule a hearing at the first session of juvenile court after the 30-day period to obtain and explain the reason for the delay and obtain any needed clarification about the contents of the order. The court must enter the order within 10 days after this hearing.

2. The appropriate remedy for a trial court's failure to enter a timely order is mandamus. *In re T.H.T.*, 362 N.C. 446 (2008).

3. Statutory timelines are not jurisdictional. *In re C.L.C.*, 171 N.C. App. 438 (2005), *aff'd per curiam*, 360 N.C. 475 (2006).

4. Counsel for the petitioner or movant must serve a copy of the termination order on the child's guardian ad litem, if any, and the child, if twelve or over.

E. An order terminating parental rights completely and permanently severs all rights and obligations of the parent to the child and the child to the parent; except, the child's right of inheritance does not terminate until a final order of adoption is issued.

1. 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).

2. A parent whose rights have been terminated is not a party for purposes of post-termination review hearings unless

   a. an appeal of the termination order is pending and

   b. a court has stayed the order pending the appeal.

3. After termination, the parent is not entitled to notice of adoption proceedings and may not object to or participate in them.

4. 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 Cnty. Dep't of Soc. Servs., 347 N.C. 371 (1997).

F. When the court terminates parental rights and the child was in the custody of DSS (or a licensed child-placing agency) when the action was filed and still is, that agency acquires all rights for placement of the child that the agency would have acquired if the parent had relinquished the child to the agency for adoption pursuant to G.S. Chapter 48. If the child was not in the custody of DSS or another agency when the action was filed, the court may place the child in the custody of the petitioner or movant, some other suitable person, a county DSS, or a licensed child-placing agency, based on the child's best interests.

1. If the child is in the custody of DSS or a child-placing agency, the court ordinarily lacks jurisdiction to determine the child's custody or placement. *See In re I.T.P-L.*, 194 N.C. App. 453 (2008) (holding that the trial court did not have subject matter jurisdiction to order the child placed with a relative following termination of parental rights because the statute gives DSS exclusive placement authority when the child was in DSS custody when the termination action was filed); *In re Asbury*, 125 N.C. App. 143 (1997). *See also* Swing v. Garrison, 112 N.C. App. 818 (1993) (holding that when DSS has custody of the child pursuant to termination of one parent's rights and the other parent's surrender and consent to adoption, grandparents did not have standing under G.S. 50-13.1 to seek custody or visitation). *Cf.* Smith v. Alleghany Cnty. Dep't of Soc. Servs., 114 N.C. App. 727 (1994).

2. Even if the child is in the custody of DSS or another agency, if the child has not been placed with adoptive parents the court at a post-termination of parental rights hearing can enter orders about the child's placement or change the plan for the child, after considering the agency's recommendations. [G.S. 7B-908(d)]

3. After termination, the court must conduct review hearings pursuant to G.S. 7B-908 at least every six months until the child is the subject of a final order of adoption, if

   a. a DSS or licensed child-placing agency has custody of the child and

   b. the termination petition or motion was filed by someone other than the other parent, the child's guardian ad litem, or a person who has filed a petition to adopt the child.

G. Despite the usual finality of termination of a parent's rights, in very narrow circumstances the court may reinstate a parent's rights. The procedures and criteria are set out in G.S. 7B-1114. A motion to reinstate parental rights can be filed only by

the child's guardian ad litem attorney or a county social services department that has custody of the child.

XVI. Appeals; Modification of Order

(G.S. 7B-1001 through -1004; Rule 3.1, N.C. Rules of Appellate Procedure)

A. Appeal to the court of appeals may be taken by

1. the juvenile, acting through a guardian ad litem;

2. a county social services department;

3. a parent, guardian, or custodian who is not a prevailing party; and

4. any party that sought but failed to obtain an order terminating parental rights.

B. Orders that may be appealed include any order that

1. terminates parental rights,

2. denies a petition or motion to terminate parental rights,

3. finds a lack of jurisdiction,

4. involuntarily dismisses the action or otherwise determines the action and prevents a judgment from which appeal might be taken, or

5. changes legal custody of the child.

C. Notice of appeal must be given in writing within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk.

1. If the appealing party is represented by counsel, both trial counsel and the appellant must sign the notice of appeal. *In re L.B.*, 187 N.C. App. 326 (2007), *aff'd per curiam*, 362 N.C. 507 (2008) (holding that the signature of respondent's guardian ad litem on the notice of appeal was not a sufficient signature by the "appellant" as required by Rule 3A(a) [now Rule 3.1(a)] of the Rules of Appellate Procedure).

2. Counsel for the appellant may sign a notice of appeal only following direct instruction of the appellant after the conclusion of the proceeding.

3. When the child appeals, the notice of appeal must be signed by the child's guardian ad litem attorney advocate.

4. The notice must specify the order(s) being appealed. *See, e.g.*, *In re D.W.C.*, 205 N.C. App. 266 (2010); *In re D.R.F.*, 204 N.C. App. 138 (2010) (holding that when a notice of appeal referred only to the disposition order the order adjudicating grounds for termination was not before the court of appeals).

5. Notice of appeal given after the trial court's order was orally rendered but before it was entered was timely. *In re S.F.*, 198 N.C. App. 611 (2009). *See also In re J.L.*, 184 N.C. App. 750 (2007) (holding that the trial court erred in dismissing respondent's appeal for failure to timely give notice of appeal, when the respondent filed a written notice of appeal after the court rendered its judgment but before entry of the written judgment, but that the error was harmless because the trial court could have dismissed the appeal on the ground that respondent failed to give notice of the appeal to the appellee).

6. The court of appeals did not have jurisdiction to consider the appeal where the record included appellate entries but did not include a notice of appeal and the respondent did not petition for a writ of certiorari. *In re Me.B.*, 181 N.C. App. 597 (2007).

7. Failure to include a certificate of service with the notice of appeal, if not waived by the party entitled to be served, is reversible error. *In re A.C.*, 182 N.C. App. 759 (2007).

D. Except in a sealed verbatim transcript,

1. initials instead of names must be used to refer to the juvenile and any sibling or other household member under age 18;

2. no filing, document, exhibit, or argument may contain the juvenile's address, Social Security number, or date of birth.

E. Expedited procedures apply in the court of appeals, and cases generally will be decided on the record and briefs without oral argument.

1. One business day after notice of appeal is filed, the clerk of superior court must notify the AOC court reporting coordinator, who must assign a transcriptionist to the case within two business days after receiving the notification.

2. The transcriptionist must prepare and deliver a transcript to the court of appeals and provide copies to the parties within 35 days after the case is assigned. The

court of appeals will grant motions for extensions of time to prepare and deliver transcripts only in extraordinary circumstances.

3. Within 10 days after receipt of the transcript, the appellant must prepare and serve the proposed record on appeal.

    a. If the parties agree to a settled record within 20 days after receipt of the transcript, then within 5 business days after the record is settled, appellant must file 3 copies of the record in the court of appeals.

    b. Within 10 days after service of the proposed record, the appellee may serve a notice approving the proposed record, specific objections or amendments, or a proposed alternative record. If all appellees file none of these, the proposed record becomes the settled record on appeal. If an appellee does timely serve one of the above and the parties cannot agree on a settled record within 30 days after receipt of the transcript, then within 5 business days after the last day on which the record could be settled by agreement, (i) the appellant must file 3 copies of the proposed record on appeal and (ii) the appellee must file 3 copies of any objections, amendments, or a proposed alternative record with the court of appeals.

4. Within 30 days after the record on appeal is filed, appellant must file his or her brief in the court of appeals and serve copies on all other parties. Within 30 days after appellant's brief is served on an appellee, the appellee must file his or her brief and serve copies on all other parties. The court will allow motions for extensions of time to file briefs only in extraordinary circumstances.

F. Appeal is a critical stage of the proceeding for purposes of an indigent respondent's right to appointed counsel pursuant to G.S. 7A-450, *et seq*. *In re D.Q.W*., 167 N.C. App. 38 (2004).

G. Arguments on appeal

1. Pursuant to Rule 3.1(d) of the N.C. Rules of Appellate Procedure, a party may file a "no-merit brief" (indicating the attorney believes the appeal is meritless and asking the appellate court to conduct its own review of the record for possible error). This provision, adopted effective October 1, 2009, supersedes earlier appellate court decisions holding that counsel for an appellant could not file an *Anders*-type brief in a termination action (Anders v. California, 386 U.S. 738 (1967)). *See, e.g*., *In re N.B*., 183 N.C. App. 114 (2007); *In re Harrison*, 136 N.C. App. 831 (2000).

2. Defenses of collateral estoppel and *res judicata* cannot be asserted for the first time on appeal. *In re D.R.S*., 181 N.C. App. 136 (2007).

3. Adjudication of any one ground is sufficient to terminate a parent's rights. Where respondent failed to challenge two of the adjudicated grounds, the court of appeals did not need to address his challenge with respect to other grounds. *See, e.g.*, *In re C.I.M.*, ___ N.C. App. ___, 715 S.E.2d 247 (Aug. 2, 2011) (rejecting respondent's argument that the appellate court was required to review all of the adjudicated grounds and, if any of them were not upheld, remand the case for a new disposition hearing); *In re H.T.*, 180 N.C. App. 611 (2006).

4. The child's death did not render appeal of the termination order moot because termination of a parent's rights can have collateral consequences to the parent. *In re C.C.*, 173 N.C. App. 375 (2005). *See also In re J.S.L.*, ___ N.C. App. ___, 723 S.E.2d 542 (Feb. 7, 2012) (holding that the fact that respondent denied paternity did not render his appeal of an order terminating his rights moot because an order terminating his rights could have collateral consequences).

5. On appeal from an order terminating parental rights, the issue of failure to appoint a guardian ad litem for respondent in the initial abuse, neglect, or dependency proceeding is not properly before the court. *In re L.A.B.*, 178 N.C. App. 295 (2006); *In re O.C.*, 171 N.C. App. 457 (2005).

H. Trial court's authority during and after appeal

1. Pending disposition of an appeal, the trial court's jurisdiction is limited to entering temporary orders affecting the child's custody or placement. *In re K.L.*, 196 N.C. App. 272 (2009).

2. G.S. 1A-1, Rule 60, permits the trial court to correct clerical mistakes and errors arising from oversight or omission up to the time an appeal is docketed in the court of appeals, but in this case the amendment was substantive and improper because it added a finding that was essential to adjudication of the ground for termination. *In re C.N.C.B.*, 197 N.C. App. 553 (2009).

3. When an order is reversed and remanded, the order is defunct and the trial court must enter a new complete order upon remand. *In re A.R.P.*, ___ N.C. App. ___, 721 S.E.2d 725 (Jan. 17, 2012).

4. The trial court erred when it ignored the mandate of the court of appeals to hold a new termination hearing, but the error was not prejudicial when the court, instead, held a new permanency planning hearing. *In re R.A.H.*, 182 N.C. App. 52 (2007).

5. The trial court committed reversible error when it failed to carry out the mandate of the court of appeals after remand of the permanency planning order by holding

a termination of parental rights hearing instead of a permanency planning hearing. *In re P.P.*, 183 N.C. App. 423 (2007).

6. On affirmation of an order by the appellate court, the trial court may modify its original order in the child's best interest to reflect the child's adjustment or changed circumstances. If modification is *ex parte*, the court must notify interested parties to show cause to vacate or alter the order within 10 days.

    a. The statute does not create a right to another review proceeding; it gives the district court discretion to modify or vacate the original order due to changed circumstances. *In re Montgomery*, 77 N.C. App. 709 (1985).

    b. The district court has discretion to hear or decline to hear evidence in support of a motion to modify or vacate an order after an appeal. *Montgomery*.

    c. The hearing on a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing; the formal rules of evidence do not apply. *Montgomery*.