UNC
SCHOOL OF GOVERNMENT

2017 Parent Attorney Conference

Looking Back and Moving Forward

The Next Ten Years of Parent Representation

August 10, 2017 / Chapel Hill, NC

Sponsored by the
The University of North Carolina School of Government and
Office of Indigent Defense Services

ELECTRONIC COURSE MATERIALS

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& Office of Indigent Defense Services

AGENDA

8:00 to 8:30	Check-in
8:30 to 8:45	Welcome
8:45 to 10:15	**Case Law and Legislative Update [90 min]** *Sara DePasquale, Assistant Professor of Public Law and Government* UNC School of Government, Chapel Hill, NC *Wendy Sotolongo, Parent Representation Coordinator* Office of Indigent Defense Services, Durham, NC
10:15 to 10:30	**Strategies and Successes of Parent Representation [15 min]** *Office of Parent Representation*, IDS, Durham, NC
10:30 to 10:45	Break
10:45 to 11:30	**Admissibility of Digital Evidence [45 min]** *John Rubin, Professor,* UNC School of Government, Chapel Hill, NC
11:30 to 12:15pm	**GAL Program: Who Speaks for a Child's Best Interest [45 min]** *Ed Eldred, Attorney,* Carrboro, NC *Marion Parsons, Attorney,* Parsons Law, Asheville, NC
12:15 to 1:00	Lunch *(provided in building)* *
1:00 to 2:15	**Parents' Rights After Removal [75 min]** *Karen Jackson, Parent Attorney,* Greensboro, NC *Annick Lenoir-Peek, Assistant Appellate Defender* Office of Indigent Defense Services, Durham, NC *Allyson Shroyer, Attorney,* Ziomek & Shroyer, PLLC, Rutherfordton, NC
2:15 to 2:30	Break *(light snack provided)*
2:30 to 3:30	**Changing Visitation to Family Time [60 min]** *Twyla Hollingsworth-Richardson, Managing Attorney* Mecklenburg County Department of Social Services *Karen Johnson, Attorney*, Charlotte, NC
3:30 to 4:30	**Implicit Bias (Ethics) [60 min]** *James Drennan, Adjunct and Former Albert Coates Professor* UNC School of Government, Chapel Hill, NC

CLE HOURS: 6.50 (Includes 1 hour of ethics/professional responsibility)

* IDS employees may not claim reimbursement for lunch

SOG Resources for Civil Defenders

Author : Austine Long

Categories : Civil Practice

Tagged as : Public defenders; SOG resources;

Date : August 2, 2017

In preparation for the upcoming parent attorney and juvenile defender annual conferences, I reviewed the list of resources and information that we provide for defenders. Our main resource is the Indigent Defense Education (IDE) page on the School of Government (SOG) website. It contains a list of upcoming programs and links to manuals and other resources for public defenders and private assigned counsel.

While speaking with my colleagues and reviewing the SOG site, I realized there are a number of other resources and materials useful for public defenders and private assigned counsel. SOG faculty focus on specific areas of law and work with particular groups of government officials and others who work in that area of law. I decided in this post to share some of the SOG resources outside of IDE that may assist defenders in representing indigent clients in civil cases.

On the Civil Side

We believe that civil cases are interesting, so we created the On the Civil Side blog in January 2015. SOG faculty and staff write about important and interesting issues for court personnel and lawyers working in civil court proceedings. You can check the site on Wednesday and Friday for a new post. If you do not want to miss a post, you can use an RSS feed to send the new post automatically to an RSS reader or you can subscribe by email.

Juvenile Law

The juvenile law page of the SOG website provides materials for practitioners working in the area of juvenile delinquency and abuse, neglect and dependency (A/N/D) proceedings. Discussed below are a few resources that are beneficial for juvenile defenders and parent attorneys.

The Juvenile Delinquency Case Compendium is an online searchable database and user-friendly tool. It includes a comprehensive collection of case annotations, and covers all published appellate court decisions related to juvenile delinquency proceedings in North Carolina from January 2007 to the present. LaToya Powell, Assistant Professor of Law and Government, created the juvenile delinquency case compendium and keeps it up to date.

The Child Welfare Case Compendium (CWCC) is also an online searchable database and user-friendly tool designed for attorneys and judicial officials. It contains annotations of published opinions addressing child welfare issues decided by the North Carolina appellate courts and the U.S. Supreme Court from January 2014 to present. Sara DePasquale, Assistant Professor of Law and Government, created the CWCC and keeps it up to date.

NC Juvenile Justice-Behavioral Health Information Sharing Guide (April 2015) by Mark Botts and LaToya Powell. The guide is a collaboration among multiple agencies and partners. It is designed to address and improve information sharing procedures for youth involved in the juvenile justice and mental health/substance abuse systems.

Beyond the Bench (podcast) Season 2: Homelessness, Neglect, and Child Welfare in North Carolina, hosted by Sara DePasquale (2016-2017). In six episodes, you will hear from people with different perspectives, including the judge, a

parent attorney, the child's guardian ad litem, county departments, and shelter providers. Each episode represents a different stage in the child welfare process.

Stages of Abuse, Neglect, and Dependency Cases in North Carolina: From Report to Final Disposition by Sara DePasquale (2015). This reference guide is a good overview for any practitioner new to this area of law. It includes a color-coded chart of the A/N/D process and is available for purchase here.

The social services page on the SOG website contains resources, publications and information in the area of social services law. One resource that caught my attention is the Social Services Confidentiality Research Tool. It is a useful tool for any practitioner who needs to locate and interpret applicable confidentiality laws.

Guardianship and Civil Commitment

The mental health page on the SOG website provides information about North Carolina's mental health, developmental disabilities, and substance abuse services system. It includes an online learning program on Involuntary Commitment. The online program consists of four modules in which Mark Botts, Associate Professor of Public Law and Government, explains the legal criteria and procedure for involuntary commitment. The mental health page also provides links to AOC forms, publications, and other resources for involuntary commitments.

Meredith Smith, Assistant Professor of Public Law and Government, provides written summaries of recent NC Court of Appeals and NC Supreme Court cases on incompetency and guardianship. The July 2017 Summaries are located here . Assistant Professor Smith primarily focuses on areas of law where clerks of superior court exercise judicial authority, and she consults with attorneys and clerks about their cases. You can find publications and other resources written by Assistant Professor Meredith Smith here.

Child Support Contempt

The IDE online learning library includes a course on the basics of contempt. In this introductory course, Michael Crowell, former Professor of Public Law and Government, explains the difference between criminal and civil contempt. He also discusses the sanctions available for both criminal and civil contempt and the procedures for both. Attorneys can view the online program free or for a fee if they want CLE credit.

Michael Crowell's bulletin on Contempt (Dec. 2015) provides a detailed discussion about civil and criminal contempt. It includes information about issues such as burden and standard of proof, willfulness, the right to jury trial, self-incrimination, and appeals.

IDE Manuals

Manuals for the substantive areas I discussed can be viewed or downloaded free at Indigent Defense Manual Series. Although the Indigent Defense Manual Series does not include a manual about child support contempt, defenders can access the Child Support Chapter from the North Carolina Trial Judges' Bench Book, District Court. Links to the child support chapter and the A/N/D manual are on the Indigent Defense Manual Series site under Other Manuals. A new edition of the comprehensive A/N/D reference, manual will be available in the fall of this year.

Please share with me your ideas for any other resources that SOG could create that would be helpful to practitioners working in these civil law areas.

CASE LAW &
LEGISLATIVE UPDATE

2017 Parent Attorney Conference
Child Welfare Case Update
August 2, 2016 - August 1, 2017

By Sara DePasquale, School of Government, UNC-Chapel Hill

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Abuse/Neglect/Dependency

Subject Matter Jurisdiction: Standing

In re A.P., ___ N.C. App. ___ (April 18, 2017)

Held: Vacate

Stay granted 5/9/2017; PDR filed 5/23/2017

- Facts regarding residence
  - At time of child's birth, respondent mother resided in Cabarrus County.
  - Respondent mother agreed to safety plan with Cabarrus County DSS where child lived in a home in Rowan County while mother obtained inpatient treatment in Mecklenburg County.
  - Upon respondent mother's discharge, she and child moved to a home in Mecklenburg County and entered into agreement with Cabarrus County DSS that she would participate in in-home family services plan. Cabarrus County transferred case to Mecklenburg County DSS.
  - Respondent's sister discovered respondent and child living outside of agreed to home, and sister took child back to the home in Rowan County, which was approved by Mecklenburg County DSS.
  - Respondent moved to South Carolina and agreed child would stay in Rowan County home.
  - Respondent returned to Mecklenburg County and was jailed and later received in-patient treatment there.
  - Respondent notified Mecklenburg County DSS she was residing in Cabarrus County.
  - The next day, Rowan County placement provider called Mecklenburg County DSS to inform it that she could not care for child. Mecklenburg County DSS contacted Cabarrus County DSS to discuss transferring the case back, but Cabarrus County DSS could not confirm respondent mother was residing in its county.
  - 6 days later, Mecklenburg County DSS took physical custody of the child and obtained nonsecure custody from a Mecklenburg County magistrate.
  - Child was adjudicated dependent and neglected in Mecklenburg County district court.
- Abuse, neglect, and dependency actions are "purely 'statutory in nature and governed by Chapter 7B'", which requires certain procedures and subjects the court to certain limitations (*citing In re T.R.P.,* 360 N.C. 588, 591 (2006)). G.S. 7B-401.1(a) authorizes a county social services department's director or authorized representative to file a petition alleging a juvenile's abuse, neglect, or dependency. G.S. 7B-101(10) includes in its definition of director of the county department "the county in which the juvenile resides or is found."
- Mecklenburg County DSS did not have standing to file the juvenile petition, and standing is jurisdictional. The petition did not invoke the court's jurisdiction as it did not allege the address or residence of respondent mother or child or the child's physical presence in Mecklenburg County. Pursuant to G.S. 153A-257(a), the child's legal residence was that of the person with whom she resided for four months -- in Rowan County -- because the child was not residing with a parent or relative and was not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility or similar institution or facility. At the time the petition was filed, the child was not found in Mecklenburg County. Because

Mecklenburg County DSS did not have standing, the trial court lacked subject matter jurisdiction.

- The provision of G.S. 7B-402(d), which provides that when a petition is filed in a county that is not the child's residence, the petitioner must provide a copy of the petition and notices of hearing to the director of the county department where the child resides, addresses notice and not standing requirements.

Subject Matter Jurisdiction: New Report after Reunification with Parent, G.S. 7B-401(b)

In re T.P., ___ N.C. App. ___ (July 5, 2017)

Held: **Vacated**

- Facts: In 2015, three siblings were adjudicated abused and placed in DSS custody. In 2016, the children were reunified with their mother by an order that granted legal and physical custody to the mother, retained jurisdiction, scheduled no further review hearings, and relieved DSS, the GAL, and the parents' attorneys. One week later, DSS received a new report of domestic violence in the mother's home. DSS investigated the report, entered into a safety plan with the mother, and filed a motion for review based on a "change in situation." The court held a permanency planning review hearing and ordered custody of two of the children to DSS and of one child to her father. Respondent mother appealed arguing a lack of subject matter jurisdiction and/or failure to conduct an adjudicatory hearing under G.S. 7B-401(b).
- The jurisdictional analysis is based on G.S. 7B-401(b), which applies when four requirements are met:
    1. The court retained jurisdiction over a juvenile whose custody was granted to a parent;
    2. The court is not conducting periodic judicial reviews of the juvenile's placement;
    3. A new report of abuse, neglect, or dependency is received by DSS after reviews have been discontinued; and
    4. The DSS director determined, based on a 7B-302 assessment, that court action was needed.

  When the criteria of G.S. 7B-401(b) are satisfied, the provisions of Article 8 of the Juvenile Code apply.
- Subject matter jurisdiction involves the court's power to deal with the kind of action in question and is conferred by statute or the N.C. Constitution. A trial court's general jurisdiction over the type of proceeding (e.g., a juvenile proceeding) does not confer jurisdiction over the specific action sought. There must be a controversy that is presented in the *form of a proper pleading*. For the court to have subject matter jurisdiction under G.S. 7B-401(b), DSS cannot file a motion for review; it must file in the existing case a verified petition alleging the newly reported and assessed abuse, neglect, or dependency. The provisions of Article 8 refer to a *petition* -- the adjudication determines the existence of nonexistence of conditions alleged in the *petition* (G.S. 7B-802) and the allegations in a *petition* must be proved by clear and convincing evidence (G.S. 7B-805, 7B-807). A petition ensures the parent's due process rights are protected by requiring DSS to make specific allegations of abuse, neglect, or dependency and set out the relief sought,

providing a parent with an understanding of what's alleged and a full and fair opportunity to rebut the allegations.

- When a new petition is filed in the existing action, the court is then required to conduct a new adjudicatory hearing under Article 8, and if the child is adjudicated to then conduct a dispositional hearing.

Subject-Matter Jurisdiction: Verification

In re N.X.A., ___ N.C. App. ___ (August 1, 2017)

Held: No Error

- Facts: Three petitions alleging dependency and neglect were verified upon information and believe by the DSS attorney. The children were adjudicated and placed in DSS custody. Two years later, DSS filed verified petitions to terminate respondent parents' rights, and both petitions were granted. Respondents appeal on the basis of a lack of subject matter jurisdiction due to the improper verification made by the DSS attorney of the underlying dependency and neglect petitions.
- "A trial court's subject matter over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593 (2006). The verification was effective pursuant to Rule 11(d) of the N.C. Rules of Civ.P.
- Rule 11 addresses verification requirements. Rule 11(b) governs verification by a party and Rule 11(c) governs verification by an agent or attorney, and both provisions require the person completing the verification to have personal knowledge of the facts. But, Rule 11(d) applies to corporations and state officers. *Citing to Vaughn v. N.C. Dep't of Human Res*., 296 N.C. 683 (1979) and G.S. 108A-14(a)(5), with respect to certain issues including the provision of foster care, a county DSS director is an agent of the state, specifically the Social Services Commission and NC DHHS. When implementing the provisions of the Juvenile Code, DSS is acting as an agent of the state agency that oversees the laws in the Juvenile Code. As such, Rule 11(d) regarding verification by the State and not Rule 11(b) or (c) applies.
- Rule 11(d) states "when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts." The DSS attorney was acquainted with the facts of the case. The application of Rule 11(d) is reinforced in practice because DSS, and not the person with personal knowledge who made the initial report, has standing to file a petition. It is not feasible to assume one person from DSS has complete personal knowledge of a case but rather it can be assumed that anyone verifying an affidavit does so having reviewed the materials compiled by several DSS employees and representatives and is therefore "acquainted with the facts" as required by Rule 11(d).

Notice Pleading

In re K.B., ___ N.C. App. ___ (May 16, 2017)

Held: Affirmed

- The court adjudicates "the existence or nonexistence of any of the conditions alleged in a petition" (G.S. 7B-802) and "if the court finds… that allegations in the petition have been proven by clear and convincing evidence, the court shall so state" in its written order (G.S. 7B-807). Factual allegations may be included in an attachment to a form petition (*citing In re D.C.*, 183 N.C. App. 344 (2007).

- Although the box on the form petition identifying the condition of dependency was not checked, the factual allegations attached to the petition were sufficient to put the respondent mother on notice of the alleged ground of dependency. The alleged facts included statements that identified specific injuries to the child, the child's mental health diagnosis and medication, that "the legal custodian was unable to provide an alternative placement resource for the child", and "the legal custodian failed to provide proper supervision" after the child was left home and sustained injuries. The factual allegations encompass the language reflected in G.S. 7B-101(9), which defines dependency: the failure to provide for the child's care or supervision and the lack of an appropriate alternative child care arrangement.
- Additionally, the court's order entering stipulations for adjudication started with a statement that the petition alleges abuse, neglect, and dependency, which shows the respondent mother had adequate notice that dependency would be at issue for adjudication.

Appointed Counsel: No Right to Self-Representation

In re J.R., ___ N.C. App. ___ (November 1, 2016)

Held: Affirmed

- G.S. 7B-602(a1) states the court "may" allow a parent to proceed pro se when the court finds that the parent makes a knowing and voluntary waiver of appointed counsel. The use of the word "may" means the court has discretion when determining whether a parent may proceed without the assistance of counsel; the court is not required to allow the respondent parent to proceed pro se.
- A parent does not have a statutory or constitutional right to self-representation. Previous language in the Juvenile Code that provided for the right to self-representation was removed by amendments made to the Code since 1998. The Sixth Amendment addresses the right to self-representation and applies to criminal proceedings; it does not apply to abuse, neglect, or dependency proceedings.
- The court did not abuse its discretion in denying the respondent mother's request to proceed pro se. In support of its decision, the court found the mother's waiver was not knowing and voluntary as
    - she was facing potential criminal charges that were related to the incident resulting in the abuse and neglect proceeding and she would not be able to protect herself from self-incrimination if she were to proceed pro se, and
    - she was being influenced and possibly coerced by her abusive boyfriend (who was a caretaker in the action) to request that her counsel be released so that she could proceed pro se.

Adjudication Findings

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: Affirm in part, vacate in part, remand

- A finding of fact that states respondent "proffered in pertinent part, the following testimony" that then summarizes respondent's testimony is not a finding of fact but is instead a recitation of the witness' testimony.

- It is not per se reversible error for findings of fact to be verbatim recitations of allegations contained in the petition if there is evidence in the record to support those findings and the court's logical reasoning in making the findings regardless of whether the findings themselves mirror the language in a pleading. The court's findings are supported by the respondent's own testimony.

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- "[I]t is not per se reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party." *In re* J.W., ___ N.C. App. ___, ___, 772 S.E.2d 249, 253 (2015). Although the adjudication order in this case included some findings of fact that were verbatim recitations of the allegations in the petition, the record shows the trial court exercised a process of logical reasoning, based on the evidentiary facts before it, to find the ultimate facts necessary to adjudicate the child abused and neglected. The record shows the court engaged in an independent decision-making process when it (1) made substantive findings in its order that are not verbatim recitations of the language in the petition, (2) considered evidence from days of witness testimony and the admitted medical records, and (3) took the matter under advisement and modified a proposed finding it discussed with the parties.
- Findings of fact that addressed the possible time frames for the child's injuries were supported by competent evidence. There was one finding that was not supported by evidence, but the error was not prejudicial.

Adjudication by Consent

In re J.S.C., ___ N.C. App. ___ (May 2, 2017)

Held: Affirmed

- There are two procedural paths for an abuse, neglect, or dependency adjudication: (1) an adjudicatory hearing and (2) adjudication by consent.
    1. An adjudicatory hearing involves a judicial process that determines the existence or nonexistence of any of the conditions alleged in the petition and requires the allegations in the petition to be proved by clear and convincing evidence. G.S. 7B-802, -805; *In re K.P.*, ___ N.C. App. ___, 790 S.E.2d 744 (2016).
    2. An adjudication by consent occurs in the absence of an adjudicatory hearing and requires that (i) all parties be present or represented by counsel who are present and authorized to consent, (ii) the child is represented by counsel, and (iii) the court makes sufficient findings of fact. G.S. 7B-801(b1); *In re K.P.*, ___ N.C. App. ___, 790 S.E.2d 744 (2016).
- When a trial court enters a consent adjudication order based entirely on stipulated facts (which are judicial admissions and are binding on the party who agreed to the stipulation), the court does not engage in the process of fact-finding, which includes receiving and weighing evidence and assessing witness credibility. The court has no occasion to apply the clear and convincing evidence standard required under G.S. 7B-805 "Quantum of proof in an *adjudicatory hearing*" (emphasis supplied in opinion). It was not reversible error for court to fail to state in its consent

adjudication order that the adjudicatory findings were based on the clear and convincing evidentiary standard under G.S. 7B-805 (applying to an adjudicatory hearing).

- Note the opinion does not address the application of G.S. 7B-807(a), which provides that if the court finds from the evidence (including stipulations) that the allegations in the petition have been proved by clear and convincing evidence to so state, because the appellant did not timely raise this issue.

Adjudication by Hearing or Consent

In re K.P., ___ N.C. App. ___ (October 4, 2016)

Held: Reverse and remanded in part; vacated in part

  - Note, because the court of appeals reversed and remanded the adjudication order, the subsequent orders (including permanency planning order) are vacated

- G.S. 7B-802 requires the trial hold an adjudicatory hearing, where allegations in the petition alleging the child is abused, neglected, or dependent are proved by clear and convincing evidence. G.S. 7B-807(a) allows the court to accept the parties' stipulations to adjudicatory facts when those stipulated facts are either (1) made in writing, signed by each party, and submitted to the court or (2) read into the record with each party orally agreeing to the stipulated facts. These mandatory statutory procedures were not complied because there was no adjudicatory hearing. Instead, two DSS reports were submitted to the court, no testimony was taken, and an exchange between the court and various counsel about dispositional issues (visitation, transportation, support) occurred.
- G.S. 7B-801(b1) authorizes a consent adjudication order when (1) all parties are present or represented by counsel who is present and authorized to consent; (2) the juvenile is represented by counsel; and (3) the court makes sufficient findings of fact. An adjudicatory order is not valid when it fails to find that there was a stipulation to adjudicatory facts or a consent to an adjudication of the children was reached. In this case, there was no evidence that the parties stipulated to adjudicatory facts or that consent was reached. There was also no evidence that a proposed consent order had been drafted for the parties to reach an agreement.

Evidence: Self-Incrimination

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: Vacate adjudication of abuse, remand to disregard portions of respondent's testimony

- Facts: Respondent mother, who had pending misdemeanor child abuse charges as a result of leaving her child in a specific person's care in violation of a safety plan with DSS, was summonsed to appear at the adjudicatory hearing. She was called as the sole witness in the A/N/D adjudicatory hearing by the DSS attorney. After answering questions about the safety plan that she agreed to after her child was injured the first time, the respondent mother invoked her V Amendment right when she was directly asked who she thought caused her child's injuries. The court ordered her to answer after concluding that she had waived her right to

invoke the privilege by answering earlier questions about the safety plan and the specific individual.

- The V Amendment privilege against self-incrimination in a future criminal proceeding extends to civil proceedings. The finder of fact in the civil action may use the witness' invocation of that privilege to infer that the testimony would have been unfavorable to her.
- The standard of review for alleged constitutional violations is de novo. Applying the reasoning discussed in *Herndon v. Herndon,* 368 N.C. 826 (2016) regarding the V Amendment's application to a voluntary versus a compelled witness, respondent mother was a compelled (not voluntary) witness as a result of being called by the adverse party even in the absence of a subpoena. Unlike a voluntary witness, who can choose whether or not to testify after weighing the advantage of taking the privilege against putting forward her version of the facts and her reliability as a witness, a compelled witness must testify and "has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate." *Herndon* at 830. It is at that point that a compelled witness may invoke or waive the privilege. If the compelled witness invokes the privilege, the court may order her to testify if it determines the answer will not be self-incriminating. Respondent's answer was incriminating, and she was deprived of her constitutional right against self-incrimination. The court should not have considered the answer when determining whether the child was abused.
- Although not all constitutional errors are prejudicial, respondent mother was prejudiced in this action. The finding that respondent knew that an individual caused the child's initial injuries supports the determination that the child was abused as a result of respondent allowing the creation of a substantial risk of serious physical injury by other than accidental means when the child suffered a second round of injuries after being left by the respondent in that same individual's care. *See* G.S. 7B-101(1). Although not knowing the weight given to respondent's testimony, it appears that her testimony likely constituted the primary basis for the finding.

Adjudication: Abuse

In re R.S., ___ N.C. App. ___ (August 1, 2017)

Held: Affirmed

- Facts: A one-month-old infant was brought to the hospital with a torn lingual frenulum (tissue connecting tongue to the floor of the mouth). Respondents denied any knowledge of the cause of the injury but confirmed they were the infant's only caregivers. Two skeletal surveys were performed, and one showed healing fractures on 3 ribs and the right tibia. Respondents had no explanation for the injuries. DSS filed a petition alleging abuse and neglect and the child was adjudicated abused and neglected. Respondent father appealed on the ground that the court improperly shifted the burden of proof from DSS to respondents.
- The findings of fact are supported by competent evidence and support a conclusion that the child was abused as defined by G.S. 7B-101(1). The court found the DSS experts were more credible than the respondent's expert, and the expert testimony addressed the nature and causes of the injuries. The court found the injuries were inflicted by other than accidental means as they required significant force, could not be self-inflicted, and were not the result of a medical condition. The court further found these serious injuries occurred while the child was in respondents' care, as respondents were the only caretakers for the child; that the respondents

had no explanation for the injuries; and that each respondent was jointly and individually responsible.

- There was no improper shifting of the burden of proof. Where different inferences may be drawn from the evidence, the court determines which inference to draw. The findings support a reasonable inference that the child was injured by the respondents who were his only caretakers. The court's finding that the parents were responsible by either directly causing or failing to prevent and thereby indirectly causing the injuries to the child is appropriate when the evidence showed the respondents were the sole caretakers of a pre-mobile infant who suffered serious and unexplained injuries.

In re K.B., ___ N.C. App. ___ (May 16, 2017)

Held: Affirmed

- **Self-Harm = Other than Accidental Means:** G.S. 7B-101(1)a. and b. define abused juvenile to include a juvenile whose parent inflicts or *allows to be inflicted* serious physical injury on the juvenile by other than accidental means or who *creates* or allows to be created *a substantial risk of serious physical injury* to the child by other than accidental means. The court concluded both criteria existed and found the supporting facts by clear and convincing evidence. The child has significant mental health issues that required placements outside the home, including residential care. Upon the child's discharge from residential care, respondents allowed his psychotropic Rx to lapse after they failed to follow up with a psychiatrist. The child had several injuries (bruising on eyes and lips, a fractured finger, a puncture wound on his finger, and scratches on his nose) that the child provided conflicting explanations for, which was supported by the testimony of two doctors and reports admitted in evidence that included respondent mother's acknowledgement that the child gave different explanations. The adjudication of abuse is based in part on the respondents allowing the child to cause injuries to himself, which is supported by the finding that the lack of a reasonable explanation for the injuries created a condition likely to lead to serious physical injury. Specifically, respondents failed to properly supervise the child, who they knew had significant mental health and behavior issues, to make sure he did not cause injuries to himself. They allowed his medication to lapse. The child did not experience any substantial injuries when outside of the home, which demonstrated those placements provided proper supervision. At home, he was injured and those injuries were by other than accidental means that the respondents allowed to occur as a result of their failure to maintain his Rx and provide adequate supervision to meet his special needs.

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- A child may be adjudicated abused when he or she sustains unexplained non-accidental injuries even without a finding of a pattern of abuse or the presence of risk factors. The evidence and findings of fact show the child, while in her parents' care, suffered two fractures and a subdural hematoma that expert witnesses had determined were caused by non-accidental trauma. The lack of an explanation and/or a rule-out of every possibility for the cause of the child's severe injuries are not required for an abuse adjudication.

Neglect: Stipulated Findings

In re G.T., ___ N.C. App. ___ (October 18, 2016)

Held: Affirmed

- Respondent mother stipulated to the facts alleged in the department's neglect and dependency petition, which included
    1. mother used marijuana, meth, and cocaine during her pregnancy and the child was born with a rapid heartbeat and signs of withdrawal;
    2. the mother was belligerent at the hospital, refused to take her psychiatric medication, had to have the infant removed from her, and was held on an involuntary commitment; and
    3. the father was present at child's birth despite a DVPO ordering no contact with the mother after he stabbed her, dislocated her jaw, and held a gun to her head threatening to kill her.
- The stipulated findings of fact support the court's conclusion that the child is neglected as a result of (1) lacking proper care, supervision, or discipline from a parent, (2) living in an injurious environment, (3) being exposed to controlled substances resulting in the child's impairment, and (4) being at substantial risk of an impairment as a result of mother's erratic behavior in the hospital and disregard for the DVPO against the father.

Neglect: Evidence, Findings, Conclusions

In re K.B., ___ N.C. App. ___ (May 16, 2017)

Held: Affirmed

- Review of a court's adjudication order is based on whether the findings of fact are supported by clear and convincing evidence and whether the legal conclusions are supported by the findings. The trial court's findings are binding if evidence exists to support the finding even if evidence supports a contrary finding. Unchallenged findings are binding on appeal.
- G.S. 7B-101(15) defines a neglected juvenile as one who does not receive proper care, supervision, or discipline from a parent….or who is not provided necessary medical care… or who lives in an environment injurious to his welfare. The conclusion of neglect was supported by the findings that respondent failed to follow the child's discharge recommendations to obtain a psychiatrist for the child and that the child's Rx lapsed for almost two weeks because the child did not have a doctor to refill the Rx. These findings were based on testimony of the social worker and expert. Additional findings were that the respondents did not provide proper supervision or correct discipline to address the child's emotional needs and behavior issues given the pattern of injuries he suffered over time that required more supervision and hypervigilance.

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: Affirmed in part

- G.S. 7B-101(15) defines a neglected juvenile in part as one who does not receive proper care, supervision, or discipline from a parent or who is not provided necessary medical care or who lives in an environment injurious to his or her welfare.

- Findings about the respondent mother's decision to leave her child in the care of an individual who was barred by a safety plan from having contact with the child and the respondent's failure to timely obtain medical treatment for significant injuries that occurred when the child was in that individual's care were supported by competent evidence and support a neglect adjudication. The 2-day delay in seeking necessary medical care supports the neglect adjudication.

In re J.A.M., ___ N.C. App. ___ (Dec. 20, 2016)

Held: Reversed

***Stay granted by NC Supreme Court on 1/10/17; PDR granted 6/8/2017**

- Facts: Mother had six other children who were involved with the department primarily because of domestic violence with the fathers of those children. Eventually, her rights to the children were terminated. Father has a prior history with the department due to domestic violence. His child was reunified with the mother (who is not the respondent mother in this action). A report was made to the department after the child in this action was born. During the assessment, the social worker determined the home was appropriate, the child seemed healthy and well-cared for, and the police had not been called to the home. Based on the parents' prior history with the department, the social worker wanted the parents to agree to a Safety Assessment. The parents refused to work with the department. The department filed a petition, and the child was adjudicated neglected. Respondent mother appealed.
- There were three findings of fact about the child's current living situation -- one of which was that the mother never acknowledged her role in the termination of her parental rights to her other children. This finding was not supported by the evidence as the only evidence that was introduced was the mother's testimony that the TPR involved her own poor decisions and choices.
- The conclusion of neglect is not supported by the findings of fact. The only relevant findings include (1) the mother failed to ask the child's father about his alleged assault on his own sister and (2) different findings about each parent's long history with the department and their other respective children who were neglected. Although there was no evidence that the parents remedied the issues that caused prior injurious environments regarding their other children, the department must introduce evidence to prove its allegations of neglect by clear, cogent, and convincing evidence. Here, there was no evidence that services were needed to alleviate any concerns about an injurious environment. There was no evidence or findings about current domestic violence or any domestic violence between the parents or in the presence of the child. Instead the findings were about the domestic violence that occurred more than 3 years before this child's birth. There were no findings that the child suffered from a physical, mental, or emotional impairment or had a substantial risk of such impairment as a consequence of living in the respondent-mother's home.

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- A juvenile is neglected when (1) he or she does not receive proper care, supervision, or discipline from a parent, guardian, custodian, or caretaker or lives in an injurious environment

and (2) as a result, the child experiences a physical, mental, or emotional impairment or substantial risk of such impairment.

- A child may be adjudicated neglected when the evidence and findings show the child suffered non-accidental injuries while in her parents' custody even though there is no explanation for how those injuries occurred. The child's skull and arm fractures and subdural hematoma while in her parents' custody establish that the child either did not receive proper care or supervision or lived in an injurious environment and suffered a physical impairment as a result.

Dependency: Findings

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: Vacated and remanded in part

- G.S. 7B-101(9) defines dependent juvenile and requires the court to address and make findings of two prongs: (1) the parent's ability to provide care or supervision and (2) the availability to the parent of alternative child care arrangements. Failure to make both findings is reversible error. The court failed to make findings of either prong.

In re M.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated in part and remanded

- There must be findings based on competent evidence to support the portion of an order that prohibits contact between the child and her maternal grandfather. There was no evidence before the trial court that the grandfather posed a threat to the child's welfare or that contact with the grandfather was contrary to the child's best interests.

Initial Disposition: Findings of Aggravating Factors

In re G.T., ___ N.C. App. ___ (October 18, 2016)

Held: Reversed in part

There is a dissent and an appeal has been filed with the NC Supreme Court

- G.S. 7B-901(c)(1)e. authorizes a court to cease reunification efforts with a parent "if the trial court **makes** a finding that: a court of competent jurisdiction **has determined** that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile: … chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile."
- Statutory interpretation requires a plain and unambiguous reading of the statute to determine legislative intent. Based on the different verb tenses used in the statute, the present perfect tense of "has determined" requires that the court reference a prior order from a previously held hearing rather than make a determination in the current disposition hearing. This previously held hearing could be an adjudicatory or other prior hearing in the same juvenile case or in a collateral proceeding held in a trial court. The prior adjudication order did not contain the ultimate finding of fact that the respondent mother allowed the continuation of

chronic or toxic exposure to controlled substances that caused impairment of or addition in the newborn. The findings that toxicology results for the newborn were pending and that the newborn's withdrawal and impairment at birth supported the neglect adjudication but not the ultimate finding of fact needed to cease reasonable efforts with the respondent mother.

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: Vacated and remanded in part

- Citing to *In re G.T.*, ___ N.C. App. ___, 791 S.E.2d. 274 (2016) and its interpretation of the language in G.S. 7B-901(c), the trial court cannot determine for the first time in an initial dispositional order that aggravating circumstances under G.S. 7B-901(c) exist. Without those findings being made in an order prior to the initial dispositional order, the court's conclusion that reasonable reunification efforts must cease was erroneous.
    - Author's Note: *In re G.T.,* decided by a divided panel, is currently before the N.C. Supreme Court

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- At initial disposition, the trial court adopted a concurrent plan of reunification and adoption. Because the court did not order that reasonable efforts for reunification are not required, the court did not have to make findings of fact of at least one aggravating factor enumerated in G.S. 7B-901(c).
- When the court orders a concurrent plan of reunification and adoption at initial disposition, the court is not required to make findings specified by G.S. 7B-906.1, which governs review and permanency planning hearings. When the court holds its permanency planning hearing, it will need to make the necessary statutory findings governing permanency planning hearings at that time.
    - *Author's Note: It appears that the court ordered concurrent planning as the initial dispositional order and did not specify that the plan was a permanent plan.*

Disposition: Relative Placement Consideration

In re L.C., ___ N.C. App. ___ (April 18, 2017)

Held: Vacated and remanded in part.

- G.S. 7B-903(a1) requires the court to consider relative placement and order such placement if the court finds the relative is willing and able to provide proper care and supervision in a safe home unless the court finds the placement is not in the child's best interests. Failure to make the finding that a child's placement with the relative is not in the child's best interest will result in a remand. In ordering a primary permanent plan of adoption and secondary permanent plan of guardianship that did not specify the relative that the respondent mother suggested for possible placement, the court was required to make the finding about the placement not being in the child's best interests. Waiting for DSS to complete an evaluation of the relative's home for a potential placement does not obviate the need for that finding.

Visitation: Minimum Outline

In re L.Z.A., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- An order that states visitation shall be supervised and take place in accordance with the current plan meets the requirements of G.S. 7B-905.1 to set out the duration, frequency, and level of supervision, when the current plan, was memorialized in a prior order. The plan established visits on Tuesdays and Saturdays from 12 p.m. to 2 p.m. at the department's facility, and allows for expanded visits. By reading the two orders together, the court set forth a plan that established supervised visits, twice a week (frequency) for two hours a visit (duration).

Visitation: Findings for No Visits

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Affirmed in part

- When a child is placed outside of the home, G.S. 7B-905.1(a) requires that the court order appropriate visitation that is in the child's best interests and consistent with the child's health and safety. The court does not have to order visitation when it makes findings that visitation is not in the child's best interests or that the parent has forfeited her right to visitation. An order denying visitation is reviewed for an abuse of discretion.
- There was no abuse of discretion when the court denied visitation between respondent mother and her child after finding visitation was not desirable and the mother was awaiting her criminal trial (which included a no contact order) for allegedly sexually abusing her child, was not compliant with substance abuse or mental health treatment, and was acting in a manner that was inconsistent with her child's health and safety.

Visitation: Cost of Supervision

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated and remanded

- Before ordering a parent to pay for supervised visits, the court must make findings of the cost of visitation and the parent's ability to pay for it.

Visitation: Not Delegate Judicial Function

In re C.S.L.B., ___ N.C. App. ___ (July 18, 2017)

Held: Affirmed in part, vacated in part, remanded

- G.S. 7B-905.1 requires that the court order that continues a child's placement outside of the home (in this case a guardianship order) provide for an appropriate visitation plan that is in the child's best interests and consistent with the child's health and safety; the order may specify the conditions under which visitation may be suspended. A court may not delegate its judicial function of awarding visitation to the child's guardian. Here, the order delegated the court's judicial function to the guardian because it unilaterally allows the guardian to modify the visitation based upon the guardian's concerns. The order stated that visits shall occur so long as there is *no concern* the mother is using drugs and may be supervised or suspended if there is

concern the mother is using drugs or there is discord between the mother and father during the visits. Emphasis in original.

Permanency Planning Hearing: Notice

In re K.C., ___ N.C. App. ___ (August 2, 2016)

Held: Vacate and remand

- G.S. 7B-906.1(b) requires that a parent receive 15 days' notice of a permanency planning hearing. A parent does not waive his or her right to the statutorily required notice when the parent objects at the beginning of the permanency planning hearing that she did not receive adequate notice. In this case, the court should not have held the permanency planning hearing after the respondent mother objected to the hearing on the basis that that she received notice only 8 days before the hearing (which was previously scheduled as a review hearing) was changed to a permanency planning review hearing.

Permanency Planning Hearing: Evidence

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Appeal on this issue dismissed

- Respondent mother's challenge that the court's findings of fact were not supported by competent evidence was not preserved for appellate review. No objection or motion to strike was made at the permanency planning review (PPR) hearing to the court's consideration of reports and documents that were not formally offered into evidence.
- Had the issue been preserved, there was no error because "a court holding a PPR hearing is free to consider written reports or other documentary evidence without a formal proffer or admission into evidence as exhibits." *In re* J.H., 780 S.E. 2d 228, 239 (2015).

Permanency Planning Hearing: Reasonable Efforts, Reunification, Evidence, Findings

In re C.S.L.B., ___ N.C. App. ___ (July 18, 2017)

Held: Affirmed in part, vacated in part, remanded

- A court is not required to make findings under G.S. 7B-906.2(b) when it does not eliminate reunification as a concurrent permanent plan. The court did not eliminate reunification as a permanent plan when the permanency planning order was a primary plan of guardianship with a relative, which was ordered, and secondary plan of reunification.

In re K.L., ___ N.C. App. ___ (July 5, 2017)

Held: **Reversed in part, vacated in part, remanded**

- Procedural History and Facts: This is a second appeal by respondent mother in this neglect action challenging a permanency planning order of custody to the children's adult sibling and the elimination of reasonable efforts for reunification. In the first appeal, the court of appeals affirmed the January 2015 permanency planning order and found it was not an order ceasing reunification efforts as the order specifically directed DSS to continue efforts to eliminate the need for the child's placement outside of the home and continue efforts to reunify the child with the respondent mother. The case was remanded to the trial court for a specific visitation

schedule. No permanency planning hearings were held after the December 2014 hearing that resulted in the January 2015 order. Reasonable efforts were not provided by DSS after the January 2015 order. On remand, after a permanency planning hearing, a permanency planning order was entered in May 2016. That 2016 order included a visitation schedule as required by the remand and findings that reasonable efforts to reunify the family would be futile and that the permanent plan was previously achieved, and it continued custody with the child's adult sibling. This 2016 order is the subject of this second appeal.

- The trial court must comply with statutory requirements set forth in the Juvenile Code. For permanency planning, several statutes in G.S. 7B apply that require the court to make certain inquiries and findings that would support the conclusion to eliminate reunification as a permanent plan: G.S. 7B-906.1(d), (e), (i) and 7B-906.2(b), (c), (d). "The court's findings do not satisfy the multiple layers of inquiry and conclusions as are required by the Juvenile Code."
    - To remove reunification as a concurrent permanent plan, there must be evidence to support the findings of fact to allow the court's conclusion to eliminate reunification efforts. The court found reasonable efforts would be futile or inconsistent with the juvenile's health and safety [G.S. 7B-906.1(d)(3); 7B-906.2(b)] but there was no evidence in the record to support the finding. Incorporating by reference findings contained in previous orders are not sufficient findings of fact. A finding of fact (1) requires a specific statement on which the rights of parties are determined, (2) must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment, (3) must show that the trial court has reviewed the evidence and made the finding through a process of logical reasoning, and (4) must consist of more than a recitation of allegations in the petition. Without evidence or proper findings, the conclusion to cease reunification efforts does not satisfy the statutory requirements.
    - The court found there was no substantial change in circumstances since the January 2015 order. A substantial change in circumstances is the legal test to review a modification of custody in a chapter 50 civil custody action between two parties and may be required in a motion to modify or vacate an order under G.S. 7B-1000. It is an unnecessary and improper test at a G.S. 7B-906.1 permanency planning hearing. G.S. 7B-906.1(i) authorizes the court at a permanency planning hearing to maintain or order a different placement for the child, appoint a guardian, or order any disposition authorized by G.S. 7B-903 that is found to be in the child's best interests.
    - G.S. 7B-906.2(d) requires the court to make specific findings to each of the four enumerated factors that demonstrate a parent's lack of success. One finding that was made prior to the first appeal was that the mother completed many court ordered services. There were no other statutorily required findings about the mother's progress or lack thereof with respect to the permanent plan or cooperation (or lack thereof) with DSS.
    - G.S. 7B-906.2(c) requires in every subsequent [to the first] permanency planning hearing that the court make written findings about the efforts DSS has made toward achieving the primary and secondary permanent plans. No findings were made on whether DSS made reasonable efforts to reunify the children with their mother, which was one of the permanent plans. The evidence showed no efforts were provided since the January 2015 order and appeal and that DSS "disregarded its statutory duty to 'finalize primary and secondary' plans until relieved by the trial court."

In re J.T., ___ N.C. App. ___ (February 21, 2017)

Held: Vacate and remand for further proceedings

- When a court fails to hear evidence at a permanency planning hearing, its findings of fact are not support by competent evidence. A court's incorporation by reference of court reports (the DSS report and the GAL report) without any oral testimony from a witness are insufficient to support findings of fact. Statements by attorneys are not evidence.
- When an order ceasing reunification efforts contains insufficient findings of the criteria required to cease reasonable efforts, a termination of parental rights (TPR) order may cure those defects by making the required findings in the TPR order. Here, the TRP order failed to include the findings required to cease reunification. Both orders must be vacated.

In re P.T.W., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- A review of an order ceasing reasonable efforts for reunification is based on
    - whether the trial court made appropriate findings of fact,
    - whether those findings are based on competent evidence,
    - whether the findings support the court's conclusion, and
    - whether the court abused its discretion with respect to the disposition.
- Competent evidence is evidence that a reasonable mind accepts as adequate to support the finding. The department of social services report, which was submitted to the trial court and admitted into evidence without objection at the cease reunification hearing, is competent evidence. In addition, the department social worker's testimony is competent evidence.
- Based on the contents of the department's report and the social worker's testimony, the court's findings of the mother being substantiated for sexual abuse of another one of her children who was not the subject of this action, her failure to comply with the case plan, her failure to demonstrate sustained parenting improvements, her lack of awareness about her history of domestic violence with the child's father, and her failure to maintain stable housing were supported by competent evidence.
- The court's finding that the respondent mother did not reengage in therapy when she moved to another county were not supported by competent evidence as the only evidence introduced on that issue was the mother's testimony of her efforts to continue with therapy and her attendance at one session. However, the remaining facts that were found by the court support the court's ultimate decision to cease reasonable efforts for reunification.
- The facts and conclusions must be based on evidence that is *presented at the hearing* that results in an order ceasing reasonable efforts (emphasis in original). The court's finding that the mother failed to demonstrate parenting improvements were supported by the department's report and social worker's testimony, both of which were introduced at the hearing. Although on appeal, respondent mother pointed to prior court orders that indicated she was making progress with her parenting, those orders and examples of her improved parenting were not offered at the hearing that resulted in the order ceasing reasonable efforts for reunification.
    - *Author's Note: This case was decided under G.S. 7B-507, which was amended effective October 1, 2015. Additional Note: In its recitation of the procedural history of the dependency and subsequent termination of parental rights actions, this opinion appears to use the generic term "review hearing" for each type of hearing that occurred in the*

actions (the adjudicatory, initial dispositional, review, permanency planning and termination of parental rights hearings).

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Vacate in part and remand

- *Citing In re* Shue, 311 N.C. 586 (1984), the essential aim of dispositional and review hearings is to reunite a child (who has been removed from his or her parent's care) with his or her parents. As a result, the Juvenile Code limits when a court may order that reasonable efforts to reunify a parent with his or her child is not required.
- The court's authority to order that reasonable efforts for reunification are not required because of any of the factors enumerated in G.S. 7B-901(c) is limited to the initial dispositional hearing and order only. G.S. 7B-901(c) factors do not apply to review or permanency planning hearings and orders.
    - *Author's Note*: *See In re* G.T., ___ N.C. App. ___ (October 18, 2016), which held that G.S. 7B-901(c) does not authorize the court to make a determination in the initial dispositional hearing that a factor exists but instead requires the court to find that there was a prior order that determined one of the factors enumerated in G.S. 7B-901(c) exists.
- At permanency planning, if the initial dispositional order did not order reasonable efforts are not required pursuant to a G.S. 7B-901(c) factor, a court may only order reunification is not a primary or second permanent plan (and thereby relieve the department of providing reasonable efforts to reunify a parent with his/her child) after making an ultimate finding of fact designated in G.S. 7B-906.2(b): "…reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." Although the court made evidentiary findings of fact pursuant to G.S. 7B-906.2(d) about the mother's lack of progress, it did not make the required ultimate finding of fact.
- The court's finding under G.S. 7B-906.1(d)(3) that efforts to reunite the juvenile with his or her parent would clearly be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable time requires the court to consider a permanent plan for the child. If this finding is made at a review hearing, it "trigger[s] the court's duty to commence the permanent planning process as early as the initial 90-day review hearing." G.S. 7B-906.1(d) does not authorize an order ceasing reunification efforts.
    - *Author's Note*: the language of the finding specified in G.S. 7B-906.1(d)(3) is based on amendments made by S.L. 2016-94, effective July 1, 2016, which are referenced in FN 4 of the published opinion
    - *Author's Second Note*: If the review hearing has not be designated as a permanency planning hearing and 15 days' notice of a permanency planning hearing was not provided to the parent, the court may not proceed to permanency planning after making the 7B-906.1(d)(3) finding at the review hearing if the parent objects. The court will have to schedule a subsequent permanency planning hearing that provides the statutorily required notice. *See* G.S. 7B-906.1(b); *In re* K.C., ___ N.C. App. ___ (August 2, 2016) which was published after initially being unpublished (note that Westlaw does not reflect the change to it being a published opinion).

Permanent Plan: Acting Inconsistently with Parental Rights, Verification of Adequate Resources/Legal Significance

In re K.L., ___ N.C. App. ___ (July 5, 2017)

Held: **Reversed in part, vacated in part, remanded**

- To award custody or guardianship to a nonparent, the court must address whether respondent is unfit as a parent or acted inconsistently with her parental rights, and those findings must be supported by clear and convincing evidence. The court's conclusion that the respondent mother was unfit and acted inconsistently with her parental rights is unsupported by any finding of fact.

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated and Remanded

- In both Chapter 50 custody and 7B juvenile actions, "[b]ecause the decision to remove a child from a natural parent's custody 'must not be lightly undertaken[,]… [the] determination that a parent's conduct is inconsistent with… her constitutionally protected status must be supported by clear and convincing evidence." [citing Adams v. Tessener, 354 N.C. 57, 63 (2001)]. The court must make clear that it applied the clear and convincing standard when determining whether the parent's conduct has been inconsistent with her constitutionally-protected status.

In re C.P., ___ N.C. App. ___ (March 7, 2017)

Held: Affirmed

- The Due Process clause protects a parent's paramount constitutional right to custody and control of his/her child. Before applying the best interests of the child standard when determining (at a permanency planning hearing) custody or guardianship to a non-parent, the court must find that the parent is unfit or has acted inconsistently with his/her constitutionally protected status. However, if a parent does not raise the right to that determination before the trial court, he/she waives the right to that determination.
- The court's conclusion that guardianship was in the child's best interest is supported by the findings that were based on competent evidence, specifically the social worker's testimony addressing respondent's failure to complete the domestic violence program, three years after the children were removed because of domestic violence. Although there were findings of respondent's progress, those findings should not be viewed in isolation but must be considered as part of the totality of all the court's findings. The findings regarding respondent's progress reflect the court's consideration of her progress when making its determination. There was no abuse in discretion in determining that guardianship with the child's caretaker was in the child's best interests.
- Before the court orders guardianship, it must verify the proposed guardian (1) understands the legal significance of the appointment and (2) has adequate resources to appropriately care for the child. There are no specific findings that must be made; the record must contain competent evidence for both components of the verification. Although the proposed guardian's testimony of "yes" answers in response to the court's questions would not have been sufficient evidence of his resources or ability to care for the child, the record also included reports from the department and the child's GAL. Those reports established the child was living in a stable, approved home with his own bedroom, toys, and tv; appeared happy and safe; responded

positively to the proposed guardian's structure and consistency; transitioned to public school, had a decrease in prior behavioral issues; and attended his many medical, dental, and therapy appointments. Although the record showed a short period were the proposed guardian had been laid off, there was evidence that the GAL believed the proposed guardian was now working, and the proposed guardian's application for TANF (welfare) benefits during his brief period of unemployment demonstrated his appreciation of the financial burden of caring for the child and his intent to prepare for it. The findings also included the motion and order allowing the proposed guardian to intervene, which addressed his consistent provision of food, clothing, and necessities to the child in the past. The court's determination that the proposed guardian's resources were adequate are satisfied by the evidence of the proposed guardian's long close relationship with the child, willingness to intervene in the action, and the undisputed evidence of his demonstrated ability to provide for the child.

- *Author's Note*: G.S. 7B-401.1(h) was amended in July 2016, removing the right of a caretaker to intervene in an A/N/D proceeding.

In re R.P., ___ N.C. App. ___ (March 21, 2017)

Held: Reverse and remand

- Before ordering guardianship to a nonparent as a permanent plan, the court must find by clear and convincing evidence that the respondent parent was unfit or acted inconsistently with his constitutionally protected status as a parent. This finding is required even when a juvenile has previously been adjudicated neglected and dependent. Here, the order made no reference to the respondent father's constitutionally protected status as a parent.
- Although a respondent parent can waive the required findings regarding his/her constitutionally protected parental status when the issue is not raised before the trial court, the respondent father did not waive those findings here. Procedurally, there had been a permanency planning hearing the month before, where the court determined that the concurrent permanent plans were guardianship and reunification and that it would proceed with the permanent plan of guardianship at the next hearing. Guardianship was not ordered until the next permanency planning hearing, where the evidence at that hearing was limited to visitation only. As a result, the respondent father was not offered the opportunity at that hearing to raise an objection on constitutional grounds and, therefore, did not waive his right to the required findings.

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Vacate in part and remand

- Although specific findings are not required by G.S. 7B-906.1(j), the court must verify that a non-parent who will obtain custody (or guardianship) of the child understands the legal significance of the placement and will have adequate resources to care for the child.
- There was competent evidence in the record that showed the aunt, who was obtaining custody of the child, understood the legal significance of a custody order. The evidence included the department social worker's report and information from the child's guardian ad litem, the department social worker, and the aunt.
- Evidence that a child has been successfully maintained in the home for several months is not sufficient evidence to verify that there are adequate resources. The court must make an independent determination that the resources available to the potential custodian are adequate

to care for the child. The following evidence was insufficient: the child was successfully maintained in the aunt's home for ten months and had his own room; the aunt was unemployed but receiving unemployment benefits and was looking for work; the guardian ad litem thought the aunt needed more financial support to care for the child; and other relatives were providing additional support and assistance to care for the child.

In re K.B., ___ N.C. App. ___ (September 6, 2016)

Held: Vacated and Remanded for further proceedings

- G.S. 7B-600 and -906.1(j) requires the court verify that a proposed guardian understand the legal significance of the guardianship and has adequate resources to appropriately care for the child. The verification does not require specific findings but there must be competent evidence in the record to support the findings the court does make as part of the verification requirements. A court cannot make a determination of a proposed guardian's adequacy of resources without evidence of the resources.
- Here, the evidence was not sufficient to support the court's determination that the proposed guardian's resources were adequate. There was evidence of the proposed guardian's source of household income (her husband worked and she received disability) but no evidence of the amount of the household income. There was evidence that the guardian lived in a 4 bedroom house and that the children's placement with her was approved through the Intestate Compact for Children's Placement (ICPC) process, but there was no evidence of the value of the home, amount of any mortgage, debt, or monthly expenses.

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Affirm in part (adequate resources); vacate in part and remand (legal significance)

- G.S. 7B-906.1(j) requires that the court verify a non-parent who is being awarded custody (or guardianship) of a child (1) has adequate resources to appropriately care for the child and (2) understands the legal significance of the placement.
- Regarding adequate resources, the court must make this determination based on competent evidence that is not merely conclusory, indirect, or inferential of the guardian's resources. The court's determination that the child's paternal cousins (a married couple) had sufficient resources to care for the child was supported by findings of fact, based on competent evidence, that described (1) the cousin's home, child's bedroom, and child's play areas; (2) the cousins' employment; (3) the type of care the child receives, including that the child's medical and developmental needs were being met and that he "lacks for nothing" in terms of toys; and (4) the activities the family engages in, such as vacations and a birthday party on the child's first birthday.
- The court must base its determination that a nonparent understands the legal significance of a placement that awards custody (or guardianship) to him/her must be based on competent evidence for each potential person who the court is considering awarding custody. Citing *In re* L.M., 767 S.E.2d 430 (2014), sufficient evidence may include (1) testimony from the potential custodian/guardian, (2) a signed guardianship agreement that acknowledges an understanding of the legal significance, or (3) social worker testimony. There was no evidence of either potential custodians (a married couple) understanding of the legal significance of the placement.

The husband did not testify; the wife's testimony did not include her understanding of the significance of the legal relationship; and the DSS report did not address the custodians' understanding of the significance of the legal relationship.

Guardianship: Parental Rights Retained

In re M.B., ___N.C. App. ___ (May 16, 2017)

Held: Affirmed

- G.S. 7B-906.1(e) provides that at a permanency planning hearing where the child is not placed with a parent, the court shall consider the following criteria and make written findings of those that are relevant. The factor in (e) addresses whether guardianship or custody with a suitable person who is not the parent should be established and if so "the rights and responsibilities that should remain with the parents."
- There is no requirement that the court make findings that constitute individual decisions on whether a parent retains every right and responsibility that he or she had before the order granting custody or guardianship. Unless the order provides otherwise, the parent's rights and responsibilities, apart from visitation, are lost when the child is in the custody or guardianship of another person. Respondent mother retained no rights when the order only addressed visitation, which was suspended until she showed her mental health stabilized. The order complied with G.S. 7B-906.1(e)(2).

Permanency Planning Hearing: 7B-906.1 vs. 7B-1000

In re J.S., ___ N.C. App. ___ (Nov. 15, 2016)

Held: Affirmed

- The language of G.S. 7B-1000(a), which addresses a review hearing that authorizes the court to modify or vacate an order based on a change in circumstances or the needs of the juvenile, does not apply to a permanency planning hearing held pursuant to G.S. 7B-906.1. Respondent mother's argument that the court did not comply with G.S. 7B-1000(a) in a 7B-906.1 hearing lacks merit.

Permanency Planning Hearing: Waive Reviews

In re C.S.L.B., ___ N.C. App. ___ (July 18, 2017)

Held: Affirmed in part, vacated in part, remanded

- The court may waive further permanency planning review hearings when it finds by clear and convincing evidence the five factors enumerated in G.S. 7B-906.1(n). The court erred in ceasing further review hearings as the order was silent as to one required factor: that the parties were aware that the matter could be brought into court for review by the filing of a motion or on the court's own motion.
- The court further erred in waiving review hearings and relieving DSS and the child's GAL of further responsibilities when reunification was a secondary plan. When reunification is a secondary plan, respondent-mother continued to have the right to have DSS provide reasonable efforts toward reunification and for the court to evaluate those efforts. See G.S. 7B-906.1(d)-(e) and 7B-906.2(b).

In re K.L., ___ N.C. App. ___ (July 5, 2017)

- **Held**: **Reversed in part, vacated in part, remanded**
- G.S. 7B-906.1(n) authorizes the court to waive permanency planning hearings when each of the five enumerated factors are found by clear, cogent, and convincing evidence. Failure to find all five criteria is reversible error. Here criteria 3 and 4 were not found.

In re T.W., ___ N.C. App. ___ (October 18, 2016)

Held: Remanded

- G.S. 7B-906.1(a) requires that after the initial permanency planning hearing, the court must hold permanency planning hearings at least every six months. It is reversible error for the court to waive these subsequent hearings when it has not made written findings of fact by clear and convincing evidence of each of the factors enumerated in 7B-906.1(n).

In re K.B., ___ N.C. App. ___ (September 6, 2016)

Held: Vacated and Remanded for further proceedings

- G.S. 7B-906.1 requires that after the initial permanency planning hearing, subsequent permanency planning hearings must be held at least every six months to review the progress made in finalizing the plan or make a new plan when necessary. These subsequent hearings may be waived by the court if the court finds by clear and convincing evidence each of the give enumerated factors set forth in G.S. 7B-906.1(n). The court cannot waive permanency planning hearings when the statutory criteria are not satisfied.
    - *Author's note:* This case involves a permanent plan appointing a guardian. G.S. 7B-906.1 criteria do not apply when a child is placed in a parent's custody. Instead, G.S. 7B-906.1(k) relieves a court of the duty to hold periodic permanency planning hearings when custody is with a parent.

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated

- G.S. 7B-906.1(n) authorizes the court to waive permanency planning hearings when it finds each of the five statutory enumerated factors by clear, cogent, and convincing evidence. It is reversible error when the court does not (1) make written findings of each factor or (2) identify the burden of proof it applied on the record (e.g., included in the written order or stated in open court) or the "record when viewed in its entirety clearly reveals the court applied the proper evidentiary standard." [*In re* M.D., 200 N.C. App 35, 39 (2009)]. Here, only one factor was found and it is unknown what standard of proof was used.

7B-911: Orders

In re J.K., ___ N.C. App. ___ (April 18, 2017)

Held: Affirm in part (permanency planning order); reverse and remand custody order

- G.S. 7B-911 provides the procedures for transferring a G.S. 7B abuse, neglect, or dependency proceeding to a Chapter 50 civil action when DSS involvement is no longer needed and the case is properly handled as a custody dispute between private parties. Compliance with G.S. 7B-911

is jurisdictional, and there are several mandatory requirements on the trial court in both the Chapter 50 and 7B actions.

- When there is not a prior civil custody action, the civil custody order entered by the 7B court must instruct the clerk to treat the order as the initiation of a civil custody action, designate the parties to the action, determine the caption for the action, make findings and conclusions supporting a Ch. 50 custody order, and make a finding that there is not a need for continued state intervention through juvenile court. The permanency planning order established the permanent plan as custody with respondent father, ordered DSS and the GAL to close their files, and relieved the attorneys of their duties, indicating the court intended to terminate jurisdiction in the juvenile proceeding. The "custody order" returned physical and legal custody to the respondent father; made findings and conclusions supporting a Ch. 50 custody order; and although not using the exact statutory language, found that continued state intervention was no longer needed. But, the "custody order" but did not include provisions transferring jurisdiction to a Ch. 50 matter. Reverse and remand the "custody order" so that the court may enter a civil custody order and terminate juvenile court jurisdiction in compliance with 7B-911.

Appeal: Order Changing Custody

In re M.M., ___ N.C. App. ___ (August 16, 2016)

Held: Vacated in part and remanded

- G.S. 7B-1001(a) identifies the types of final orders that are entered in an A/N/D proceeding that may be appealed, one of which is "any order, other than a nonsecure custody order, that changes legal custody of juvenile."
- *Citing Peters v. Pennington,* 210 N.C. App. 1 (2011) and *Peterson v. Rogers*, 337 N.C. 397 (1994), legal custody means "the right and responsibility to make decisions with important long-term implications for a child's best interests and welfare" and includes a "parent's prerogative to determine with whom their children shall associate." An order that continues the previous order of joint legal and physical custody of the child to the father and mother but adds a no contact provision between the child and her maternal grandfather is an order that changes legal custody of a juvenile. That order may be appealed pursuant to G.S. 7B-1001(a)(4).

Appeal: Clerical Error

In re J.K., ___ N.C. App. ___ (April 18, 2017)

Held: Remand for clerical error

- In an order that contained findings of fact and conclusions of law supporting custody of the child with respondent father to achieve the primary permanent plan of reunification with the respondent father, two other conclusions of law that stated returning the child to the "respondents" (plural) would be contrary to the child's welfare were clerical errors. Clerical mistakes in an order arise from a minor mistake or oversight and not from judicial reasoning.
- When a clerical error is discovered on appeal, remand to the trial court for correction is appropriate so that the record speaks the truth.

Interstate Compact on the Placement of Children (ICPC): Moot

In re M.B., ___N.C. App. ___ (May 16, 2017)

Held: Moot

- Facts: At a permanency planning hearing that occurred as a result of a remand by the court of appeals for the court to consider further evidence of the proposed guardian's financial ability to care for the child, the court appointed guardianship to the paternal great-grandmother, whom the child had been living with continuously since June 2014. The court found the child and guardian lived in Ohio. Within one month of the entry of the permanency planning order, the child and guardian moved back to North Carolina. Respondent mother appealed requesting a remand for further proceedings consistent with the ICPC. The respondent mother served the guardian the notice of appeal at the guardian's North Carolina address.
- The guardian's return to North Carolina renders the issue of the applicability of the ICPC and respondent mother's appeal moot: "An issue is moot when a determination is sought on a matter, which when rendered, cannot have any practical effect on the existing controversy."

Appeal: Moot

In re J.S., ___ N.C. App. ___ (Nov. 15, 2016)

- Facts: At a permanency planning hearing held pursuant to G.S. 7B-906.1, the permanent plan remained reunification, with legal and physical custody of the children continuing to be awarded to the children's father. Visitation for the mother was reduced. The court entered a separate G.S. Chapter 50 civil custody order and terminated its jurisdiction in the G.S. Chapter 7B proceeding pursuant to G.S. 7B-911. Respondent mother appealed the permanency planning order only.
- Respondent mother's failure to appeal the civil custody order pursuant to G.S. Chapter 50 and the 7B-911 order that terminated the court's jurisdiction moots the effect of the mother's challenge to the permanency planning order. The two orders that were not appealed would still be in effect.

Legislative Changes: Pending Cases (Statutory Construction)

In re E.M., ___ N.C. App. ___ (August 16, 2016)

Held: Affirm in part

- Changes made to the Juvenile Code by S.L. 2015-135 became effective for actions filed or pending on or after October 1, 2015. Pending is defined as remaining undecided or awaiting a decision. A permanency planning review (PPR) is pending when the PPR hearing is held before October 1, 2015 but an order isn't entered until after October 1, 2015. A new statute, G.S. 7B-906.2 requires the court to consider certain criteria at the permanency planning hearing. The court was not required to consider in its order the new criteria that became effective after the PPR hearing where the court heard evidence regarding the permanent plan. Such a requirement would be absurd or illogical.

Responsible Individual List

Subject Matter Jurisdiction, Stay, Findings/Conclusions

In re Patron, ___ N.C. App. ___ (November 15, 2016)

Held: Affirmed

- Facts: Respondent is the stepmother (a caretaker) to the juvenile, who when he was 17 years old, she hit in the back of the head with a coffee cup that required 4 staples to close the wound. The county department substantiated her for abusing the juvenile and notified her of its intent to place her on the Responsible Individual List (RIL). Respondent requested a judicial review but the hearing was not scheduled until after the juvenile turned 18 years old.
- The Juvenile Code, specifically G.S. 7B-200(a)(9), 7B-311, and 7B-323, confers exclusive original jurisdiction over actions involving the Responsible Individuals List to the district court. The district court does not lose jurisdiction because the juvenile turned 18 prior to the hearing on the petition for judicial review. G.S. 7B-323(e) authorizes the court to conduct the review hearing "at any time," which includes after the juvenile has reached the age of majority. The relevant inquiry is whether the abuse or serious neglect occurred when the juvenile was under 18 years old. The evidence introduced at the hearing shows the juvenile was 17 years old when the abuse occurred.
- G.S. 7B-324(b) gives the court discretion when determining whether it will stay the judicial review after a motion to stay the proceeding because of a pending criminal action resulting from the same incident was filed by the respondent. There was no abuse of discretion in denying the motion to stay. Referring to Rule 52 of the Rules of Civil Procedure, the court was not required to make findings of fact and conclusions of law in its order denying the motion to stay since the respondent did not request that the court make findings of fact.
- The court's findings were supported by competent evidence in the record. After finding that a juvenile was abused by the respondent, who is a responsible individual, the court is mandated to conclude as a matter of law that the respondent be placed on the RIL. G.S. 7B-311(b)(2).

Termination of Parental Rights (TPR)

Subject Matter Jurisdiction: 7B-1101

In re J.M., ___ N.C. App. ___ (October 4, 2016)

Held: Vacated

- G.S. 7B-1101 establishes that the district court has exclusive original jurisdiction to hear a termination of parental rights action to "any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion." The court lacked subject matter jurisdiction as none of the 3 prongs were satisfied. The child resided in Wake County with his court appointed guardians after the court ordered a permanent plan of guardianship. The guardians filed the TPR petition in Durham County, but the Durham County Department no longer had custody of the child as a result of the guardianship order to the petitioners. There was no evidence the child was found in Durham County when the TPR petition was filed in the district court in Durham County.

Subject Matter Jurisdiction: Verified Motion

In re E.B., ___ N.C. App. ___ (October 4, 2016)

Held: Affirmed

- The trial court had subject matter jurisdiction to terminate respondent mother's parental rights after the child's guardian ad litem filed a verified motion to terminate parental rights. Respondent mother's counsel did not receive a copy of the verification page of the motion; however, the record showed the court order included in its findings of fact there was a verified motion filed in the action. In addition, the GAL was permitted to amend the record on appeal to add an affidavit from the Deputy Clerk of Court stating the verification page was attached to the GAL's motion but that the verification page was inadvertently retained by the clerk's office. A file stamped verified motion was attached to the Deputy Clerk's affidavit.

Appointment of GAL for Child

In re P.T.W., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- Under the Juvenile Code, the court must appoint a guardian ad litem (GAL) to represent the child when a petition is filed by the county department that alleges the juvenile is abused or neglected [G.S. 7B-601(a)] or in a termination of parental rights (TPR) action where the respondent parent files an answer denying a material allegation in the petition or motion [G.S. 7B-1108(b)]. When a GAL appointment is not statutorily required in a TPR, the court may exercise its discretion and appoint a GAL to represent the child's best interests [G.S. 7B-1108(c)].
- In this TPR action, the respondent parent did not file an answer. There was an underlying dependency action, where the court had not appointed a GAL to represent the child. The court was not statutorily required to appoint, and did not appoint, a GAL to represent the child's best interests. Respondent did not object to the court's failure to appoint a GAL for the child, and therefore, did not preserve the issue for appeal.
- The trial court acted within its discretion when it did not appoint a GAL to represent the child's best interests in the TPR proceeding. The court heard testimony from the petitioner, respondent, and respondent's family member. There was no evidence that it was unreasonable for the court to determine the child's best interests without the assistance of a GAL.

Motion to Continue

In re C.M.P., ___ N.C. App. ___ (August 1, 2017)

Held: Affirmed

- Facts: Respondent mother received notice of the TPR hearing but was not present for the hearing. Her attorney, who had been representing the mother for three years and expected her to be present for the hearing, sought a motion to continue, which was denied.
- A trial court's decision regarding a motion to continue is discretionary. Continuances are generally disfavored; the burden is on the party seeking the continuance; and G.S. 7B-803 sets forth the standard to continue.

- Author's Note: Although not cited, G.S. 7B-1109(d) explicitly addresses the standard to continue a TPR.

- If a motion to continue is based on a constitutional right, the motion raises a question of law that is reviewable on appeal. In this case, respondent argues her constitutional right to due process and effective assistance of a counsel were affected. The reasons presented for a continuance are important when considering whether the request implicates a constitutional right. Here, only one ground was raised as a reason to continue the hearing, which was respondent's unexplained absence. Respondent did not preserve the issue of whether the motion to continue violated her constitutional right to effective assistance of counsel.
- Previous court holdings have held that a parent's due process rights are not violated at a TPR hearing where the parent is not present. As such, the motion to continue was not based on a constitutional right. There was no abuse of discretion in denying the motion. The court conducted a full hearing, where respondent's attorney participated fully, including objecting, cross examining witnesses, and presenting a closing argument. The hearing was recorded. Respondent was not prejudiced.

Ineffective Assistance of Counsel

In re M.Z.M., ___ N.C. App. ___ (Dec. 20, 2016)

Held: Affirm

- Reviewing prior published opinions, this opinion discusses ineffective assistance of counsel. Indigent parents in a termination of parental rights proceeding have a statutory right to effective assistance of counsel. A claim of ineffective assistance of counsel requires the respondent parent show that counsel's performance was deficient; the deficiency was so serious as to deprive the represented party of a fair hearing; and the respondent was prejudiced by counsel's alleged deficient performance. Attorneys have a responsibility to advocate on the behalf of their clients. A counsel's silence or lack of positive advocacy could be part of a strategy and trial tactics. When reviewing the counsel's performance, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."
- In this case respondent mother's counsel did not cross examine either of the two witnesses called by the petitioner (the mother and county department social worker) or introduce any evidence or arguments on behalf of respondent mother during the adjudicatory phase of the hearing that addressed the 3 alleged grounds (G.S. 7B-1111(a)(1) neglect, (a)(7) abandonment, and (a)(2) willfully failing to correct the conditions). Instead, respondent's counsel waited until the dispositional phase of the hearing to introduce evidence (the mother's testimony) and offer a "thoughtful and reasoned argument" against the termination of parental rights based on it being contrary to the children's best interests, which addressed the importance of maintaining a relationship between the children and their mother. Counsel's silence during the adjudicatory phase appears to be a tactical decision to concede the grounds alleged. Respondent-mother has failed to show prejudice or that counsel's conduct undermined the fundamental fairness of the proceeding. She was not denied effective assistance of counsel.

Evidence: Expert Witness

In re K.G.W., ___ N.C. App. ___ (October 18, 2016)

Held: Affirmed

- After an offer of proof, the court sustained the department's and guardian ad litem's objection to the testimony of respondent mother's expert witness in the disposition (or best interests of the child) stage of a termination of parental rights hearing. The offered witness is a clinical psychologist who had no contact with or observation of the child and lacked experience in abuse, neglect, or dependency proceedings. The court determined the offered expert witness did not have testimony that would assist it as the trier of fact because of the expert's lack of familiarity with the child and with juvenile proceedings. The court, as trier of fact, has discretion to determine the credibility and weight to give to evidence, and this court's determination that the testimony would not be helpful did not deny respondent mother's rights.

Evidence: Quash Subpoena/Motion in Limine

In re A.H., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- Facts: Respondent mother subpoenaed her 13-year old son, who suffered from significant mental health issues and who was the subject of the action, to appear and testify at the termination of parental rights (TPR) hearing. The child's GAL filed a motion to quash. At the hearing on the motion to quash, respondent mother would not specify whether the subpoena was for testimony at the adjudicatory hearing, the dispositional hearing, or both. Respondent mother and the child's therapist testified at the hearing on the motion to quash. Respondent mother testified to what she thought her child would testify to, including his experience living with her versus living in foster care, and that she understood his testimony could be taken remotely, in chambers, or outside of the courtroom. The child's therapist testified that the child's testifying could result in emotional or behavioral regression and increased anxiety. The court granted the motion to quash. At a later hearing, the court terminated respondent mother's parental rights. Respondent mother appealed the orders quashing the subpoena and terminating her parental rights (TPR), arguing that the court abused its discretion. The appeal of the TPR focused on the dispositional stage, where the court concluded the TPR was in the child's best interests. Based on the mother's arguments on appeal, the appellate court limited its analysis to the dispositional hearing only.
- The standard of review for a court's evidentiary decision is abuse of discretion. The order quashing the subpoena was not an abuse of discretion; it was based on the court's conclusion that compelling the child to testify would be unreasonable and oppressive [G.S. 1A-1, rule 45(c)(3) and (5)] and that the testimony offered limited probative value and would be detrimental to the child's well-being. The court further concluded the child's best interests is the paramount concern. The conclusions were based on the court's findings that included the child had little contact with his mother, the child was agitated for days after speaking with his mother about her wanting him to testify, and that he would likely experience significant emotional distress and regression. These conclusions and findings demonstrate that the court considered the relevancy of the child's testimony -- for example, the lack of probative value of the child's

testimony and the G.S. 7B-1110(a) best interests of the child factor addressing the bond between the parent and child. The court's balancing of the relevance of the child's testimony and the detrimental effect it would have on the child met the purpose of the Juvenile Code to assure fairness and equality and provide the mother with a meaningful opportunity to participate in the hearing.

- *Quoting State v. Simpson*, 314 N.C. 359, 370 (1985), "in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record…[T]he essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred."
- The exclusion of the mother's testimony of what her child would have testified to as an offer of proof was not an abuse of discretion because the essential substance of the child's testimony the mother sought to elicit had previously been made known to the court in the hearing on the motion to quash. At that hearing, respondent mother represented to the court a "specific forecast" of her son's testimony. *Citing State v. Martin*, ___ N.C. App. ___, 774 S.E.2d 330, 333 (2015), a "specific forecast" typically includes
    - the substance of the testimony,
    - the basis of the witness' knowledge,
    - the basis of the attorney's knowledge of the testimony, and
    - the attorney's purpose for offering it.

  Respondent mother asserted (1) her son would testify to his life with her, his life in foster care, the difference between them, his experience being institutionalized and hospitalized while in DSS custody, and noncompliance with his IEP; (2) that the basis of her son's knowledge was his own personal experience; (3) her own knowledge of her son's testimony; and (4) the purpose for offering the testimony was to have her son present his wants and needs to the court. Because respondent mother provided a specific forecast of her son's testimony, the informal offer of proof was sufficient to establish the essential element or substance of the excluded testimony.
- A better practice regarding an offer of proof is (1) the attorney should announce to the court his/her intention to make an offer of proof before eliciting any testimony about the substance and (2) the trial court allows the attorney to proceed with a formal offer of proof.

<u>Motion in Limine</u>

- <u>Facts</u>: Prior to the TPR hearing, respondent mother (without her assistance of counsel) filed with the court a "parent report" and "green folder" that consisted of several documents. The child's GAL filed a motion in limine to strike the documents from the court file. The motion was granted. Respondent mother appeals.
- Respondent mother was not prevented at the TPR hearing from seeking to properly introduce into evidence the documents that had been filed with the court and stricken from the court file before the TPR hearing. A court's ruling on a motion in limine is preliminary in nature, and a court may reconsider the admissibility of challenged evidence based on other evidence that is presented at trial. To preserve the underlying evidentiary issue, the party must attempt to

introduce the evidence at trial. By failing to do so, respondent mother did not preserve this issue for appeal.

Grounds: Findings, Circumstances at Time of Hearing

In re A.B., ___ N.C. App. ___ (April 18, 2017)

Held: Vacate and remand for additional findings

- Facts: The children had been adjudicated neglected and dependent, in part based on an injurious environment and improper supervision created by the parents' substance abuse and domestic violence. Respondent mother's case plan involved obtaining a substance abuse evaluation and following any recommendations, random drug screens, completing a court-approved parenting course and demonstrating learned skills during visitations, attend visitation and the child's medical and school appointments, maintain suitable housing for at least 6 months, and maintain employment to be able to financially provide for the children for 4-6 months. After two years, the concurrent permanent plan was changed from reunification with mother and adoption to adoption and guardianship. A TPR was granted on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children's removal 3 years earlier.
- The findings of fact do not support either ground.
    - G.S. 7B-1111(a)(1) Neglect. When the child has been placed outside of the home for a significant period of time, a TPR based on neglect must be based on findings and evidence of prior neglect and the probability of repetition of neglect. The court must consider any evidence of changed conditions since the prior neglect adjudication and determine the parent's fitness to care for the child at the time of the termination hearing. *See In re Ballard*, 311 N.C. 708 (1984).
    - G.S. 7B-1111(a)(2) Willfully failing to correct conditions. Willfulness does not require a finding of fault but requires a failure to exhibit reasonable progress or a positive response toward DSS efforts, and failure to fully satisfy all elements of the case plan is not the equivalent of a lack of reasonable progress. *Citing In re A.C.F.*, 176 N.C. App. 520, 528 (2006), "the nature and extent of the parent's reasonable progress must be evaluated for *the duration leading up to the hearing on the motion or petition to terminate parental rights*." (emphasis in original)
    - The court made findings that summarize the respondent mother's progress or lack thereof on specific dates in the past (based on past hearings) and did not merely find certain findings were made at prior hearings. But, the court made no findings of the mother's conduct or circumstances after the prior review hearing and up to the termination of parental rights hearing.
    - An ultimate finding of fact that supports the ground must be supported by a process of a logical reasoning from adequate evidentiary facts found by the court. The facts found by the court do not support the ultimate finding. Evidence shows the respondent mother's progress improved over time with (1) negative drug screen after her 3rd round of treatment, (2) her eventual separation from respondent father and obtaining a DVPO that remains in effect, (2) working full-time and being current on child support, (4) completing the only ordered parenting classes from 2 years before, and (5) regularly attending visits and being appropriate with 3 of the 4 children. There is conflicting

material evidence on willfulness and reasonable progress (from DSS and respondent) that were not resolved by the court's order, such as her willingness to share her availability for random drug screens and the reason for not having utilities or providing information for a background check on an adult who lives in her home.

Ground: Neglect

In re C.M.P., ___ N.C. App. ___ (August 1, 2017)

Held: Affirmed

- G.S. 7B-1111(a)(1) authorizes the termination of parental rights upon a finding that the parent has neglected the child as defined by G.S. 7B-101(15). The ground is based upon evidence showing neglect at the time of the termination hearing. When a child has been removed from his/her parent's custody, the court may consider prior neglect by that parent and any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect if the child were returned to his or her parent. "Neglect exists where the parent has failed in the past to meet the child's physical and economic needs and it appears that the parent will not, or cannot, correct those inadequate conditions within a reasonable time." *In re J.H.K.*, 215 N.C. App. 364, 369 (2011). Failure to make progress on a case plan is indicative of a likelihood of future neglect.
- The findings of fact, based on competent evidence, support the conclusion of law that neglect (including the likelihood of a repetition of neglect) exists. The findings include (1) the children's removal based on domestic violence, unstable housing and employment, and inappropriate supervision; (2) the children's adjudication as neglected and dependent; (3) respondent's case plan requiring parenting education, safe and stable housing and employment, and completion of domestic violence classes resulting in a change in respondent's behaviors; and (4) respondent's lack of progress in her case plan as demonstrated by continuing domestic violence incidents, inconsistent attendance at the domestic violence program and ultimate discharge from that program, unstable housing, and although employed, no stable employment.
- Although the court found respondent acted inconsistently with her constitutional parental rights, this finding is not required to terminate parental rights on the ground of neglect.
- *Concurrence, Murphy, J.*: An unchallenged finding of fact is conclusive and binding on appeal. The finding of fact that the children remain in foster care and that there is a high probability of a repetition of neglect due to the respondent's ongoing struggles is unchallenged and therefore binding on appeal.

In re L.L.O., ___ N.C. App. ___ (April 4, 2017)

Held: Vacated and remanded

- When the child has not been in the parent's custody for a significant period of time before the TPR hearing and the ground is neglect, the trial court must consider the history of neglect and the probability of a repetition of neglect.
- The child was adjudicated neglected based the failure of her parents to provide necessary medical and remedial care. The court's findings that address the parents' lack of employment, failure to provide financial assistance to the child, missed and failed drug screens, irregular contact with the child, and insufficient housing do not "address or mention the probability of

repetition of neglect or failure to provide necessary medical or remedial treatment to" the child. An order that lacks the required finding of fact that the parent was likely to repeat the neglect does not establish the ground for termination and is not harmless error.

In re C.L.S., ___ N.C. ___ (Sept. 23, 2016)

Held: Affirmed per curium *In re* C.L.S., ___ N.C. App. ___ (January 16, 2016)

- *Citing* previous published opinions, "incarceration alone … does not negate a father's neglect of his child." A parent can show an interest in his child's welfare despite being incarcerated.
- There was sufficient evidence provided through the DSS social worker that the father neglected C.L.S. by failing to provide love, support, affection, and personal contact to the child from the time paternity was established up to the termination hearing. Specifically, after the father's paternity was adjudicated, he stated he did not want to pursue reunification. Later, he expressed an interest in reunification but failed to attend appointments with the social worker. After being incarcerated, he failed to sign the case plan, meet the child, or provide financial support for the child.

Ground: Failure to Correct Conditions

In re L.L.O., ___ N.C. App. ___ (April 4, 2017)

Held: Vacated and remanded

- G.S. 7B-1111(a)(2) requires a two part analysis: (1) the child has willfully been left by the parent in foster care or placement outside the home for over 12 months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal. The order does not contain findings that support the court's conclusion. The order contained inconsistent findings that were not resolved by the court. There was also conflicting evidence that the court findings did not resolve.
- Note: Although the opinion did not address whether the TPR motion provided sufficient notice of an alleged ground because neither respondent raised the issue, it noted that the TPR motion's failure to cite the statutory ground, G.S. 7B-1111(a)(2), or state any of the terms used in the statute, such as "willfully left," "reasonable progress," or "conditions which led to the removal" would put respondent at a disadvantage in preparing for the hearing.

Willful Failure to Pay Reasonable Cost of Care

In re N.X.A., ___ N.C. App. ___ (August 1, 2017)

Held: No Error

- G.S. 7B-1111(a)(3) allows for parental rights to be terminated when the juvenile has been placed in DSS custody or a foster home and the parent for a continuous period of 6 months next preceding the filing of the TPR petition has willfully failed for such period to pay a reasonable portion of the cost of the juvenile's care although financially and physically able to do so. This ground requires that the court make specific findings that a parent was able to pay some amount greater than the amount the parent paid during the relevant time period, but the court is not required to make a finding as to the specific amount of support that would have constituted a "reasonable portion" of the cost of care under the circumstances.
- The findings support the court's conclusion that the ground existed as they make clear the mother had an ability to pay some amount greater than zero, which is what she paid. The

findings included mother's annual income of $10,000 - $13,000, her declaring the children as dependents for tax purposes resulting in a significant tax refund, and her failure to pay any support.

Ground: Dependency

In re A.L.L., ___ N.C. App. ___ (July 5, 2017)

Held: Affirmed

- Clear, cogent, and convincing evidence supported the court's findings and conclusion of dependency. A mental health evaluation conducted a year before the TPR hearing can support a TPR where the "persistence of her personality problems" characterized in the evaluation is "not easily amenable to change" and there is a lack of mental health treatment. In this case, a 2 year old and then 1 year old evaluation that showed the respondent (1) had recurring severe depression and PTSD, which are longstanding mental health conditions, and (2) failed to follow through with treatment recommendations necessary to care for her children safely constitute clear and convincing evidence.

In re D.T.N.A., ___ N.C. App. ___ (Dec. 6, 2016)

Held: Reversed

- To terminate parental rights, the focus of the adjudicatory phase is on "whether the parent's individual conduct satisfied one or more of the statutory grounds which permit termination." (citing In re T.D.P. 164, N.C. App. 287, 288, aff'd per curium, 359 N.C. 405 (2005).
- When adjudicating the ground at **G.S. 7B-1111(a)(6)**, the court must find the parent (1) does not have an ability to provide care or supervision to the child and (2) lacks an available alternative child care arrangements for the child.
    - The evidence does not support the court's findings that the respondent father was incapable of providing proper care and supervision because he failed to comply with his case plan, engaged in poor decision making, was unable to provide for the child's daily needs, and used drugs. Regarding his **drug use**, the court's finding that assumed the respondent's refusal to take drug tests would have resulted in positive results is not supported by the record, which included judicial notice of the court file that contained permanency planning orders where the court found the respondent had negative drug screens as part of his criminal probation and a court report that stated respondent had tested negative for illegal substances. Even if drug use was proven, the petitioner has the burden of showing that abuse prevents the parent from providing proper care and supervision for the child, and there was no such evidence.
    - The finding that the respondent father did not offer **another child care placement** was contradicted by evidence from the case file that showed the respondent father recommended a relative for placement, which was approved but not utilized by the department, at the beginning of the underlying dependency case.

Ground: Willful Abandonment

In re D.E.M., ___ N.C. App. ___ (July 18, 2017)

Held: Affirmed; there is a dissent

- Procedural History and Facts: In 2013, the paternal grandparents (petitioners in the TPR) were awarded primary legal and physical custody of the child through a Chapter 50 civil custody order. Respondent mother was awarded visitation in that custody order. In 2014, petitioners filed and obtained a TPR, which was vacated in 2016 by a court of appeals decision that held the petitioners lacked standing. During the pendency of that appeal, the TPR order was not stayed, and respondent mother did not visit with the child. In 2016, a new TPR petition was filed as the child had continuously resided with the petitioners for two years preceding this TPR petition. The TPR was granted, and respondent mother appeals.
- G.S. 7B-1111(a)(7) authorizes a termination of parental rights on the ground that the parent has willfully abandoned the child for at least 6 consecutive months immediately preceding the filing of the TPR petition or motion. The relevant six month time period is September 2015 to March 2016. Abandonment implies conduct by the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child, and a parent's willful intent is a question of fact.
- Although there was a termination of mother's parental rights on appeal during the relevant time period, that order did not prohibit respondent from contacting the child. The order limited her options but did not prevent her from taking whatever measures possible to show an interest in her child. Respondent mother did not seek a stay of the TPR order that was on appeal, seek visitation with the child, send gifts or letters, or pay support. Similar to an incarcerated parent with limited options, mother's failure to attempt to show affection to her child is evidence of abandonment.
- The court may consider respondent mother's conduct outside the relevant 6 month time period when evaluating the respondent's credibility and intentions. Mother demonstrated almost no interest in the child since she lost custody of him in 2013. She did not contact the petitioners to schedule visitation after her single visit in December 2013 or send any gifts or support for the child despite being employed. Considering this history, the evidence of respondent's ongoing failure to visit, contact, or provide for the child during the relevant time period allows the court to reasonably infer that she acted willfully.

In re D.T.N.A., ___ N.C. App. ___ (Dec. 6, 2016)

Held: Reversed

- To terminate parental rights, the focus of the adjudicatory phase is on "whether the parent's individual conduct satisfied one or more of the statutory grounds which permit termination." (citing *In re* T.D.P. 164, N.C. App. 287, 288, aff'd per curium, 359 N.C. 405 (2005).
- The ground of abandonment (G.S. 7B-1111(a)(7)) requires a showing that the parent engaged in conduct that manifests a willful determination to forego all parental duties and relinquish all claims to the child. The finding that the respondent father failed to provide for a plan for the child or comply with his own case plan is unsupported by evidence. Evidence showed that he did not engage in conduct to willfully forego his parental duties as he entered into and substantially complied with a case plan that included being current in child support, regularly visiting with the child, attending parenting classes, and participating in the child's medical appointments.

In re D.M.O., ___ N.C. App. ___ (December 6, 2016)

Held: Vacate and remand

- G.S. 7B-1111(a)(7) authorizes the termination of a parent's rights (TPR) when the parent has willfully abandoned the child for at least six months immediately preceding the filing of the TPR petition. Willfulness is a question of fact that must be supported by competent evidence and requires purpose and deliberation and not merely an intention to do a thing. Abandonment requires conduct by the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.
- The findings of fact regarding respondent mother's willfulness do not support the conclusion that she willfully abandoned her child during the relevant six month time period. The findings are that the mother failed to visit with the child, attend his sports games, or contact the father (petitioner in this private TPR) during the relevant time period. But the evidence showed respondent mother was incarcerated for all but 33 days of the 180 relevant days and that she struggled with drug addiction and substance abuse and participated in a drug treatment program during the same relevant time period. The court's findings must address the limitations incarceration imposes on a parent to exercise her parental rights (in this case request and exercise visitation, attend sports games, or communicate with the father). There were no findings as to whether respondent mother made the effort or had the ability to exercise any of those rights given her incarceration, addiction issues, and participation in a drug treatment program. There were no findings that if she had the ability to make the effort that she failed to do so.
- Testimony from petitioner-father and respondent-mother regarding her efforts to communicate with the father and contact the child conflict. On remand, the court must resolve the material conflicts in the evidence related to the respondent's willfulness regarding her conduct in order to make a conclusion as to whether willful abandonment exists.

Prior TRP/Safe Home; Incarceration; Findings

In re J.D.A.D., ___ N.C. App. ___ (April 18, 2017)

Held: Reversed

- Facts: Mother is petitioner; father is respondent. Respondent father has been incarcerated since 2015 and is not expected to be released until October 2018. The TPR was granted on the ground set forth at G.S. 7B-1111(a)(9) after the court found the respondent is unable to provide a home for the child but did not find that his failure to establish a safe home was willful.
- G.S. 7B-1111(a)(9) allows a termination of parental rights when two prongs are satisfied by clear, cogent, and convincing evidence:
    - (1) the respondent's parental rights to another child of his/hers have been involuntarily terminated by a court and
    - (2) the parent lacks the ability or willingness to establish a safe home ("safe home" is defined at G.S. 7B-101(19)).
- Although a parent's incarceration is relevant when determining whether the grounds for termination exist, "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision" (*citing In re C.W.* 182 N.C. App. 214, 220 (2007)). The court's only rationale to support the TPR ground was the adjudicatory fact addressing the respondent's incarceration. The finding does not support the conclusion of law that the ground exists.

- Evidence of the Respondent's lack of approval for visitation, minimal financial support for the child, continued use of illegal substances, and failure to obtain necessary substance abuse treatment support the petitioner's claims regarding the respondent's inability to provide a safe home but there were no *adjudicatory findings* of these issues (emphasis added). Some of this evidence was relief upon in disposition but not for adjudication.

Best Interests

In re D.E.M., ___ N.C. App. ___ (July 18, 2017)

Held: Affirmed; there is a dissent regarding grounds

- G.S. 7B-1110(a) requires the court to consider and making findings of relevant best interests of the child factors when determining whether to TPR after a ground has been proved by clear and convincing evidence. One factor is the likelihood of the child's adoption. In this case, the child was placed with petitioners as a result of a Chapter 50 civil custody order and not a pre-adoptive placement pursuant to G.S. Chapter 48. However, G.S. 48-2-301(a) allows for the placement requirement set forth in G.S. Chapter 48 to be waived for cause, such that the petitioners would have standing to file a petition to adopt the child. Additionally, the TPR petitioners are the child's legal custodians and wish to adopt him. The court did not err in determining it was likely that petitioners will adopt the child.

In re A.L.L., ___ N.C. App. ___ (July 5, 2017)

Held: Affirmed

- A trial court is not required to make findings of fact on all the evidence that is presented or state every option it considered as part of the best interest factor, "any relevant consideration", set forth at G.S. 7B-1110(a)(6).

In re A.H., ___ N.C. App. ___ (December 6, 2016)

Held: Affirmed

- There is competent evidence in the record (the social worker's testimony) to support the court's findings regarding best interests. Those findings demonstrate the court (1) considered the criteria enumerated at G.S. 7B-1110(a) and (2) made a reasoned decision within its discretion.
- The court specifically made findings regarding the likelihood of adoption [7B-1110(a)(2)], whether a termination of parental rights would aid in the accomplishment of a permanent plan of adoption [7B-1110(a)(3)], and the bond between respondent mother and child [7B-1110(a)(4)]. Although the evidence showed the child has a diagnosis of autism, it also demonstrated that he "would be considered adoptable" and having him be available for adoption after a TPR supports the finding that his likelihood of adoption is good. The absence of an adoptive placement does not bar a TPR. Although respondent mother introduced competing evidence regarding a strong bond between her and the child, it is a well-established principle that "findings of fact supported by competent evidence are binding on appeal, despite evidence in the record that might support a contrary finding."

Appeal: Lack of Transcript, Findings

In re A.L.L., ___ N.C. App. ___ (July 5, 2017)

Held: Deny petition for writ of certiorari

- Respondent father petitioned for writ of certiorari to challenge permanency planning orders he argued lacked statutorily required findings of fact. He did not provide a transcript or portion of the transcript. In the absence of transcripts, the court of appeals is obligated to consider the trial court's findings supported by competent evidence. See *Stone v. Stone*, 181 N.C. App. 688 (2007).

UCCJEA

Jurisdiction: Notice and Due Process

In re A.L.L., ___ N.C. App. ___ (July 5, 2017)

Held: Affirmed

- Timeline and Facts
    - Sept. 2013: Michigan custody order awards sole custody to mother
    - "Shortly after" Michigan order, mother and children move to NC
    - Oct. 2013: father files motion to modify custody order in MI
    - April 2014: Michigan order modifies custody regarding visitation in NC
    - Sept. 2014: DSS files petition in NC alleging abuse, neglect, and dependency; nonsecure custody granted
    - Nov. 2014: NC and MI judges talk; MI will relinquish jurisdiction; adjudicatory hearing in NC continued to allow time to obtain an order from MI relinquishing jurisdiction
    - Dec. 2014: order from MI relinquishing jurisdiction to NC; the pre-adjudication, adjudication, and disposition hearing held; mother was present; father was not yet served but provisional counsel for father was present
    - Jan. 2015: adjudication order entered
    - Sept. 2015: DSS locates father in MI; attorney appointed to represent him
    - March 2016: DSS files petition to terminate mother's and father's parental rights
    - April 2016: respondent mother and father served with TPR petitions
    - Aug. 2016: hearing on TPRs
    - Nov. 2016: NC orders terminating parental rights of both parents; father appeals claiming lack of subject matter jurisdiction under the UCCJEA
- The UCCJEA applies to A/N/D actions. The court had **temporary emergency jurisdiction** to enter nonsecure custody orders as the criteria of G.S. 50A-204(a) were satisfied. The court is not required to make findings of fact to exercise temporary emergency jurisdiction. But, it is required to communicate with another state after it learns that there is a custody determination that was made in that other state [and a parent continues to reside in that other state].
- The NC court has subject matter jurisdiction to proceed with the action if the criteria for **modification jurisdiction** under G.S. 50A-203 is satisfied.
    - NC was the children's home state. A court determines home state jurisdiction based on the physical location of a child and their parent. The children and their mother lived in NC for more than a year before the hearing on the pre-adjudication, adjudication, and disposition.
    - The Michigan court determined NC was a more convenient forum. There was a facially valid order from Michigan ceding jurisdiction to NC. The NC court is not required to

collaterally review a facially valid order from another state before exercising modification jurisdiction.

- Father argues that he was denied **due process** under the UCCJEA for not receiving notice of and a meaningful opportunity to participate in the jurisdictional decision. His argument is misplaced. The Michigan court as the original decree state is the sole determinant of whether it will relinquish jurisdiction, and any alleged due process denial occurred in Michigan, not NC. In regard to other due process arguments, the lack of service on a respondent in an earlier proceeding does not defeat valid service and notice provided in the TPR action.

Modification Jurisdiction

In re T.E.N., ___ N.C.App. ___ (April 4, 2017)

Held: Vacated for lack of jurisdiction

- Procedural History/Timeline:
  - 2009 child born in New Jersey and lived with parents there
  - 2009 NJ restraining order (mom v dad) that provided for parenting time/visitation
  - 2011 Final Restraining Order from NJ court granting temporary custody to mom
  - 2012 Amended Final Restraining Order from NJ court granting supervised visits to dad
  - Aug. 2013 mom and child move to NC; dad remains in NJ
  - Oct. 2013, modification of visitation by NJ court
  - Jan. 2015, mom files TPR in NC, which is granted in 2016
- Modification jurisdiction is governed by G.S. 50A-203, which requires a two-prong analysis. A North Carolina court may modify an out-of-state custody determination if (i) North Carolina has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or (a)(2) and (ii) the court of the other state determines it no longer has exclusive continuing jurisdiction or NC would be a more convenient forum, or the court of the other state or the NC court determines the child, child's parents, and any person acting as a parent do not presently reside in the other state.
- In this case, the first condition was met as NC was the child's home state when the TPR action was commenced, but the second condition required the court of the other state to determine it no longer had exclusive continuing jurisdiction or that NC was a more convenient forum since the respondent father continued to reside in the other state.
- Citing previous opinions, one of which quotes the Official Comment to G.S. 50A-202, the record must contain an order from the original decree state that indicates it no longer has jurisdiction. *See In re K.U.S.G.*, 208 N.C. App. 128 (2010); *In re N.R.M.*, 165 N.C. App. 294 (2004). Petitioner's testimony that the NJ court transferred jurisdiction and a finding of fact in the trial court's TPR order that the NJ court transferred jurisdiction of the custody proceeding to NC is insufficient to establish modification jurisdiction in NC. The NC court never acquired subject matter jurisdiction.

In re T.R., ___ N.C. App. ___ (November 15, 2016)

Held: Affirmed

- Timeline:
  - 2007: child born in Illinois; mom and dad reside there
  - 2011: divorce and custody ordered to mom in IL
  - 2012: child and mom move to FL; dad remains in IL

- June 2014: child and mom move to NC; dad still in IL
- July 2014: DSS files petition alleging neglect; nonsecure custody ordered; Dad still in IL
- Sept. 2014: NC judge contacts IL judge; IL docket entry that NC is the proper forum and IL case will be transferred; NC order includes finding that based on conversation with IL judge, NC is proper forum and has jurisdiction
- Jan. 2015: adjudication and disposition order entered
- 2016: permanency planning order awards custody to father in IL; mother appeals based on lack of subject matter jurisdiction under the UCCJEA

- North Carolina had subject matter jurisdiction under the UCCJEA to hear the neglect proceeding. Jurisdiction is based on G.S. 50A-203, which authorizes NC to modify the previously entered custody order from IL (modification jurisdiction).
- For modification jurisdiction, NC met applicable criteria under G.S. 50A-203:
  - NC had jurisdiction to make an initial custody determination pursuant to G.S. 50A-201(a)(2) because the IL court determined NC was a more appropriate forum to hear the custody case. The IL docket entry satisfied the requirement of a court order. Illinois courts have recognized a docket entry as an order, and the docket entry itself contains the attributes of a court order including the conclusion that the case should be transferred to NC.
  - The respondent and child had a significant connection with NC as they had been living here, and
  - substantial evidence concerning the alleged child neglect was available in NC.

Civil Cases Related to Child Welfare

Personal Jurisdiction: Minimum Contacts

Hedden v. Isbell, ___ N.C. App. ___ (Nov. 1, 2016)

Held: Affirmed

- Citing *Lockert v. Breedlove*, 321 NC 66 (1987), the court has personal jurisdiction over a party who is served while in North Carolina pursuant to Rule 4(j) of the Rules of Civil Procedure, and the minimum contacts analysis is not required. *See* G.S. 1-75.4.

Jurisdiction Between Custody and Ch. 35A Guardianship of Minor

Corbett v. Lynch, ___ N.C. App. ___ (Dec. 20, 2016)

Held: Affirmed

- Facts: Brother and Sister were orphans as a result of Mother's death in 2006 and Father's death in 2015. Father was married to Stepmother at time of his death. Father's will named Aunt and Aunt's husband as testamentary guardians for the minor children.
- Procedural History:
  - August 4, Stepmother filed a petition for guardianship and a petition for a stepparent adoption in superior court
  - August 5, Stepmother initiated a custody action under G.S. Ch. 50 in district court. An ex parte temporary emergency custody order was entered based on the allegation that Aunt was coming to take children to Ireland.

- August 7, Aunt filed an application for guardianship in superior court and filed an answer, motion to dismiss, and counterclaim for custody in the district court custody action.
- August 17, clerk of superior court ordered guardianship to Aunt and her husband.
- District court dismissed the custody action as a result of the guardianship order. Stepmother appealed.

- The clerk of superior court had jurisdiction over the guardianship proceeding as the children had no "natural guardian" (no biological or adoptive parent). G.S. 35A-1221. The custody order did not divest the clerk of jurisdiction as G.S. 35A-1221(4) requires the application for guardianship to include a copy of any order awarding custody. Guardianship of the person includes custody. G.S. 35A-1241(a)(1) and -1202(10). NC statutes "provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person." The clerk retains jurisdiction over the guardianship proceeding, including modifications. G.S. 35A-1203(b), (c). The appointment of a general guardian in a Ch. 35A guardianship proceeding renders a Ch. 50 custody action moot.
- The holding "does not affect any jurisdiction the district court may have to issue ex parte orders under Chapter 50 for temporary custody arrangements where the conditions of G.S. 50-13.5(d)(2)-(3) are met."

Necessary Party

Tanner v. Tanner, ___ N.C. App. ___ (August 2, 2016)

Held: **Vacate** order to extent it addresses any issue other than joinder of necessary party; **Remand** for hearing on substantive issues with all parties having notice and an opportunity to be heard

Facts:

- 2012 husband transferred over $300K from his business account to his mother.
- 2013 complaint filed; answer and counterclaim filed
- April 2014 defendant wife filed a motion requesting joinder of plaintiff's mother (appellant) as a necessary party, a determination of ownership interest in the funds transferred to her, and the imposition of a restraining order to prohibit use of the funds
- November 2014 hearing on motion for joinder, constructive trust, and restraining order; mother testifies at the hearing
- January 6, 2015 attorney for appellant enters appearance in court action
- January 7, 2015, appellant's attorney objects to entry of an order from November 2014 hearing
- January 12, 2015, order entered joining mother as a party and imposing constructive trust with mother as trustee and a restraining order on the funds

- An order that determines a claim in an action where necessary parties have not been joined are null and void [*citing Rice v. Randolph*, 96 N.C. App. 112 (1989)]. When it appears to the court that a necessary party is absent, the trial court may refuse to deal with the merits of the action until the necessary party is brought to the action. A court may correct this ex mero motu. [*citing White v. Pate*, 208 N.C. 759 (1983)]
- At the November 2014 hearing, the court was only authorized to determine mother was a necessary party. The court should not have heard the merits of the motion prior to mother

being joined as a party. By determining the merits of the motion before mother was made a party, mother was denied an opportunity to be heard as a party. At time of hearing, mother was only identified as a potential party, was not served with summons or any pleadings or notice of proceedings, was not represented by an attorney, did not consent to be added as a party or to proceed with the hearing on an issue that would affect her rights, and only participated as witness who had been subpoenaed to testify.

Criminal Case with Application to Child Welfare

Child Abuse: Corporal Punishment

State v. Varner, ___ N.C. App. ___ (March 7, 2017)

Held: Reversed and remanded

Stay granted 4/1/ 2017; PDR filed 4/25/2017

- Facts: Defendant disciplined his 10 year old son's refusal to eat dinner by counting down from three and then striking his son's thigh three times with a paddle. The next day the son's thigh (from his knee to his waist) was bruised, and for several days the son was in pain, walked with a slight limp, and was unable to participate in gym class at school. The father was charged with felony child abuse and was convicted of misdemeanor child abuse.
- Appellate issue relates to the jury instruction regarding a parent's right to inflict "moderate punishment" to correct his child. The instruction did not define "moderate punishment" as there was disagreement over whether it should be defined as causing "lasting injury."
- NC Supreme Court precedent referred to by the opinion
    - As a general rule, a parent (or person acting in loco parentis) is not criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment. *State v. Pendergrass,* 19 N.C. 365 (1837); *State v. Alford*, 68 N.C. 322 (1873)
    - An exception includes when a parent administers punishment "which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other *permanent* injury." *State v. Alford*, 68 N.C. 322, 323 (1873)
    - Another exception is when "the parent does not administer the punishment 'honestly' but rather 'to gratify his own evil passions' irrespective of the degree of physical injury inflicted." *State v. Thorton*, 136 N.C. 610, 615 (1904); *State v. Pendergrass,* 19 N.C. 365 (1837)
- The jury instruction did not inform the jury that a parent is not criminally liable for injuring his child when administering corporal punishment unless the jury could infer from the evidence that the correction produced or was calculated to produce lasting injury or was done with the purpose of gratifying malice. Without defining moderate punishment, the jury could have convicted based on its determination that the punishment was excessive, which is not the standard set forth by the NC Supreme Court. There was some evidence (the father's cursing and yelling before administering the punishment) for the jury to consider when determining whether the defendant acted with malice.
    - *Author's Note*: the opinion states that the NC Supreme Court has not disavowed its previous holdings requiring a parent act with malice or cause permanent injury for criminal

liability. However, the holding also refers to G.S. 7B-101(1)(c) and the General Assembly's limitation on a parent's authority to discipline his/her child in the juvenile proceeding context by defining "abuse" as the use of "cruel or grossly inappropriate" procedures or devices to discipline a child.

Rule 412 Evidence (Prior Sexual History of Victim)

State v. Jacobs, ___ N.C. App. ___ (March 21, 2017)

Held: No error; PDR allowed 6/8/2017

- Relevant Facts**:** Defendant appeals conviction for first-degree sex offense with a child (Defendant is the father of the 13-year-old victim). The state filed a motion in limine under G.S. 8C-1, Rule 412 to prohibit the defense from referencing any STDs that may have been detected in the victim (of which she was diagnosed with two) and that were not diagnosed in the defendant. The evidence was ruled inadmissible.
- Rule 412 sets aside the idea that any previous sexual behavior of a complainant is relevant in a rape proceeding. The Rule is designed to protect the witness complainant from unnecessary humiliation and embarrassment while shielding the fact finder from unwanted prejudice that may result from evidence with little relevance and low probative value to the case. The Rule prohibits evidence of a complainant's sexual behavior unless it falls within one of four identified categories, one of which is evidence of specific instances of sexual behavior offered to show that the act charged was not committed by the defendant. Rule 412(b)(2).
- Evidence that a complainant has an STD implicates Rule 412 because an STD denotes sexual behavior and is commonly associated with sexual activity, sexual intercourse, and carries the same type of stigma Rule 412 was designed to prohibit.
- The offer of evidence that the victim was diagnosed with STDs that the defendant did not also have was properly excluded. It was offered for the purpose of raising speculation that the victim must have been sexually active with someone else. Without also offering an alternative explanation or specific act to prove that the sexual act defendant was charged with was committed by someone else, the criteria under Rule 412(b)(2) was not satisfied.

Convicted Sex Offender Permanent No Contact Order with victim's children

State v. Barnett, Jr., ___ N.C. ___ (December 21, 2016)

Held: Reversed in part COA decision, remanded for entry of new permanent no contact order

- Facts: Defendant dated the victim. For the last two months of their relationship, he lived with her and her 3 minor children. After the relationship ended, when defendant was retrieving his belongings from the apartment, he assaulted the victim. Afterwards he repeatedly threatened her life by text and letter and sent one letter to one of the victim's daughters. Defendant was convicted of habitual misdemeanor assault, attempted second-degree rape, assault on a female, and deterring appearance by a witness. His sentence included a "Convicted Sex Offender Permanent No Contact Order" and named the victim and her three minor children. The defendant appealed the provision that included the minor children. The Court of Appeals vacated the order as to the children after determining the court lacked statutory authority to prohibit contact with the victim's children because the statute focused on contact between the defendant and victim. The State sought discretionary review.

- The purpose of the statute and legislature's intent protects the particular victim of the sex offense and not third persons. However, the trial court has authority to enter a no contact prohibition with the victim's children or others when the prohibition is supported by appropriate findings that indicate contact with other persons would constitute indirect contact with the victim or engagement in any of the prohibited actions in G.S. 15A-1340.50(f)(1) through (f)(7). The inclusion of the children to prohibit indirect contact with the victim does not extend the protection of the entire no contact order to the children.

Sex Offense with a Child and Sex Activity by a Substitute Parent

State v. Johnson, ___ N.C. App. ___ (May 2, 2017)

Note: this summary focuses only on that portion of the opinion that addresses sex offender registration

Held: Reversed and remanded as to lifetime sex offender registration

- Facts: Defendant was convicted in 3 separate judgments, each one representing a specific incident between himself and his 10-year-old stepson, of sex offense with a child and sex activity by a substitute parent (6 counts total). Defendant received 3 consecutive sentences of 300-420 months imprisonment, lifetime sex offender registration, and enrollment in lifetime satellite based monitoring (SBM).
- Sex offender registration assists law enforcement in the protection of the public from persons convicted of sex offenses or certain other offenses committed against minors (G.S. 14-208.5; see also 14-208.6A). A person with a "reportable conviction" registers for at least 30 years (G.S. 14-208.7), and a person who is a recidivist, convicted of an aggravated offense, or is classified as a sexually violent offender registers for life (G.S. 14-208.23). G.S. 14-208.6(1a)(ii) allows an offense to be aggravated if it includes "engaging in a sexual act involving vaginal, anal, or oral *penetration* with a *victim who is less than 12 years old*" (emphasis added).
- When determining whether an offense is an aggravated offense, the court looks to the elements of the convicted offense and not the underlying facts. Although "reportable convictions," neither sexual offense with a child nor sexual activity by a substitute parent are aggravated offenses. Neither statute requires the element that the victim be less than 12 years old. Additionally, neither crime requires the element of penetration.

LEGISLATIVE UPDATE

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Changes

- Filing of the Petition
- Nonsecure Custody
- Review Hearings
- Return of Custody to P/G/Cu/Ca
- TPR-Service of Petition
- Post TPR
- Appeals
- State Recognized Tribes
- Reform of social services system

Filing of the Petition

- HB 630-Effective 3/1/2019. Amends 7B-400(a) to require:
  - A/N/D Petition to be filed in the judicial district where juvenile resides or is present at the time the petition is filed
  - For regional DSS-petition to be filed in the judicial district where juvenile resides or is present at the time report was received
- Practice Tip-No compliance = No SMJ?

Filing of the Petition

- HB 362-Effective 10/1/2017
  - Amends § 7B-404 and § 7B-405 to clarify the magistrate's role when DSS needs to file a petition and the clerk's office is closed
    - Magistrate accepts the petition-no longer 'draw, verify and issue' petitions
    - No permission from the chief district court judge needed to accept a petition for filing

Nonsecure Custody

- HB 362-Effective 10/1/2017
  - Amends § 7B-505(a)
    - Approved NSC placements include parent, relative, nonrelative kin, or other person with legal custody of a sibling of the juvenile
  - Amends § 7B-506
    - The provisions of § 7B-905.1 (visitation) apply to nonsecure phase of the case

Review Hearings

- HB 362-Effective 10/1/2017
  - Amends § 7B-906.1
    - All cases have a review hearing within 90 days of the initial disposition (not just those where custody was removed from P/G/C)
    - If, at a review hearing, court finds that RE to reunify would be unsuccessful or inconsistent with juvenile's health and safety, PPH must be scheduled within 30 days
- Practice Tip: No objection = no issue

Return of Custody to P/G/C

- HB 630-Effective 6/1/2017
  - Amends § 7B-903.1(c)
    - Before recommending return of physical custody from the removal P/G/Cu/Ca, DSS must:
      - Observe 2 visits, 1 hour each, spaced 7 days apart
      - Give documentation of DSS' observations to the court

Serving a TPR Petition

- HB 362-Effective 10/1/2017
  - Amends § 7B-1106(a) to require petitioner to show court diligent efforts to serve respondent by personal service before receiving permission to serve by publication.

Post TPR Reviews

- HB 362-Effective 10/1/2017
  - Amends § 7B-906.1 and § 7B-908 so that post TPR hearings are governed by § 7B-908 and not § 7B-906.1

Appeals

- HB 239, HB 630, HB 229
  Effective for appeals filed on or after 1/1/2019
  - CRE orders from 906.2(b) are now appealable when no TPR filed within 65 days (vs. 180 days)
  - TPR appeals and TPR/CRE appeals go directly to the NC Supreme Court
- Practice Tip: Get orders entered

State Indian Tribes

- HB 257-Effective 7/1/2017
  Section 11C.7.(a) allocates $60,000 a year this biennium to:
  - (1) assist in the recruitment of foster parents,
  - (2) increase the number of foster homes for children who are members of a NC state recognized tribe, and
  - (3) provide training to county department staff regarding culturally appropriate services for children who are members of NC state recognized tribes.

Family and Child Protection and Accountability Act-HB 630

- Regional Supervision and Collaboration
- Reforming State Supervision and Accountability
- County Contract/Corrective Action/State Intervention
- Regional Social Services Departments
- Child Well-Being Transformation Council
- Driver's License Pilot Project
- Pilot Waiver for IAFT Foster Parents
- TPR Appeals
- Reducing the Time for Foster Care Licensure
- DSS observation before Reunification (Rylan's Law)

By: Sara DePasquale and Aimee Wall

2017 Legislative Changes
Child Welfare

S.L. 2017-161 (H362): Changes to the Juvenile Code. Effective October 1, 2017, this law makes various changes to G.S. Chapter 7B.

- **Jurisdiction and Extended Foster Care.** Section 1 adds G.S. 7B-200(a)(5a), which provides that the district court has original exclusive jurisdiction of G.S. 7B-910.1 review hearings of extended foster care placements for young adults.

- **After Hours Filings**. Sections 2 and 3 amend G.S. 7B-404 and 7B-405 to change the language regarding a magistrate's role when a petition must be filed at a time when the clerk's office is closed from "draw, verify, and issue petitions" to "accept [a petition] for filing". Language regarding authorization by the chief district court judge is removed.

- **Service**. Section 4 amends G.S. 7B-407 to refer to Rule 4 service generally and specifically subsection (j1) (service by publication) and (j3) (service in a foreign country). Section 11 amends G.S. 7B-1106(a) to refer to Rule 4 service generally and adds a new requirement before service by publication on a respondent parent in a termination of parental rights action that the court (1) finds the respondent cannot be otherwise served despite diligent efforts made by the petitioner and (2) approve the form of the notice before it is published.

- **Nonsecure Custody**. Section 7 adds G.S. 7B-506(g1), which explicitly references visitation under G.S. 7B-905.1 at continued nonsecure custody. Section 5 amends G.S. 7B-505(a)(3) by adding to specific placement options the home of the parent, nonrelative kin, or other person with the legal custody of the child's sibling.

- **Consent for Medical Care.** Section 6 amends G.S. 7B-505.1(a)(1) to include treatment for common pediatric illnesses and injuries that require prompt attention to "routine" care. Section 12 amends G.S. 7B-2503(1)c. and 7B-2506(1)c. to remove the language in those statutes that address consent for medical treatment and evaluations of juveniles placed in DSS custody through delinquency or undisciplined dispositions. Section 13 amends G.S. 7B-3600 by replacing references to statutes that previously addressed consent to medical treatment for children in DSS custody and refers instead to the current statute addressing medical treatment for children in DSS custody: G.S. 7B-505.1.

- **Review and Permanency Planning Hearings**. Section 8 amends G.S. 7B-906.1(a) and (d). The court is required to conduct a review hearing within 90 days from the date of the initial dispositional hearing; there is no longer a condition that custody

be removed from a parent, guardian, or custodian for this review hearing. A permanency planning hearing must be scheduled within thirty days of the court finding at a review hearing that reasonable efforts would be unsuccessful or inconsistent with the juvenile's health and safety.

- **Post Termination of Parental Rights Review Hearings**. Section 8 adds G.S. 7B-906.1(o), stating that G.S. 7B-906.1 hearings and findings do not apply to post termination of parental rights (TPR) placement reviews. Section 9 amends G.S. 7B-908 to address when a post TPR review is required and refers to concurrent permanent plans.

S.L. 2017-41 (H630) (as amended by S.L. 2017-102): Rylan's Law/ Family and Child Protection and Accountability Act. This session law is expansive in scope and addresses may different social services topics. Each topic is addressed separately below.

- **Part I. Regional Supervision and Collaboration.** This part focuses primarily on the need to (1) enhance state supervision of the administration of social services programs by the counties and (2) improve collaboration between counties. The N.C. Department of Health and Human Services (DHHS) is required to submit a plan for establishing regional offices to the General Assembly by November 15, 2018, with the expectation that the system of regional supervision will be operational by March 1, 2020.

  In developing the plan, DHHS must take into consideration recommendations from the *Social Services Regional Supervision and Collaboration Working Group* (Working Group). The Working Group will have 18-members representing different groups and stakeholders, including legislators, DHHS, judiciary, county commissioners, social services directors, and social services attorneys. There will be two co-chairs, one from the Senate and one from the House of Representatives. The UNC School of Government is required to convene the Working Group, facilitate the meetings, and provide administrative and technical support to the effort. The co-chairs are authorized to establish ad hoc subcommittees to gather information from various experts and stakeholder organizations.

  The Working Group is required to prepare two reports. The first is due by April 15, 2018 and must include recommendations regarding:
  - The size, number, and location of the regional state offices.
  - The allocation of responsibility between central/Raleigh, regional, and local/county officials in supervising and administering social services programs.
  - Methods for holding the regional offices accountable for performance and responsiveness.
  - Information sharing between the regional offices and the boards of county commissioners regarding local department performance.

- Options for authorizing the board of county commissioners to intervene in program administration prior to the state assuming direct control of service delivery.

The second report is due by February 1, 2019 and must include:

- Recommendations regarding legislative and regulatory changes necessary to improve collaboration between counties. Specifically, the recommendations must address information sharing, conflicts of interest, and intercounty movement of clients.
- A vision for transitioning the State from a county-administered system to a regionally-administered system.

It is important to note that earlier versions of the legislation would have required the state to implement a regionally-administered social services system. The version of the law that was adopted requires regional *supervision*, and directs the working group to consider the issue of regional *administration.*

- **Part II. Reforming State Supervision and Accountability.** This part directs the Office of State Budget and Management (OSBM), in consultation with DHHS, to contract with an outside organization (contractor) to develop a plan to reform the State supervision and accountability for the social services system. It identifies two components of the plan: system reform and child welfare reform. These components are described in more detail below. The contractor is required to submit a preliminary report to the General Assembly 180 days after the contract is finalized. After that report, the contractor must submit bimonthly progress reports. DHHS is required to submit preliminary recommendations for legislative change by October 1, 2018 and may submit supplemental recommendations as necessary.

  System reform plan
  The contractor will be required to evaluate the role of the state, develop a new vision and strategic direction for the social services system, and develop a plan for reforming the overall system to improve outcomes, supervision, and accountability. It must also develop a plan related to data collection and use and create a Dashboard using data from the NC FAST system. The purpose of the Dashboard is to serve as a report card for the public to see how the local departments are performing. The contractor is also required to develop a plan for continuous quality improvement (CQI).

  In the context of the system reform plan, the contractor will be required to review policies and procedures to identify changes necessary to support reform. It will also need to provide ongoing evaluation and oversight of DHHS's implementation of system reform.

  Child welfare reform plan
  As part of the system reform plan, the contractor is also required to develop a

specific plan focused on child welfare reform. The plan must include recommendations regarding child protective services, preventive and in-home services, child fatality oversight, placement, permanency, health, mental health, and educational services for children and families, services for older youth and those who have aged out, and staff training and compensation. It must also address a long list of specific practice-related issues.

- **Part III. County Contract/Corrective Action/State Intervention.** This part amends G.S. 108A-74, which is a statute that authorizes the state to intervene in county child welfare programs in certain circumstances. The amendments expand the scope of the statute beyond child welfare and also provide additional mechanisms for oversight and intervention.

  Initial contracts (FY 2018-19 and FY 2019-20)
  Beginning next fiscal year (2018-19), counties will need to enter into a contract with the State that specifies (1) performance requirements and (2) administrative responsibilities. The contract will govern all social services programs other than medical assistance, which will include child welfare, adult protective services, public assistance, and child support enforcement. DHHS may develop a standardized contract for all 100 counties or it may develop contracts that are more tailored to the needs of individual counties.

  The law does not include many details about the substance of the contract but it does require:
  - When possible, the performance requirements must be "based upon standardized metrics utilizing reliable data."
  - The administrative responsibilities must address, at a minimum, staff training, data submission, and communication with DHHS.

  The agreement may also authorize DHHS to withhold State or federal funds in the event of noncompliance.

  Contracts beginning FY 2020-21
  Beginning in FY 2020-21, there are some changes to the contract specifications and the consequences for noncompliance.
  - The details described above are unchanged except that the performance requirements required in the contract must be based on data in the Dashboard developed by the contractor (see Part II, above) and other reliable data.
  - If a department fails to comply with the contract or applicable law for 3 consecutive months or for 5 months within any consecutive 12-month period, DHHS and the department must enter into a corrective action plan.
  - If the department fails to complete the corrective action plan, DHHS must direct the regional office to temporarily assume all or part of the department's social

services administration. Prior to doing so, DHHS must provide 30 days' notice to the board of county commissioners, department, county manager, and board of social services.
  - Once DHHS determines that the department is able to meet performance requirements, it must restore administrative responsibilities to the department. Prior to doing so, it must provide notice to county officials.

DHHS is required to submit various reports over time to the General Assembly regarding the contracts and corrective action.

- **Part IV. Regional Social Services Departments.** As mentioned above, earlier versions of the legislation would have required a new system of regional social services departments. The version that was enacted directs the Working Group to broadly consider the idea of regionalization and also authorizes counties to create regional departments on their own initiative beginning in March 2019. Some highlights about regional departments:
  - They may provide the full array of social services or limit the scope to one or more selected programs or services. For example, a group of counties could decide to create a regional department that is focused only on child support enforcement.
  - They will be public authorities, which means they will be separate legal entities from the county. They will have independent authority related to budgeting, contracting, personnel, etc.
  - Boards of county commissioners, together with the social services governing board, will have the authority to decide whether to create or join a regional department. The board or boards of county commissioners will have the exclusive authority to decide whether to withdraw from or dissolve a regional department. Withdrawals and dissolutions may be effective only at the end of a fiscal year.
  - They must maintain a physical presence in each county.
  - Participating counties are required to contribute financially to the regional department. The Social Services Commission is required to adopt rules governing financial contributions.
  - They will have a governing board that is appointed by a combination of county commissioners, the Social Services Commission, and the sitting members.
  - They will have a director who has the same powers and duties as a county social services director, as well as the authority to enter into contract.

  The session law included several conforming amendments to other statutes to accommodate the concept of a multi-county social services agency. One of the most significant changes was to G.S. 7B-400(a), which was amended to provide that

  > (1) a proceeding may be commenced in the judicial district where the juvenile resides or is present *at the time the petition is filed* and

(2) if a regional department includes more than one judicial district, the department must file in the district where the child resides or was present *when the report was received*.

Like the other provisions in this Part, this amendment is effective March 1, 2019.

- **Part V. Child Well-Being Transformation Council.** Effective immediately, the state is required to establish a new 17-member Child Well-Being Transformation Council that must focus on improving coordination, collaboration, and communication among agencies and organizations that provide public services to children. Membership of the group is prescribed in the law and includes representatives from different public and private stakeholders. The Legislative Services Commission will be responsible for staffing the Council.
  The Council is required to focus initially on
  - identifying the relevant child-serving agencies and organizations;
  - identifying problems with coordination, collaboration, and communication in child welfare; and
  - researching the role of entities like the Council in other states.

  After March 1, 2020, the Council is charged with monitoring the reforms that will be underway, identifying gaps in coordination, collaboration, and communication, and recommending changes necessary to remedy the gaps.

- **Part VI. Driver's License Pilot Project.** Part VI is effective July 1, 2017 and requires NC DHHS to establish a two-year pilot program that reimburses on a first-come, first-served basis youth and caregivers' costs associated with the youth in care obtaining a driver's license. Expenses include driver's education, driver license fees, and automobile insurance. The Division of Social Services must report on the pilot project to the Joint Legislative Oversight Committee on Health and Human Services by March 1, 2018.

- **Part VII. Pilot Waiver for IAFT Foster Parents.** DHHS is required to establish a pilot program that waives the work requirement for foster parents of children who require Intensive Alternative Family Treatment (IAFT) in an effort to reduce placement disruptions for these children with high special needs. Participating LME/MCOs must submit a report of required measured outcomes to the Division of Social Services, comparing whether there is improved placement stability and compliance with threshold target measures for treatment goal achievement and the use of higher level hospital beds. The Division of Social Services must submit a report to the Joint Legislative Oversight Committee on Health and Human Services by December 1, 2018.

- **Part VIII. Termination of Parental Rights/Appeals.** Part VIII amends G.S. 7B-1001 and S.L. 2017-7*. These changes are effective for appeals filed on or after January 1, 2019. G.S. 7B-1001(a1) is a new subsection making an appeal by right of the

following orders directly to the North Carolina Supreme Court:
- an order granting or denying a termination of parental rights (TPR) and
- a G.S. 7B-906.2 order that eliminates reunification as a concurrent permanent plan when a TPR has been filed within 65 days of the entry and service of that order and the TPR is granted and timely appealed.

G.S. 7B-1001(a)(5) is amended to specify the written procedural requirements for an appeal of an order eliminating reunification as a concurrent permanent plan when a TPR has not been filed within 65 days (reducing the time from 180 days) from the entry and service of that order.

- **Part IX. Reducing the Time Period for Foster Care Licensure.** Effective June 21, 2017, DHHS is required to grant or deny an application for a foster care license within three months from the date of application. The agency must also examine other time frames for processing foster care applications to reduce the time to approve or deny the application.

- **Part X. DSS Observation before Reunification (Rylan's Law).** Effective June 21, 2017, Part X amends G.S. 7B-903.1(c) requiring DSS to observe and provide documentation of at least two visits between the child and the removal parent, guardian, custodian, or caretaker before recommending to the court the child's return of physical custody to such person.

***S.L. 2017-7 (H239) (as amended by 2017-41 section 8.(a) and S.L. 2017-102 section 40.(f)): Reduce Court of Appeals to 12 Judges.** This act amends G.S. 7A-27 and 7B-1001. Effective for appeals filed on or after January 1, 2019, appeals of orders granting or denying a termination of parental rights are made by right directly to the North Carolina Supreme Court.

S.L. 2017-102 (H229): GSC Technical Corrections 2017. Effective July 12, 2017, Section 35 adds subdivisions (16) and (17) to G.S. 12-3, rules for statutory construction. The terms "husband and wife", "man and wife", "woman and husband" or other terms suggesting two individuals who are then lawfully married to each other must be construed to include any two individuals who are then lawfully married to each other. "Widow" or "widower" refers to the surviving spouse of a deceased individual.

S.L. 2017-57 (S257): Appropriations Act of 2017. Subpart 12C addresses the Department of Health and Human Services Division of Social Services and is effective July 1, 2017. It has many provisions addressing the Division of Social Services, one of which is summarized here.

- **State Indian Tribes.** Section 11C.7.(a) allocates $60,000 a year this biennium for a collaboration between the Division of Social Services and the NC State Commission on Indian Affairs to assist in (1) the recruitment of foster parents, (2) increasing

the number of foster homes for children who are members of a NC state recognized tribe, and (3) providing training to county department staff regarding culturally appropriate services for children who are members of NC state recognized tribes.

S.L. 2017-158 (H236): NCAOC Omnibus Bill. Effective July 21, 2017, S.L. 2017-158 makes various changes to laws related to the clerks of court and makes changes to various mediation statutes. Three changes apply to child welfare proceedings.

- **Entry of Order**. Sections 1 and 2 amend Rules 5 and 58 of the North Carolina Rules of Civil Procedure (G.S. 1A-1) regarding entry of orders. The validity or enforceability of an order filed in a civil action or special or estate proceeding is not affected by the failure to affix a date or file stamp on that order if the clerk or court, after giving the parties adequate notice and an opportunity to be heard, enters the order nunc pro tunc [i.e., retroactive] to the date of filing.

- **Clerk/Contempt.** Section 11 amends G.S. 5A-23(b) to provide the clerk of superior court with the authority to exercise civil contempt power in cases where the clerk has original subject matter jurisdiction and has issued the order. This includes adoption, legitimation, and guardianship proceedings. Previously, the law only authorized the clerk to exercise contempt powers when a statute specifically provided authority.

- **Juvenile Court Records**. Section 23 amends G.S. 7B-2901(a) to add that the recording of an abuse, neglect, or dependency hearing may be destroyed in accordance to the retention scheduled approved by the AOC Director and Department of Natural and Cultural Resources.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-161
HOUSE BILL 362

AN ACT TO MAKE VARIOUS CHANGES TO THE JUVENILE LAWS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7B-200(a) is amended by adding a new subdivision to read:

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

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

…

(5a) Proceedings to review the placement of a young adult in foster care pursuant to G.S. 108A-48 and G.S. 7B-910.1.

…."

SECTION 2. G.S. 7B-404 reads as rewritten:

"**§ 7B-404. Immediate need for petition when clerk's office is closed.**

(a) When the office of the clerk is closed, a magistrate ~~may be authorized by the chief district court judge to draw, verify, and issue petitions as follows:~~shall accept for filing the following:

(1) ~~When the director of the department of social services requests a~~ A petition alleging a juvenile to be abused, neglected, or ~~dependent, or~~dependent.

(2) ~~When the director of the department of social services requests a~~ A petition alleging the obstruction of or interference with an assessment required by G.S. 7B-302.

(b) The authority of the magistrate under this section is limited to emergency situations when a petition ~~is required in order~~ must be filed to obtain a nonsecure custody order or an order under G.S. 7B-303. Any petition ~~issued~~ accepted for filing under this section shall be delivered to the clerk's office for processing as soon as that office is open for business."

SECTION 3. G.S. 7B-405 reads as rewritten:

"**§ 7B-405. Commencement of action.**

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

SECTION 4. G.S. 7B-407 reads as rewritten:

"**§ 7B-407. Service of summons.**

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

If service by publication under G.S. 1A-1, Rule ~~4(j1)~~ 4(j1), or service in a foreign country under Rule 4(j3), is required, the cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the court may direct."

SECTION 5. G.S. 7B-505 reads as rewritten:

"**§ 7B-505. Placement while in nonsecure custody.**

(a) A juvenile meeting the criteria set out in G.S. 7B-503 may be placed in nonsecure custody with the department of social services or a person designated in the order for temporary residential placement ~~in:~~in any of the following:

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

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

(3) Any other home or facility, including ~~a relative's home~~ the home of a parent, relative, nonrelative kin, or other person with legal custody of a sibling of the juvenile, approved by the court and designated in the order.

(b) ~~The court shall order the department of social services to make diligent efforts to notify relatives and any custodial parents of the juvenile's siblings that the juvenile is in nonsecure custody and of any hearings scheduled to occur pursuant to G.S. 7B-506, unless the court finds such notification would be contrary to the best interests of the juvenile.~~ The court shall order the department of social services to make diligent efforts to notify relatives and other persons with legal custody of a sibling of the juvenile that the juvenile is in nonsecure custody and of any hearings scheduled to occur pursuant to G.S. 7B 506, unless the court finds the notification would be contrary to the best interests of the juvenile. In placing a juvenile in nonsecure custody under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that placement with the relative would be contrary to the best interests of the juvenile.

…."

SECTION 6. G.S. 7B-505.1 reads as rewritten:

"**§ 7B-505.1. ~~Juvenile~~ Consent for medical care for a juvenile placed in nonsecure custody of a department of social services.**

(a) Unless the court orders otherwise, when a juvenile is placed in the nonsecure custody of a county department of social services, the director may arrange for, provide, or consent to any of the following:

(1) Routine medical and dental care or ~~treatment.~~treatment, including, but not limited to, treatment for common pediatric illnesses and injuries that require prompt intervention.

…."

SECTION 7. G.S. 7B-506 reads as rewritten:

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

…

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

…

(g1) The provisions of G.S. 7B-905.1 shall apply to determine visitation.

…."

SECTION 8. G.S. 7B-906.1 reads as rewritten:

"**§ 7B-906.1. Review and permanency planning hearings.**

(a) ~~In any case where custody is removed from a parent, guardian, or custodian, the~~ The court shall conduct a review hearing within 90 days from the date of the initial dispositional hearing held pursuant to G.S. 7B-901 and shall conduct a review hearing within six months

thereafter. Within 12 months of the date of the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing. Review hearings after the initial permanency planning hearing shall be designated as subsequent permanency planning hearings. ~~The subsequent~~ Subsequent permanency planning hearings shall be held at least every six months thereafter or earlier as set by the court to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.

…

(d) At each hearing, the court shall consider the following criteria and make written findings regarding those that are relevant:

…

(3) Whether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time. The court shall consider efforts to reunite regardless of whether the juvenile resided with the parent, guardian, or custodian at the time of removal. If the court determines efforts would be unsuccessful or inconsistent, the court shall ~~consider other permanent plans of care for the juvenile pursuant to G.S. 7B-906.2.~~schedule a permanency planning hearing within 30 days to address the permanent plans in accordance with this section and G.S. 7B-906.2, unless the determination is made at a permanency planning hearing.

…

(o) This section does not apply to post termination of parental rights' placement reviews."

SECTION 9. G.S. 7B-908 reads as rewritten:

"**§ 7B-908. Post termination of parental rights' placement court review.**

(a) The purpose of each placement review is to ensure that every reasonable effort is being made to provide for ~~a~~ permanent placement ~~plan~~ plans for the juvenile who has been placed in the custody of a county director or licensed child-placing agency, which ~~is~~ are consistent with the juvenile's best interests. At each review hearing the court may consider information from the department of social services, the licensed child-placing agency, the guardian ad litem, the child, the person providing care for the child, and any other person or agency the court determines is likely to aid in the review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

(b) The court shall conduct a placement review not later than six months from the date of the termination hearing when parental rights have been terminated by a petition or motion brought by any person or agency designated in ~~G.S. 7B-1103(2)~~ G.S. 7B-1103(a)(2) through ~~(5)~~ (6), or one parent's parental rights have been terminated by court order and the other parent's parental rights have been relinquished under Chapter 48 of the General Statutes, and a county director or licensed child-placing agency has custody of the juvenile. The court shall conduct reviews every six months thereafter until the juvenile is the subject of a decree of adoption:

…

(c) The court shall consider at least the following in its review and make written findings regarding the following that are relevant:

(1) The adequacy of the ~~plan~~ permanency plans developed by the county department of social services or a licensed child-placing agency for a permanent placement ~~relative to~~ in the juvenile's best interests and the efforts of the department or agency to implement ~~such plan.~~the plans.

(2) Whether the juvenile has been listed for adoptive placement with ~~the North Carolina Adoption Resource Exchange, the North Carolina Photo Adoption Listing Service (PALS), or any other specialized adoption agency.~~NC Kids Adoption and Foster Care Network or any other child-specific recruitment program or whether there is an exemption to listing that the court finds is in the child's best interest.

(3) The efforts previously made by the department or agency to find a permanent ~~home~~ placement for the juvenile.

(4) Whether the current placement is in the juvenile's best interest.

(d) The court, after making findings of fact, shall ~~do one of the following:~~adopt concurrent permanent plans and identify the primary and secondary plan in accordance with G.S. 7B-906.2(a)(2) through (6). The court may specify efforts that are necessary to accomplish a permanent placement that is in the best interests of the juvenile.

~~(1) Affirm the county department's or child-placing agency's plans.~~

~~(2)~~ ~~If~~

(d1) If a juvenile is not placed with prospective adoptive parents as selected in G.S. 7B-1112.1, ~~order a placement or different plan the court finds to be in the juvenile's best interest after considering the department's recommendations.~~the court may order a placement that the court finds to be in the juvenile's best interest after considering the department's recommendations.

~~In either case, the court may require specific additional steps that are necessary to accomplish a permanent placement that is in the best interests of the juvenile.~~

…."

SECTION 10. G.S. 7B-910.1(d) read as rewritten:

"(d) The clerk shall give written notice of the initial and any subsequent review hearings to the young adult ~~and~~ in foster care and the director of social services at least 15 days prior to the date of the hearing."

SECTION 11. G.S. 7B-1106(a) reads as rewritten:

"(a) Except as provided in G.S. 7B-1105, upon the filing of the petition, the court shall cause a summons to be issued. The summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the juvenile. However, a summons does not need to be directed to or served upon any parent who, under Chapter 48 of the General Statutes, has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency or to any parent who has consented to the adoption of the juvenile by the petitioner.

(2) Any person who has been judicially appointed as guardian of the person of the juvenile.

(3) The custodian of the juvenile appointed by a court of competent jurisdiction.

(4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the child has been given by a court of competent jurisdiction.

(5) Repealed by Session Laws 2009-38, s. 3, effective May 27, 2009.

The summons shall notify the respondents to file a written answer within 30 days after service of the summons and petition. Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule ~~4(j). But the~~ 4. Prior to service by publication under G.S. 1A-1, the court shall make findings of fact that a respondent cannot otherwise be served despite diligent efforts made by petitioner for personal service. The court

shall approve the form of the notice before it is published. The parent of the juvenile shall not be deemed to be under a disability even though the parent is a minor."

SECTION 12. G.S. 7B-2503(1)c. reads as rewritten:

"c. If the director of the department of social services has received notice and an opportunity to be heard, place the juvenile in the custody of a department of social services in the county of the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of a department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. An order placing a juvenile in the custody or placement responsibility of a county department of social services shall contain a finding that the juvenile's continuation in the juvenile's own home would be contrary to the juvenile's best interest. This placement shall be reviewed in accordance with G.S. 7B-906.1. ~~The director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown, unavailable, or unable to act on behalf of the juvenile or juveniles, the director may, unless otherwise ordered by the judge, arrange for, provide or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or the judge's designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent, guardian, or custodian of the affected juvenile. If the director cannot obtain consent, the director shall promptly notify the parent, guardian, or custodian that care or treatment has been provided and shall give the parent, guardian, or custodian frequent status reports on the circumstances of the juvenile. Upon request of a parent, guardian, or custodian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to the parent, guardian, or custodian by the director unless prohibited by G.S. 122C-53(d).~~"

SECTION 13. G.S. 7B-2506(1)c. reads as rewritten:

"c. If the director of the county department of social services has received notice and an opportunity to be heard, place the juvenile in the custody of the department of social services in the county of ~~his~~ the juvenile's residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of a department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state. An order placing a juvenile in the custody or placement responsibility of a county department of social services shall contain a finding that the juvenile's continuation in the juvenile's own home would be contrary to the juvenile's best interest. This placement shall be reviewed in accordance with G.S. 7B-906.1. ~~The director may, unless otherwise ordered by the judge, arrange for, provide, or consent to, needed routine or emergency medical or surgical care or treatment. In the case where the parent is unknown,~~

~~unavailable, or unable to act on behalf of the juvenile or juveniles, the director may, unless otherwise ordered by the judge, arrange for, provide, or consent to any psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile placed by a judge or his designee in the custody or physical custody of a county department of social services under the authority of this or any other Chapter of the General Statutes. Prior to exercising this authority, the director shall make reasonable efforts to obtain consent from a parent, guardian, or custodian of the affected juvenile. If the director cannot obtain consent, the director shall promptly notify the parent, guardian, or custodian that care or treatment has been provided and shall give the parent, guardian, or custodian frequent status reports on the circumstances of the juvenile. Upon request of a parent, guardian, or custodian of the affected juvenile, the results or records of the aforementioned evaluations, findings, or treatment shall be made available to the parent, guardian, or custodian by the director unless prohibited by G.S. 122C-53(d).~~"

SECTION 14. G.S. 7B-3600 reads as rewritten:

"**§ 7B-3600. Judicial authorization of emergency treatment; procedure.**

A juvenile in need of emergency treatment under Article 1A of Chapter 90 of the General Statutes, whose physician is barred from rendering necessary treatment by reason of parental refusal to consent to treatment, may receive treatment with court authorization under the following procedure:

…

The court's authorization for treatment under this Article shall have the same effect as parental consent for treatment.

Following the court's authorization for treatment and after giving notice to the juvenile's parent, guardian, or custodian the court shall conduct a hearing in order to provide for payment for the treatment rendered. The court may order the parent or other responsible parties to pay the cost of treatment. If the court finds the parent is unable to pay the cost of treatment, the cost shall be a charge upon the county when so ordered.

This Article shall operate as a remedy in addition to the provisions in ~~G.S. 7B-903, 7B-2503, and 7B-2506.~~G.S. 7B-505.1 and G.S. 7B-903.1."

SECTION 15. This act becomes effective October 1, 2017.

In the General Assembly read three times and ratified this the 29th day of June, 2017.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Roy Cooper
Governor

Approved 11:40 a.m. this 21st day of July, 2017

ADMISSIBILITY OF DIGITAL EVIDENCE

Admissibility of Electronic Writings

Teaching old evidence rules
new electronic tricks

The Statement

I gave her a whipping

with my belt.

She had it coming.

OPRAH **P R A O H** HARPO

- **P**rivilege
- **R**elevance
- **A**uthenticity
- **O**riginal Writing
- **H**earsay

Authenticity: A Subset of Relevancy

- Rule 104 commentary:
  - "[I]f a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it."

Showing of Relevancy

Rule 104(a)

- "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to . . . subdivision (b). In making its determination it is not bound by the rules of evidence . . . ."

Rule 104(b)

- "When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Lorraine v. Markel American Ins. Co.
241 F.R.D. 534, 538 (D. Md. 2007)

Rule 901: Authentication

- Rule 901(a)
  - "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."
- Rule 901 commentary
  - "This requirement of showing authenticity . . . is governed by the procedure set forth in Rule 104(b)."

Authentication Standard

- State v. Ford, ___ N.C. App. ___, 782 S.E.2d 98 (2016)
  - Burden to authenticate is not high
  - Only a prima facie showing is required
  - Proponent need only present evidence sufficient to support finding that matter is what proponent claims

What Is Sufficient Evidence?

- Rule 901(b) provides examples
  - "(1) Testimony of Witness with Knowledge--Testimony that a matter is what it is claimed to be."
  - "(4) Distinctive Characteristics and the Like--Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

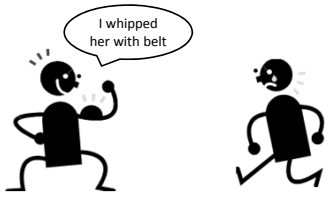
Original Writing Requirements

1. Is it a "writing" under Rule 1001?
2. If so, is the proponent seeking to prove the writing's contents under Rule 1002?

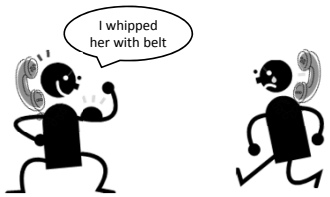
More Original Writing Requirements

3. If yes to 1. and 2., the proponent must offer the original except:
   - A duplicate is generally admissible under Rule 1003
   - Other evidence of the contents of the writing is admissible if permitted by Rule 1004
     - writing lost or destroyed
     - no original can be obtained by any available process
     - original in opponent's possession and on notice
     - collateral matter

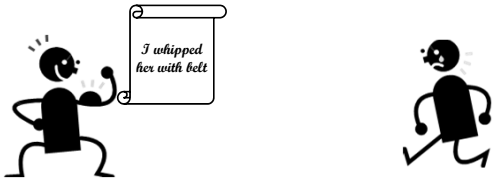
In Person



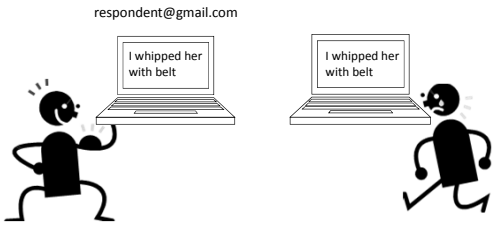
Telephone



Letter



Email



Testimony of Email

Printout of Email

Recipient testifies, "On May 12, 2017, I received an email from respondent@gmail.com, which said I whipped her with belt."

To: Recipient

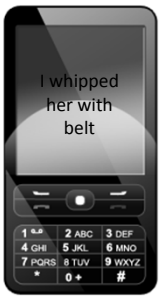
From: respondent@gmail.com

Date: May 12, 2017

Subject: I whipped her with belt

Text Message

Original Writing



Web Posting

Wrapping Up

- Evidence of authorship must be admissible to authenticate an electronic writing
- Screen name, telephone number, and the like may not be sufficient without more to establish authorship
- Original or duplicate of electronic writing must be produced unless all writings have been lost or destroyed (without bad faith)

Digital Evidence

2015

Jeffrey B. Welty

UNC
SCHOOL OF
GOVERNMENT

Chapter 5: The Admissibility of Electronic Evidence

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Even evidence that has been lawfully seized cannot be admitted in court if it cannot satisfy the evidence rules. This chapter considers how the rules of evidence apply to electronic evidence. It focuses on issues that are of particular significance for digital evidence: authentication, the original writing rule (also known as the best evidence rule), and hearsay. Of course, issues of privilege, relevance, and the like may arise with electronic evidence as they may with any form of evidence. Because those issues are not unique to electronic evidence, they are not addressed in this publication.

Like other chapters of this book, this chapter draws heavily on cases decided in other jurisdictions. Fortunately, the rules of evidence are similar across jurisdictions, even sharing a common numbering system based on the federal rules.

I. Authentication

Authentication is widely regarded as the evidentiary consideration that is most different for electronic evidence than it is for traditional evidence.[1] This section reviews important general principles regarding authentication and then applies the principles to several common types of electronic evidence.

A. Authentication Generally

Simply put, authentication is the process of establishing that the piece of evidence in question is what it purports to be, such as an email from the defendant, or a website created by a witness. As explained in the Advisory Committee's Note to Rule 901 of the North Carolina Rules of Evidence, it is a "special aspect of relevancy." To illustrate that point with an example, if a self-incriminating email wasn't actually written by the defendant, it does not tend to establish the defendant's guilt and so should not be admitted at the defendant's trial.

Under N.C. R. Evid. 901(a), "[t]he requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[2] This is a low hurdle that courts often

1. *See, e.g.*, G. Michael Fenner, *The Admissibility of Web-Based Evidence*, 47 Creighton L. Rev. 63, 64 (2013) ("By and large, the novel question regarding the admissibility of web-based evidence . . . is going to be authentication. . . . Once the evidence is authenticated . . . most of the rest of the evidentiary problems are the common problems lawyers face all the time.").

2. Section 8C-901(a) of the North Carolina General Statutes (hereinafter G.S.).

describe as a prima facie showing.[3] Doubts about authentication generally go to the weight, not the admissibility, of the evidence.[4]

Furthermore, there are many ways to authenticate evidence. N.C. R. Evid. 901 gives several examples of how authentication can be accomplished, such as testimony of a witness who knows what the evidence is under Rule 901(b)(1) and authentication by the distinctive characteristics of the evidence under Rule 901(b)(4). But the Rule itself states that these examples are "[b]y way of illustration only, and not by way of limitation."[5] The following sections of this publication apply these general principles to several common types of digital evidence.

B. Authentication of Electronic Communications

The central concern with authenticating electronic communications is whether the proponent of the evidence has established who authored the communication in question. Sufficient evidence of authorship can be provided in several ways.

---

3. State v. Mercer, 89 N.C. App. 714, 716 (1988) (noting approvingly that "federal courts have held that a *prima facie* showing, by direct or circumstantial evidence, such that a reasonable juror could find in favor of authenticity, is enough"); United States v. Vidacak, 553 F.3d 344, 349 (4th Cir. 2009) (explaining that "[t]he burden to authenticate under [Federal] Rule [of Evidence] 901 is not high—only a *prima facie* showing is required," and stating that all that is needed is evidence "from which the jury could reasonably find that the evidence is authentic"); United States v. Gadson, 763 F.3d 1189, 1203 (9th Cir. 2014) (endorsing the *prima facie* showing standard); United States v. Turner, 718 F.3d 226, 232 (3d Cir. 2013) (stating that the burden of authentication is "slight" and that the court "does not require conclusive proof of a document's authenticity, but merely a prima facie showing of some competent evidence to support authentication," with the ultimate determination of authenticity to be made by the jury); United States v. Fluker, 698 F.3d 988, 999 (7th Cir. 2012) ("Only a prima facie showing of genuineness is required; the task of deciding the evidence's true authenticity and probative value is left to the jury."). *See generally* Fenner, *supra* note 1, at 87–88 (noting that the proponent of evidence need only "make a prima facie showing that the evidence . . . is what he or she claims it is" and that "[t]his is not a particularly high barrier to surmount"); United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (endorsing the prima facie showing standard in a case involving Facebook and YouTube evidence).

4. Thomas v. Dixson, 88 N.C. App. 337, 344 (1988) ("Authentication does not, however, require strict, mathematical accuracy, and a lack of accuracy will generally go to the weight and not the admissibility of the exhibit.").

5. G.S. 8C-901(b).

1. Rule 901(b)(1): Testimony of a Witness with Knowledge

Occasionally, the proponent is able to call the author of the evidence or someone who saw the author create the evidence. For example, the State might be able to call a witness who saw the defendant compose and send a Tweet about shooting a victim, or a witness to whom the defendant subsequently admitted to sending a threatening email.[6] The leading North Carolina case in this area is *State v. Gray*,[7] where a group of people planned a robbery and communicated about the crime via text message. An officer uncovered, and took pictures of, texts between two of the co-conspirators while searching a phone that belonged to one of them. The State sought to introduce the text messages at the trial of a third co-conspirator. One of the co-conspirators testified at trial that she sent the text messages in question and that the pictures accurately reflected the text messages that she sent. The trial court admitted the messages and the court of appeals affirmed, citing N.C. R. Evid. 901(b)(1). Since the co-conspirator sent the messages herself, she was able to testify about their authorship.

The *Gray* court considered and rejected the defendant's argument that the messages were not adequately authenticated because the State did not call an employee of the telecommunications service provider to explain how the company processes and delivers text messages. Although the court did not explain its reasoning on this point in detail, it is reasonable to assume that the court views modern telecommunications processes as presumptively reliable.

There are a few cases that suggest that Rule 901(b)(1) allows the "personal knowledge" of a recipient of a communication to authenticate the communication as coming from a particular author.[8] That suggestion is probably

---

6. Moore v. State, 763 S.E.2d 670, 674 (Ga. 2014) (ruling that evidence from the defendant's Facebook page was adequately authenticated in part because the defendant "admitted to [his girlfriend] that the Facebook page belonged to him"); Bobo v. State, 285 S.W.3d 270, 275 (Ark. Ct. App. 2008) (ruling that emails sent by the defendant were adequately authenticated in part because the defendant "admitted that she sent emails to [the victim]," even though she disputed the content of the emails).

7. ___ N.C. App. ___, 758 S.E.2d 699, *review allowed*, ___ N.C. ___, 766 S.E.2d 635 (2014).

8. *See, e.g.*, Shea v. State, 167 S.W.3d 98, 105 (Tex. App. 2005) (ruling that emails were properly authenticated under Texas Rule of Evidence 901(b)(1) where a witness testified only "that she was familiar with [the author's] e-mail address and that she had received the six e-mails in question from [the author]"); State v. Koch, 334 P.3d 280, 290 (Idaho 2014) (stating that because a witness testified that she "recognized [the defendant's] number and had previously been in frequent communication with him" at that number, text messages sent from that

mistaken. The recipient of an electronic communication typically does not have first-hand knowledge of who wrote it. Normally, the recipient is making an inference about the identity of the author based on the account from which the communication is sent, the content of the communication, and the like. In other words, the recipient is relying on the characteristics of the communication to identify the author. Such an inference may be entirely reasonable and sufficient to authenticate the communication, as discussed below in connection with Rule 901(b)(4), but it does not constitute personal knowledge under Rule 901(b)(1).

Case Summaries Regarding Rule 901(b)(1)

State v. Gray, ___ N.C. App. ___, 758 S.E.2d 699 (discussed in text, above), *review allowed*, ___ N.C. ___, 766 S.E.2d 635 (2014).

Donati v. State, 84 A.3d 156, 171 (Md. Ct. Spec. App. 2014) (under Maryland Evidence Rule 901(b)(1), "the proponent could admit the e-mail through the testimony of the author of the e-mail or a person who saw the author compose and send the e-mail").

United States v. Fluker, 698 F.3d 988, 999 (7th Cir. 2012) (noting that authentication under Federal Rule of Evidence 901(b)(1) was impossible because neither "[the author] nor anyone who saw [the author] author the emails testified that the emails were actually sent by [the author]").

State v. Webster, 955 A.2d 240 (Me. 2008) (ruling that a transcript of online chats between the defendant and an undercover officer was properly authenticated by the personal knowledge of the undercover officer).

2. Rule 901(b)(4): Distinctive Characteristics

Most often, electronic communications will be authenticated by their distinctive characteristics. That is, the proponent of the evidence will show that it was authored by a specific person by establishing that the communication came from that person's email or social media account; referred to matters known only to that person or of particular interest to that person; contained nicknames, terms, or sayings typically used by that person; and the like.

---

number were properly authenticated under Idaho Rule of Evidence 901(b)(1); the court also ruled that the messages were authenticated under Rule 901(b)(4) of the state rules).

These methods are similar to those used to authenticate traditional means of communication, such as letters.[9]

As to what kind, and what quantity, of such circumstantial evidence is enough to authenticate a communication, the cases nationally "arrive at widely disparate outcomes" and are as "clear as mud."[10] Although the lack of agreement in the case law makes it very difficult to announce general rules, a rough summary of the state of the law follows.

First, the fact that an electronic communication concludes with the name of the purported author (such as "Respectfully yours, Janet Adams") or comes from an account that contains the name of the purported author (such as janetadams@gmail.com) is not alone sufficient to establish the authorship of the communication.[11]

Second, the fact that a communication comes from an account linked to a specific person (such as an account that a witness testifies Janet Adams has used for years or an account linked to Janet Adams through subscriber information obtained from a service provider) is at least important evidence of the authorship of the communication. Depending on the strength of the connection between the purported author and the account, such evidence may in some cases be sufficient to authenticate authorship.[12]

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9. *See, e.g.*, State v. Young, 186 N.C. App. 343, 354 (2007) (holding that letters were properly authenticated as having been written by the defendant where the defendant told the recipient that he would write to him, the letters used nicknames normally used by the defendant and the recipient, and the letters reflected "intimate knowledge of the crime").

10. Paul W. Grimm et al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 441 (2013).

11. Commonwealth v. Purdy, 945 N.E.2d 372, 381 (Mass. 2011) (stating that "[e]vidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant," arguing that "[t]here must be some 'confirming circumstances' sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails," and finding sufficient confirming circumstances to authenticate a series of e-mails); 2 Kenneth S. Broun et al., McCormick on Evidence § 221, at 57 (6th ed. 2006) (noting in connection with traditional writings that "the purported signature or recital of authorship on the face of a writing will *not* be accepted, without more, as sufficient proof of authenticity to secure the admission of the writing in evidence"); *Id.* § 227, at 73 n.2 ("For purposes of authentication, self-identification of an e-mail is insufficient, just as are the traditional signature and telephonic self-identification.").

12. *Compare* Hollie v. State, 679 S.E.2d 47, 50 (Ga. Ct. App. 2009) ("Though the e-mail transmission in question appears to have come from P.M.'s [the victim's] e-mail address, this alone does not prove its genuineness."), *aff'd*, 696 S.E.2d 642

Third, additional circumstantial authenticate regarding the contents of the communications is often the best way to authenticate authorship. For example, it may be persuasive evidence of authorship if a communication refers to facts or events known only to the author ("Remember that time we kissed behind the Post Office?"), refers to facts or events of particular interest to the author ("I can't wait for the Star Trek convention next week!"), or uses terms or nicknames that are characteristic of the author ("My little tomato, no one can have you if I can't."),[13] Similarly, it may be persuasive evidence of authorship if there is a connection between the communication and a precipitating event in which the author was involved. For example, when a threatening message is sent from the defendant's email address to the defendant's neighbor a few minutes after the two had a verbal altercation, the temporal proximity of the encounter and the email tends to show that the defendant is the author of the email. And it may be persuasive evidence of authentication where there are follow-up communications, linked to the author, referring to or repeating the contents of the original electronic communication, as when the defendant's threatening email is followed up with a face-to-face threat referring to the email.

Case Summaries Regarding Rule 901(b)(4)

SUFFICIENT EVIDENCE OF AUTHENTICITY

Commonwealth v. Johnson, 21 N.E.3d 937, 952 (Mass. Dec. 23, 2014) (ruling, in a harassment case, that the prosecution sufficiently authenticated emails between a defendant and a cooperating witness where the witness testified that the emails were "signed using [the defendant's] typical signature," the witness testified that he had exchanged many emails with the defendant using the same address over the past decade, and the emails referenced the harassing acts at issue in the case).

(Ga. 2010), *with* State v. Andrews, 293 P.3d 1203, 1206 (Wash. Ct. App. 2013) ("[T]estimony as to the defendant's phone number and signature sufficiently authenticated pictures of received text messages.").

13. *See generally* State v. Francis, ___ S.W.3d ___, No. ED 100009, 2014 WL 1686538, at *11 (Mo. Ct. App. Apr. 29, 2014) (collecting cases and stating that authentication may be established by, for example, "an admission by the author that the number from which the message was received is his number and that he has control of that phone," testimony from "the person receiving the message testifying that he regularly receives text messages from the author from this number," or "something distinctive about the text message indicating the author wrote it, such as a personalized signature"); *In re* F.P., 878 A.2d 91 (Pa. Super. Ct. 2005) (instant messages were properly authenticated as having been authored by the defendant where he used his name in the conversation and the content of the conversation referred to a long-running dispute with the victim).

Culp v. State, ___ So. 3d ___, No. CR-13-1039, 2014 WL 6608543 (Ala. Crim. App. Nov. 21, 2014) (holding, in a domestic violence case, that the prosecution sufficiently authenticated threatening emails as having been written by the defendant where the victim testified that she had helped the defendant set up the account from which the emails were sent, each email contained the defendant's picture and screen name, many emails concluded with the defendant's initials, and several emails contained slang terms for drugs that were typically used by the defendant).

State v. Koch, 334 P.3d 280, 289 (Idaho 2014) (collecting cases and ruling, in a child sexual abuse case, that a text message sent to the complainant's mother was properly authenticated as having been authored by the defendant; although "more than just confirmation that the number belonged to the person in question is required when the message's authentication is challenged," the contents of the message in question, including a reference to a recent fight between the defendant's daughter and the complainant, also showed that the defendant was the author; the court also analyzed several other electronic communications, ruling that most, but not all, were adequately authenticated by similar circumstantial evidence).

State v. Wilkerson, ___ N.C. App. ___, 733 S.E.2d 181 (2012) (text messages were sufficiently authenticated as being written by the defendant where a witness reported the defendant's suspicious driving on the victim's street and testified that the defendant appeared to be using a cell phone as he drove; the cell phone from which the messages were sent was found on the defendant's person; the text messages referenced an item stolen from the victim; and cell site data was interpreted by experts to establish that the phone traveled from the area of the defendant's home to the area of the victim's home and back).

Gulley v. State, 423 S.W.3d 569 (Ark. 2012) (sufficient circumstantial evidence authenticated the defendant's authorship of three text messages; messages came from cellular phone number assigned to the defendant; two of the messages referred to facts and circumstances known to the defendant; the third text message announced that the defendant would be dropped off at the victim's house and was followed by his arrival there the night she was killed).

Campbell v. State, 382 S.W.3d 545, 550 (Tex. App. 2012) (noting that "the fact that an electronic communication on its face purports to

originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author of the communication"; finding that contents of Facebook messages were authenticated by speech patterns in messages that were consistent with the defendant's patterns of speech, by references to an incident and potential charges a few days after the incident occurred, and by the victim's testimony that, while she once had access to the defendant's account, she did not at the time the messages were sent and did not write the messages).

Tienda v. State, 358 S.W.3d 633 (Tex. Crim. App. 2012) (internal content of MySpace postings, including photographs of the defendant, comments, and music, and a subscriber report listing the owner of two of three accounts as having an email address that contained the defendant's name and zip code and a third account as having an email address that included the defendant's nickname, were sufficient to permit a reasonable juror to find that MySpace postings for all three accounts were created and maintained by the defendant).

State v. Williams, 191 N.C. App. 254 (2008) (unpublished) (instant messages purportedly exchanged between the defendant and the victim were properly authenticated by circumstantial evidence as being authored by the defendant where the victim testified that she and the defendant exchanged instant messages regularly, that the defendant's email address was the one from which the messages originated, and that the content of the messages included details known only to the defendant and the victim).

Dickens v. State, 927 A.2d 32 (Md. Ct. Spec. App. 2007) (authentication requirements were satisfied where threatening text messages were linked to the defendant by direct and circumstantial evidence, including references to facts known by few people, conduct consistent with the contents of the message, and references to seeing the minor child of the defendant and the victim).

State v. Taylor, 178 N.C. App. 395 (2006) (text messages were sufficiently authenticated by circumstantial evidence as being written by the victim where the messages indicated that the author would be driving a car of the same make and model as the victim's and the author twice referred to himself by the victim's name; there was also sufficient authentication of the text messages as being messages to and from a particular cellular phone number where there was expert testimony

regarding the service provider database from which the messages were retrieved and the service provider's business practice of storing such messages).

INSUFFICIENT EVIDENCE OF AUTHENTICITY

Smith v. State, 136 So. 3d 424, 434 (Miss. 2014) (ruling, in a murder case, that the prosecution failed to authenticate Facebook messages purportedly sent from the defendant to his wife [and mother of the child victim] as having been composed by the defendant; the court reasoned that social media accounts may easily be hacked or fabricated, so authentication requires more than showing that a message comes from an account with the purported author's "name and photograph"; in this case, "[n]o other identifying information from the Facebook profile, such as date of birth, interests, hometown, or the like, was provided" and the witness did not explain how she identified the messages as coming from the defendant; the court noted that the messages did not appear to be part of a conversation between the two).

State v. Lukowitsch, ___ N.C. App. ___, 752 S.E.2d 258 (2013) (unpublished) ("[T]he trial court properly excluded the content of the text messages because defendant failed to present any evidence to authenticate the text messages as having been sent by [a certain party].").

Rodriguez v. State, 273 P.3d 845 (Nev. 2012) (trial court abused its discretion in admitting text messages that the State claimed were sent by the defendant, a co-defendant, or both, using the victim's cell phone because the State failed to present sufficient evidence corroborating the defendant's identity as the person who sent the messages).

Griffin v. State, 19 A.3d 415 (Md. 2011) (printed pages of a MySpace account allegedly belonging to the defendant's girlfriend upon which appeared a post indicating that "SNITCHES GET STITCHES" were not properly authenticated, and it was prejudicial error to admit them into evidence; the court concluded that because of the risk of camouflaged identities and account manipulation on social networking sites, "a printout of an image from such a site requires a greater degree of authentication than merely identifying the date of birth of the creator and her visage in a photograph on the site in order to reflect that [the defendant's girlfriend] was its creator and the author of the 'snitches get stitches' language").

State v. Eleck, 23 A.3d 818 (Conn. App. 2011) (trial court did not abuse its discretion in excluding evidence of Facebook messages purportedly sent from State's witness's account to the defendant; a reference in the messages to acrimonious history did not sufficiently establish that the State's witness authored the messages such that it was an abuse of discretion to exclude the evidence), *aff'd on other grounds*, 100 A.3d 817 (2014)).

3. Business Records

Courts in some jurisdictions have addressed whether electronic communications may be authenticated as the business records of a social media company or an electronic communications service provider. Those courts have considered Fed. R. Evid. 902(11) or its state equivalents. The federal version of Rule 902(11) designates as self-authenticating "[t]he original or a copy of a domestic record that meets the requirements of [Fed. R. Evid.] 803(6)(A)-(C) [the business records exception to the hearsay rule], as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court." The rule requires that the proponent of such evidence give the opposing party advance notice of the proponent's intent to offer it.

The Fourth Circuit recently held that screenshots of two defendants' Facebook pages, among other evidence, could be admitted as Facebook's business records.[14] However, a Colorado appellate court reached a contrary result, reasoning that "even though an arguable business relationship exists between Facebook and its users, there was no evidence presented that Facebook substantially relies for any business purpose on information contained in its users' profiles and communications."[15] At least for now, the issue is only of academic interest in North Carolina, as North Carolina has not adopted a version of Rule 902(11) and business records are not self-authenticating in North Carolina's courts.

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14. United States v. Hassan, 742 F.3d 104, 133 (4th Cir. 2014) (finding no abuse of discretion in district court's decision to admit screenshots of defendants' Facebook pages and YouTube videos posted by defendants as self-authenticating business records).

15. People v. Glover, ___ P.3d ___, No. 13CA0098, 2015 WL 795690 (Colo. App. Feb. 26, 2015) (ruling that the defendant's Facebook messages and profile were not admissible as business records under Colorado's analogue of Fed. R. Evid. 902(11)).

C. Authentication of Tracking Data

As discussed in chapter 3 and elsewhere in this book, GPS data may come into criminal cases in several ways: because law enforcement placed a tracking device on a suspect's vehicle; because a suspect was wearing a GPS tracking bracelet as a condition of probation or pretrial release; because law enforcement seized a cell phone or other device containing GPS data from a suspect; and so on. Although each situation presents slightly different considerations, it is often possible to authenticate such data under N.C. R. Evid. 901(b)(1) (testimony of a witness with knowledge that the data is what it is claimed to be), Rule 901(b)(9) (concerning "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result"), or some combination of the two.

The leading case in North Carolina is *State v. Jackson*.[16] The defendant committed a sexual assault while wearing a GPS tracking device as a condition of his pretrial release. The supervisor of the electronic monitoring unit testified regarding how the tracking device worked. The defendant argued that the tracking data was not properly authenticated, but the court of appeals ruled to the contrary. However, the court did not analyze the authentication issue in detail—instead focusing mainly on whether the data were inadmissible hearsay—so the opinion is useful mainly for cases that have similar facts.

A few cases from other jurisdictions provide more general guidance. Most courts seem satisfied if a witness who possesses a working familiarity with the GPS system explains how it functions, how the data were collected, and what the data mean.[17] Several cases have focused on the qualifications and experience necessary to authenticate the data. Courts generally have ruled that the witness need not be an expert so long as he or she is familiar with the technology.[18]

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16. ___ N.C. App. ___, 748 S.E.2d 50 (2013).

17. *See, e.g.*, United States v. Espinal-Almeida, 699 F.3d 588, 612, 613 (1st Cir. 2012) (ruling that data taken from a GPS device seized from a boat used for drug trafficking were properly authenticated by the testimony of the lab analyst who examined the device; the analyst provided a "good amount of testimony about the processes employed by the GPS," allowing the court to apply Fed. R. Evid. 901(b)(9), which permits a witness to describe a process or system and thereby authenticate the result of the process or system; the court ruled that expert testimony was not required to authenticate the data, noting that the analyst was "knowledgeable, trained, and experienced in analyzing GPS devices").

18. *Id. See also* United States v. Brooks, 715 F.3d 1069, 1078 (8th Cir. 2013) (a bank robber was apprehended based on a GPS device that was placed surreptitiously in the loot bag; the trial judge properly took judicial notice of the "accuracy and reliability of GPS technology" generally, and the testimony of an

By contrast, evidence about cell site location information typically is introduced by an expert witness, and courts have disagreed about the extent to which such experts may pinpoint a phone's location, as opposed to identifying a general area in which the phone was located or simply describing the location of the towers to which the phone connected.[19]

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employee of the security company that supplied the device was sufficient to admit the data generated by the device in question; although the witness apparently lacked a "scientific background," he had worked for the company for eighteen years, "had been trained by the company . . . knew how the device worked, and . . . had demonstrated the device for customers dozens of times"); United States v. Thompson, 393 F. App'x 852 (3d Cir. 2010) (unpublished) (a bank robber was apprehended based on a GPS device that was placed surreptitiously in the loot bag; the GPS data was authenticated at trial by an employee of the security company that supplied the device; he explained how the device worked, and he was properly permitted to testify as a lay witness rather than an expert, given that his knowledge was based on his personal experience with such devices).

19. *Compare* United States v. Evans, 892 F. Supp. 2d 949, 955–57 (N.D. Ill. 2012) (ruling that an FBI agent with extensive training in cell phone investigations could testify as an expert about how cellular networks operate and could testify about which towers interfaced with the defendant's cell phone at various times, but could not estimate the defendant's location using "granulization," a system for determining which of two "closely positioned towers" serves which nearby locations, because granulization does not account for the possibility that a phone may make contact with a tower that is not the closest one due to physical obstructions or network traffic, and because granulization "remains wholly untested by the scientific community"), *and* State v. Payne, 104 A.3d 142, 145–55 (Md. 2014) (ruling that a detective "needed to be qualified as an expert . . . before being allowed to testify . . . [about] the communication path" of the defendants' cell phones, i.e., "the location of cell phone towers through which particular calls were routed and . . . the locations of those towers on a map in relation to the crime scene"; the court noted that "[t]here are a variety of factors affecting to which tower a cell phone will connect, beyond merely the distance" between the phone and the available towers and ruled that the witness "engaged in a process to derive his conclusion [about the location of the defendants' phones] that was beyond the ken of an average person"), *with* United States v. Machado-Erazo, 950 F. Supp. 2d 49, 55–58 (D.D.C. 2013) (ruling that an FBI agent with extensive training in cell phone investigations could testify as an expert to the "general location where a cell phone would have to be located to use a particular cell tower and sector," distinguishing *Evans* as involving an attempt to identify a phone's specific location within an area of overlapping coverage by multiple towers and noting that "many cases" have admitted testimony similar to that at issue in this case), *and* United States v. Jones, 918 F. Supp. 2d 1, 4–6 (D.D.C. 2013) (ruling that an FBI agent with extensive training in cell phone investigations could testify as an expert regarding the location of cell towers in a relevant area, the coverage sectors of the towers, and "where the cell phones must have been when they connected to each tower," because such testimony is "based on reliable methodology" and has been "widely accepted by numerous courts").

D. Authentication of Evidence Seized from a Defendant's Digital Device

Many cases involve evidence that is seized from a digital storage device, such as a computer, disc drive, or cell phone. Child pornography cases may involve images; fraud cases may involve accounting records; and homicide cases may involve information that sheds light on the defendant's motive or the method he or she used to commit the crime. Such evidence normally is authenticated by testimony about the retrieval of the evidence and its preservation, unaltered, until trial.[20] This is similar to the authentication procedure for physical evidence.

A defendant may argue that he did not place the evidence on the digital device—that a virus put it there or that someone else with access to the device was responsible for the presence of the evidence. Such an argument may well be critical to the defendant's culpability and proper for jury consideration, but it is largely irrelevant to authentication, as it does not relate to the identity or genuineness of the evidence. Similarly, in child pornography cases, whether images show real or simulated children may be an important factor in the defendant's guilt or innocence, but it probably should not be viewed as an authentication issue. So long as the images accurately reflect the data obtained from the defendant's digital storage device, they have been authenticated.[21]

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20. *See generally* United States v. Salcido, 506 F.3d 729, 733 (9th Cir. 2007) ("[T]he government properly authenticated the videos and images . . . by presenting detailed evidence as to the chain of custody [and] how the images were retrieved from the defendant's computers."); Midkiff v. Commonwealth, 694 S.E.2d 576 (Va. 2010) (images retrieved from the defendant's computer were properly authenticated by testimony that they were retrieved by copying the defendant's hard drive and then copying the images in question onto a DVD, from which the images used at trial were generated); Bone v. State, 771 N.E.2d 710 (Ind. Ct. App. 2002) (images were properly authenticated by testimony that they were retrieved from the defendant's computer and printed out).

21. *See, e.g.*, United States v. Edington, 526 F. App'x 584, 591 (6th Cir. 2013) (unpublished) ("The government must produce evidence sufficient to support a finding that the item is what the government claims it is—in this case, a video that the defendant received or possessed. This can be done by offering testimony from an investigator who was present when the video was retrieved and can describe the process used to retrieve it"; the government does not need to show that the video depicts actual children, as that is an issue for the jury to determine); *Salcido,* 506 F.3d at 733 ("While [the defendant] frames [the prosecution's alleged failure to establish that the videos and images in question depicted real, rather than virtual, children] as an issue of authenticity, this argument is more properly considered a challenge to the sufficiency of the evidence.").

E. Authentication of Web Pages

Web pages are often important evidence in criminal cases. Such evidence might include a Facebook wall posting from a defendant admitting guilt; Mapquest directions reflecting the driving distance between the defendant's home and the victim's residence; or a Google Maps printout showing an overhead view of the crime scene. Courts have been skeptical about the origins and authentication of material printed from websites generally.[22] However, the specific authentication issues regarding web pages vary based on the type of page at issue.

For example, social media postings present authorship issues similar to those with electronic communications, discussed above.[23] Different considerations arise with mapping websites like Mapquest and Google Maps. These sites

22. *In re* Yopp, 217 N.C. App. 489, 495 (2011) ("internet printout[]" used to show that two banks had merged "was not authenticated as a public record and was inadmissible; the mere fact that a document is printed out from the internet does not endow that document with any authentication whatsoever"); Rankin v. Food Lion, 210 N.C. App. 213, 217 (2011) (plaintiff attempted to use two documents to establish identity of the proper corporate defendant; "[o]ne of these documents appears to consist of a page printed from the website of the North Carolina Secretary of State, while the other appears to consist of an internet posting" about a defendant; these documents were not authenticated and were not admissible); United States v. Jackson, 208 F.3d 633, 638 (7th Cir. 2000) ("[The defendant] needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailings actually were posted by the groups, as opposed to being slipped onto the groups' web sites by [the defendant] herself, who was a skilled computer user"; but the defendant did not do so, and the websites were not authenticated).

23. For additional cases specifically concerning social media postings, see *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (screenshots of Facebook pages were properly authenticated as having been authored by the defendants where investigators had "track[ed] the Facebook pages and Facebook accounts to [the defendants'] mailing and email addresses via internet protocol addresses"); *United States v. Vayner*, 769 F.3d 125, 131 (2d Cir. 2014) ("[W]e conclude that the district court abused its discretion in admitting the VK web page, as it did so without proper authentication under [Federal] Rule [of Evidence] 901. The government did not provide a sufficient basis on which to conclude that the proffered printout was what the government claimed it to be—*Zhyltsou's* profile page—and there was thus insufficient evidence to authenticate the VK page and to permit its consideration by the jury."); *Parker v. State*, 85 A.3d 682 (Del. 2014) (ruling, in an assault case, that Facebook posts were properly authenticated as having been written by the defendant in part because they "referenced the altercation" in question and were created on the same day that the assault took place); and *Moore v. State*, 763 S.E.2d 670 (Ga. 2014) (ruling, in a murder case, that Facebook posts were properly authenticated as having been written by the defendant where the defendant's picture appeared on the Facebook page, the page contained details about the defendant, such as his nickname, hometown, and girlfriend, and

offer maps, driving directions, and driving times. The maps often are admitted based on the testimony of a witness that the maps fairly and accurately represent the area shown.[24] The distance measurements available on the sites may be the subject of judicial notice, though driving times may be hearsay.[25] Finally, information from government websites, like the state prison system's website, may be self-authenticating under Rule 902(5), which provides that "[b]ooks, pamphlets, or other publications purporting to be issued by public authority" are self-authenticating.[26]

II. Original Writing/Best Evidence Rule

A second issue that arises with regard to electronic evidence concerns the original writing or "best evidence" rule. Generally, if a piece of evidence is a writing, a recording, or a photograph and the proponent seeks to prove its contents, N.C. R. Evid. 1002 requires the introduction of the original of the writing, recording, or photograph.

Electronic writings such as emails, text messages, and social media postings are "writings" within the meaning of the original writing requirement. N.C. R. Evid. 1001(1) states that "writings" consist of "letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or

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the posts matched the "structure and style" of other communications from the defendant).

24. State v. Brown, 1 So. 3d 504 (La. Ct. App. 2008) (court erred in excluding Mapquest printout depicting crime scene; witness should have been allowed to testify that it fairly and accurately showed the scene; any inaccuracies went to weight, not admissibility).

25. People v. Stiff, 904 N.E.2d 1174 (Ill. App. Ct. 2009) (taking judicial notice of the distance between two residences based on Google Maps); Jianniney v. State, 962 A.2d 229, 230 (Del. 2008) (noting that "many courts have taken judicial notice of facts derived from internet map sites" but ruling that estimates of driving times, as opposed to distances, are hearsay not within any exception).

26. G.S. 8C-902(5). *See, e.g.*, Williams Farms Produce Sales, Inc. v. R & G Produce Co., 443 S.W.3d 250, 259 n.7 (Tex. App. 2014) ("[W]e hold that documents printed from government websites [here, a docket sheet printed from a federal court's website] are self-authenticating."), Firehouse Rest. Group, Inc., v. Scurmont, LLC, No. 4:09-cv-00618-RBH, 2011 WL 3555704, at *4 (D.S.C. Aug. 11, 2011) (unpublished) ("Records from government websites are generally considered admissible and self-authenticating."); Williams v. Long, 585 F. Supp. 2d 679, 689 (D. Md. 2008) ("The printed webpage from the Maryland Judiciary Case Search website is self-authenticating under [Federal] Rule [of Evidence] 902(5).").

electronic recording, or other form of data compilation." Courts have recognized that electronic writings of various kinds meet this definition.[27] Digital photographs also fall within the rule. Thus, in cases in which the contents of a digital writing or photograph are at issue, the proponent must satisfy the original writing requirements.[28]

Some electronic text may not be a writing within the scope of the rule. For example, when a witness seeks to testify about the phone number from which a call originated, based on the witness's observation of the number through caller ID, the opposing party may argue that the caller ID information is a "writing" the content of which the proponent is seeking to prove and that the original writing requirement therefore applies. However, it probably is not, as the number is generated by a computer rather than being "set down by handwriting, typewriting" or the like, as required by the rule.[29]

When it is necessary to comply with the rule, various "originals" may exist. A printout of data stored on an electronic device is an "original."[30] In the case of text messages, the cellular phone displaying the text message also constitutes an "original."[31] Furthermore, even if an "original" is not available,

27. *See, e.g.*, State v. Espiritu, 176 P.3d 885 (Haw. 2008) (finding text messages to be a writing).

28. *See* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (discussing criminal cases in which the proponent sought to prove the content of electronic writings). *See also generally* Hon. Paul W. Grimm et al., *Back to the Future:* Lorraine v. Markel American Insurance Co. *and New Findings on the Admissibility of Electronically Stored Information,* 42 Akron L. Rev. 357 (2009) ("[I]f there is no non-documentary proof of the occurrence, and the only evidence of what transpired is contained in a writing, then the original writing rule applies."). *Cf.* State v. Branch, 288 N.C. 514 (1975) (holding that witness could testify to a conversation he heard even though a recording of the conversation also existed; the conversation, not the content of the recording, was what was at issue).

29. State v. Schuette*,* 44 P.3d 459, 464 (Kan. 2002) ("Caller ID displays by their nature . . . cannot be printed out or saved on an electronic medium. [The defendant's argument] . . . is akin to contending that a clock must be produced before a witness can testify as to the time he or she observed an accident."). Even if a court were to rule that caller ID information constitutes a "writing," testimony about the writing probably would be admissible under N.C. R. Evid. 1004(1) on the theory that the "original" had been lost or destroyed without bad faith.

30. *See* N.C. R. Evid. 1001(3).

31. *See, e.g.*, State v. Winder, 189 P.3d 580 (Kan. Ct. App. 2008) (unpublished) (excusing production of cell phone containing text message, which the court assumed constituted an original); *Espiritu*, 176 P.3d 885 (trial court properly allowed witness to testify regarding contents of text messages when witness no longer had the cellular phone on which she received the messages; in ruling that the witness no longer had the "actual text messages," the court implicitly

in most instances, a duplicate is admissible to the same extent as an original.[32] A photograph of an electronic writing—for example, a photograph of a text message—may be admitted as a duplicate.[33]

Finally, neither an original nor a duplicate is required in the circumstances described in N.C. R. Evid. 1004. Subsection (1) of Rule 1004 describes the exception that is most likely to arise in criminal cases. It provides that the original is not required, and that a witness may testify to the contents of a writing, if all originals have been lost or destroyed—unless the proponent lost or destroyed the original in bad faith.[34] It is unclear how far courts should inquire into the loss or destruction of originals. For example, if a text message has not been retained on the recipient's phone and the recipient seeks to testify about the contents of the message, must the proponent of the testimony show that it is impossible to recover the contents from the recipient's service provider? From the sender's service provider? From the sender's phone? Case law does not yet answer these questions.[35]

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concluded that if the witness had retained the phone, that would have constituted an original).

32. *See* N.C. R. Evid. 1003 (stating that a duplicate is admissible except when there is a genuine question about the authenticity of the original or when it would be unfair to admit a duplicate in lieu of the original).

33. *See, e.g.*, Rodriguez v. State, 449 S.W.3d 306, 2014 Ark. App. 660 (Ark. Ct. App. 2014) (ruling that a photograph of a threatening text message was admissible where the witness testified that the message had been deleted from her phone and a representative of the phone company testified that the company does not keep records of the content of text messages; "the photograph of the text was all there was"); State v. Andrews, 293 P.3d 1203 (Wash. Ct. App. 2013) (ruling that a photograph of a text message was properly admitted as a duplicate where defense counsel acknowledged having no reason to doubt the accuracy of the photograph); Dickens v. State, 927 A.2d 32 (Md. Ct. Spec. App. 2007) (photographs of text messages properly admitted).

34. *See, e.g.*, Espiritu, 176 P.3d at 892 (concluding that "bad faith cannot be inferred because the text messages were not printed out when there is no indication that such a printout was even possible").

35. *Cf. Rodriguez*, 449 S.W.3d at 313, 2014 Ark. App. at ___ (ruling that a photograph of a text message was properly admitted notwithstanding the best evidence rule and noting in the course of the discussion that "[t]he State presented an AT & T representative, who testified that the company does not keep records of the content of text messages").

III. Hearsay

The hearsay rule applies to electronic evidence as it does to other evidence. However, certain types of electronic evidence present particular hearsay concerns. This section addresses the provisions of hearsay law that are most likely to arise when dealing with electronic evidence.

A. Statements by the Defendant

When offered by the State, a statement by the defendant is an admission of a party-opponent and therefore will be subject to the hearsay exception for such statements in N.C. R. Evid. 801(d). Thus, a text message, email, or the like that is authenticated as having been written by the defendant may be admitted under the hearsay rules.

If the defendant's statement is threatening, the statement also may be considered a declaration of state of mind within the hearsay exception in N.C. R. Evid. 803(3), or it may be non-hearsay evidence of a verbal act.[36]

B. Evidence That Is Not Hearsay

Several types of electronic evidence are not hearsay. Many courts have recognized that evidence that is produced automatically by a computer is not a statement of a declarant and so simply falls outside the scope of the hearsay rules. Examples include:

- Cell phone records[37]
- Caller ID information[38]
- Logs generated by alarm systems[39]

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36. *See* State v. Weaver, 160 N.C. App. 61 (2003) (holding that a statement of a bribe was evidence of a verbal act and was not offered for the truth of the matter asserted but, rather, to show that the statement was made).

37. Godoy v. Commonwealth, 742 S.E.2d 407, 411 (Va. Ct. App. 2013) (holding, in a rape case, that the defendant's cell phone records were properly admitted as they were "automatically self-generating" and "not governed by hearsay principles"; the court also noted that the records were not created for the purpose of litigation and so were not testimonial for purposes of Confrontation Clause analysis).

38. Inglett v. State, 521 S.E.2d 241, 245 (Ga. Ct. App. 1999) (finding no hearsay issue because caller ID information is "computer-generated data automatically appearing on the screen of the telephone").

39. State v. Gojcaj, 92 A.3d 1056, 1067 (Conn. App. Ct. 2014) ("[R]ecords that are entirely self-generated by a computer do not trigger the hearsay rule," because they aren't statements made by a declarant; thus, a log showing when an alarm system had been turned on and off was not hearsay).

- Information recorded by red light cameras[40]
- Data recorded by a tracking or monitoring device[41]

Similarly, the telephone number from which a text message was sent has been found not to constitute hearsay because such information is not a statement of a person.[42] Photographs also are not statements and so are not hearsay.[43] It is debatable whether a map constitutes a "statement" or is, like a picture, outside the realm of hearsay. If a map is a statement, it may often be admissible for the non-hearsay purpose of illustrating the testimony of a witness.[44]

C. Business Records

Some electronic evidence may be admitted as business records under N.C. R. Evid. 803(6), which concerns "records of regularly conducted activity" in any form. Courts have sometimes admitted evidence under the business records exception even where the evidence likely is not hearsay at all for the reasons set forth in the preceding section. For example, phone records are

40. People v. Goldsmith, 326 P.3d 239, 249 (Cal. 2014) (ruling that red light camera data, including date, time, and "length of time since the traffic signal light turned red" are "not statements of a person" but are electronically generated and so are not hearsay).

41. State v. Kandutsch, 799 N.W.2d 865, 879 (Wisc. 2011) (distinguishing between "computer-stored records, which memorialize the assertions of human declarants, and computer-generated records, which are the result of a process free of human intervention," and finding that tracking device data are the latter and so are not hearsay).

42. *See* State v. Schuette, 44 P.3d 459 (Kan. 2002); N.C. R. Evid. 801(a) (defining a statement as from "a person").

43. N.C. R. Evid. 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." *See* State v. Patterson, 332 N.C. 409 (1992).

44. State v. Wright, 752 A.2d 1147 (Conn. App. Ct. 2000) (rejecting a defendant's hearsay argument regarding the admission of a map used to show the distance from the location of his arrest to a nearby school; a witness testified that the map was a fair and accurate representation of the area, and the court stated that the map was merely a pictorial representation of the testimony of the witness); Dawson v. Olson, 543 P.2d 499 (Idaho 1975) (map should have been admitted for illustrative purposes, though if offered as substantive evidence, the hearsay rule would apply).

often admitted as business records,[45] and GPS data may also be admitted as a business record.[46]

An issue that arises with business records is whether live testimony is required to establish the foundation for admissibility. According to N.C. R. Evid. 803(6), the foundation for the business records exception must be "shown by the testimony of the custodian or other qualified witness." By way of contrast, the federal business records rule, Fed. R. Evid. 803(6), expressly provides that the foundation may be supplied by testimony *or by a written certification* from an appropriate witness. Notwithstanding the use of the term "testimony" in the North Carolina version of the rule, appellate case law supports the use of an affidavit to satisfy the foundational requirements of the business records exception.[47]

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45. State v. Brewington, 80 N.C. App. 42, 51 (1986) ("The [telephone] records were duly authenticated by the company's custodian for billing records and, if otherwise competent, were admissible under the business records exception to the hearsay rule."); State v. Hunnicutt, 44 N.C. App. 531 (1980) (telephone company's computerized billing and call records were properly admitted as business records). *Cf.* State v. Taylor, 178 N.C. App. 395 (2006) (noting that a telephone representative described how the records of text messages were created and maintained). Of course, the requisite foundation must be established. State v. Price, 326 N.C. 56 (1990) (holding that the trial court erred in allowing a telephone bill to be introduced to show the record of calls without the testimony of a witness about the preparation of the records), *vacated on other grounds*, Price v. North Carolina, 498 U.S. 802 (1990).

46. State v. Jackson, ___ N.C. App. ___, 748 S.E.2d 50 (2013) (the defendant committed a sexual assault while wearing a GPS tracking device as a condition of his pretrial release; the supervisor of the electronic monitoring unit testified regarding how the tracking device worked, and that established the foundation to admit the data from the device as a business record); United States v. Brooks, 715 F.3d 1069, 1079 (8th Cir. 2013) (the defendant robbed a bank and a teller slipped a GPS tracking device into the loot bag; the GPS "tracking reports fell under the business records exception").

47. *See* Simon v. Simon, ___ N.C. App. ___, 753 S.E.2d 475 (2013) (expressly rejecting the argument that the term "testimony" in N.C. R. Evid. 803(6) requires a live witness and holding that the applicability of the business records exception may be established by an affidavit from an appropriate person); *In re* S.W., 175 N.C. App. 719 (2006) (cited approvingly in *In re* S.D.J., 192 N.C. App. 478 (2008)). As authority for the use of an affidavit, *S.W.* cites *Chamberlain v. Thames*, 131 N.C. App. 705 (1998), a civil case that allowed an affidavit to be used under the specific provision regarding the use of affidavits to establish the foundation for the admission of medical and public records in N.C. R. Civ. P. 45(c). Because *Chamberlain* is a civil case applying a particular rule of civil procedure, it may not be a strong precedent for the use of affidavits in criminal cases. However, since *S.D.J.* and *Simon* have followed *S.W.*, the propriety of using affidavits appears to be settled.

The proponent may not avoid the foundation requirements of the business records exception by having a witness read from a business record for which a proper foundation has not been established.[48]

Business records generally are not testimonial, and therefore may be admitted without running afoul of the Confrontation Clause. The North Carolina Court of Appeals recently ruled that this was so even when the business records in question were GPS tracking records compiled by the North Carolina Department of Correction in connection with the monitoring of an individual on post-release supervision.[49]

48. *See* State v. Springer, 283 N.C. 627 (1973) (holding that allowing investigator to read from records violated the original writing rule).

49. State v. Gardner, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA14-646, 2014 WL 6907482, at *3 (N.C. Ct. App. Dec. 2, 2014) (reasoning that "the GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions.").

STATE OF NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE**
		DISTRICT COURT DIVISION
COUNTY OF _____		**FILE NO.: _____**
	)	
IN THE MATTER OF	)	**MOTION TO ALLOW**
	)	**REMOTE TESTIMONY VIA**
_____	)	**ELECTRONIC MEANS OR**
	)	**TELEPHONE**

NOW COMES, the undersigned counsel, _____, on behalf of the Respondent Mother/Father, _____, and moves the Court for an Order permitting the testimony of the Respondent [OR ANOTHER WITNESS] via electronic means or via telephone. In support of this motion, counsel for Respondent states the following:

1. The Petitioner filed a Petition on [DATE], seeking to terminate the parental rights of the Respondent Mother/Father _____.
2. That Respondent Mother/Father is [DESCRIBE CIRCUMSTANCES PREVENTING PRESENCE, SUCH AS THE FOLLOWING]:
   - Incarcerated at a federal facility located at _____
   - Respondent suffers from the following developmental disability or mental retardation [DESCRIBE] and N.C. Rule of Evidence 616 allows alternate participation for such a witness.
   - Respondent Mother/Father resides [X] miles away from the courthouse and lacks transportation and funds to travel to court.
   - Respondent Mother/Father has received services through [ORGANIZATION] located in the State of [NAME], which testimony is essential for purposes of a defense.
   - *Other circumstances (be specific!).*
3. That the Respondent Mother/Father has no practical means of transportation given the nature of her/his unavailability and the distance required to travel. [OR The witness(es) are located out of state (or some distance away) and the Respondent lacks the funds to compensate them for their time and travel to attend the hearing in person and they are not subject to a N.C. subpoena.]
4. That a hearing on the termination petition [or other hearing] has been scheduled for [DATE] at [LOCATION OF COURTHOUSE AND COURTROOM].
5. That the Respondent Mother/Father [or WITNESS treating the biological mother/father] of the minor child has the requisite personal knowledge and information relevant to this case.
6. That the testimony of the Respondent Mother/Father [or WITNESS] is essential in determining the termination of her/his parental rights to the minor child.

7. That the Respondent will be prejudiced without the ability to present her/his testimony at this proceeding when s/he is the only person with the direct knowledge of certain facts critical to her/his defense of this case.

8. [Use if applicable] That juvenile proceedings are subject to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) which allows for out-of-state participants to appear by electronic means. N.C. Gen. Stat. §50A-111.

9. The N.C. Administrative Office of the Courts provides both video and phone conference rooms for court personnel through Webex, which could be set up by the Juvenile Clerk.

10. That the Respondent requests that this Court enter an Order permitting the testimony of the Respondent/[WITNESS] via electronic means or via telephone from the [FACILITY NAME] in [LOCATION FROM WHICH CLIENT OR WITNESS WILL PROVIDE TESTIMONY].

WHEREFORE, Respondent, through counsel, moves this Court to permit the testimony of the Respondent/[WITNESS] via electronic means or via telephone and for such other and further relief as the Court may deem just and proper.

This the _____day of _____, 201__.

By: _____

Counsel Name
State Bar No.
Address
Telephone

Attorney for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO ALLOW REMOTE TESTIMONY VIA ELECTRONIC MEANS OR TELEPHONE has been served on the parties listed below by:

( ) depositing said notice in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

[*Insert name and address of attorney or party served in this manner]*

( ) hand-delivery to the attorney or party by leaving it at the attorney's office with a partner or employee.

[Insert name of attorney served in this manner]

( ) sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time.

[*Insert name and fax number of attorney served in this manner]*

THIS the _____ day of _____, 20__.

_____

[Name]
Attorney at Law
[Address]
[Telephone #]

STATE OF NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE**
		DISTRICT COURT DIVISION
COUNTY OF _____		**FILE NO.: _____**
	)	
IN THE MATTER OF	)	**ORDER GRANTING**
	)	**MOTION TO ALLOW**
_____	)	**REMOTE TESTIMONY**
	)	

THIS CAUSE coming on for hearing before the undersigned District Court Judge upon motion of counsel for the Respondent for an Order granting Respondent's motion to allow remote testimony via telephone or electronic means; and

IT APPEARS TO THE COURT that present in the Court were: [list all attorneys and parties they represent];

AND IT APPEARING TO THE COURT (or the Court finds that) [copy and paste #1-10 from motion as appropriate]

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that upon the Respondent's Motion and after hearing the arguments of counsel, the Respondent's Motion to allow electronic testimony is hereby granted and the Respondent/ [WITNESS] _____ is permitted to testify through electronic means such as video-conferencing, Skype, or telephone. [If the Court specifies the manner, please ensure it is included here. Consider leaving telephone as a backup in the event of technology failures or impossibilities.] The hearing on this matter is scheduled for [DATE] at [TIME].

This the _____day of _____, 2017.

_____

DISTRICT COURT JUDGE PRESIDING

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ORDER has been served on the parties listed below by:

( ) depositing said notice in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department.

[*Insert name and address of attorney or party served in this manner]*

( ) hand-delivery to the attorney or party by leaving it at the attorney's office with a partner or employee.

[Insert name of attorney served in this manner]

( ) sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time.

[*Insert name and fax number of attorney served in this manner]*

THIS the _____ day of _____, 20__.

_____

[Name]
Attorney at Law
[Address]
[Telephone #]

TECHNOLOGY IN THE COURTROOM
FOR PARENT ATTORNEYS

Follow “Lawyer Life Hacks” on Facebook for useful tips!

Calendar systems (use them for communication between parents and foster parents and social workers):

- Our Family Wizard (expense associated)
    - Heavily discounted for military families
    - Can get fee waived if obtain a court order explaining indigency status
    - www.ourfamilywizard.com
- Google Calendar
    - www.google.com
    - Create a common calendar in which the parents, foster parents, and social worker have access to medical appointments, school or other events or even visits

Creating a timeline (useful for clients to put together):

- www.thegolog.com

Electronic signatures:

- www.signnow.com
- www.getsigneasy.com

Screen shot presentations (texts, FB, Pinterest, etc):

- Screen Recorder (available on most computers)
- www.macroplant.com (text messages and voice mails using iExplorer) – cost associated

GAL PROGRAM:
WHO SPEAKS FOR A CHILD'S BEST INTEREST

THE GAL: Rethinking Who Speaks for the Child's Best Interests

AUGUST, 2017

PARENT ATTORNEY CONFERENCE

GAL Program

- Structure and Staff
- Volunteer
- Team Representation
- Responsibilities
- Conflicts of Interest

GAL Program-Structure and Staff

- Established by statute in 1983.
- G.S. 7B-1200 through 7B-1204.
- Staff
  - District Administrator
  - Program Supervisor(s)
  - Program Assistant
- Attorney Advocate
  - Independent contractor or State employee
- Volunteer

GAL Program-Volunteer

- Complete application
- Screening interview
- Criminal record check
- 30 hours training
- Sworn in
- Commit to at least 8 hours per month on a case
- Continuing education recommended at 12 hours/year

GAL Program-Responsibilities

G.S. 7B-601 sets out specific duties of the GAL, including to:

- make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs;
- facilitate, when appropriate, the settlement of disputed issues;
- offer evidence and examine witnesses at adjudication;
- explore options with the court at the dispositional hearing;
- conduct follow-up investigations to ensure that the orders of the court are being properly executed;
- report to the court when the needs of the juvenile are not being met; and
- protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

GAL Program-Team Representation

"An attorney advocate works as a partner with a guardian ad litem volunteer, and both are supported by the GAL program staff. The attorney advocate, volunteer, and staff therefore act as a team to represent and promote the best interests of the child."

- The TPR petition that is signed and verified by a GAL program specialist and not the individual volunteer GAL is proper. *In re S.T.B.*, 235 N.C. App. 290 (2014)
- The volunteer's presence at the hearing was not required unless the attorney advocate or the trial court deemed the GAL's presence necessary to protect the child's best interest. *In re J.H.K.*, 365 N.C. 171 (2011).
- TPR was reversed and remanded because a GAL was not appointed for the child in a timely fashion. There should have been a GAL investigating and determining the best interests of the child from the first petition alleging neglect…; it was not sufficient that an attorney advocate was appointed for her or that the attorney advocate was appointed as the guardian at litem during the TPR hearing. The functions of the attorney advocate and guardian ad litem are not sufficiently similar to allow one to substitute for the other when the best interests of the juvenile are at stake. *In re R.A.H.*, 171 N.C. App. 427 (2005),

GAL Program-Conflicts

- Minor mother has a baby and neglect petitions have been filed on both
- Conflict among sibling group where allegations that the older brother sexually abused the younger sister
- Generational conflict
- Personal conflict of GAL staff
- Personal conflict of attorney advocate

Strategies

Strategy 1: Develop a working relationship between your client and the volunteer

Strategy 2: Use the Court to force the GAL to take action

Strategy 3: Challenge the GAL's position

Strategy 1: Develop a working relationship

- Direct communication between the GAL volunteer and your client: pros and cons
- Client letter about the child for the GAL and foster parent
- List of people to interview/places to visit as part of the GAL's investigation

Strategy 2: Using the Court

- Motion for home visit
- Motion for observation of visit
- Motion for GAL to interview collateral contacts

Strategy 3: Challenging the GAL's position

- Motion for discovery
- Motion for replacement
- Motion for appointment of conflict attorney
- Motion to comply with statutory duties
- Cross examination

Contact Information

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North Carolina
GUARDIAN AD LITEM
A CHILD'S ADVOCATE IN COURT

Job Description

SUMMARY

A Guardian ad Litem (GAL) is a trained community member appointed by a district court judge to investigate and determine the needs of abused and neglected children and youth petitioned into the court system by the Department of Social Services. The GAL is paired with an Attorney Advocate to represent the child's best interest in court.

RESPONSIBILITIES

Digging for Details

- Gather and assess independent information about the child's situation and needs by
  - Getting to know the child
  - Interviewing parents, caretakers, social workers, teachers, service providers
  - Reading records related to the child and family

Collaborating

- Seek cooperative solutions with other participants in the child's case
- Communicate with the GAL Attorney Advocate to develop legal strategies and prepare for court
- Attend court hearings and other meetings

Recommending the Best

- Write child-focused reports for court hearings
- Make recommendations in the child's best interest
- Testify, when needed, to support recommendations or inform the court of changes in the child's situation

Empowering the Child's Voice

- Ensure that the court knows the child's wishes
- Keep the child informed about the court proceedings
- Facilitate the child's participation in court hearings as appropriate

Staying Vigilant

- Monitor the situation on an on-going basis
- Consult with local program staff for support and guidance

Confidentiality is Key

- Keep all records and information confidential

QUALIFICATIONS

A Guardian ad Litem possesses:

- A sincere concern for the well-being of children
- A commitment to advocate for a child until a safe and permanent home is established and court involvement is no longer required
- The ability to be objective and non-judgmental
- The ability to interact respectfully with people from diverse economic, educational, and ethnic backgrounds
- Good verbal and written communication skills

REQUIREMENTS

Guardian ad Litem advocates commit to at least eight hours per month on a case, and they are encouraged to serve until the case is completed, which usually takes at least a year.

In order to become a GAL, you will need to complete:

- an application
- a screening interview with program staff
- a criminal record check

After acceptance into the program, GALs complete 30 hours of training before being sworn in by a judge and appointed to advocate on behalf of a child. In addition to advocating for the child, GALs will attend continuing education trainings on advocacy issues.

SUPERVISION

Guardians ad Litem are supervised by program staff.

North Carolina
GUARDIAN AD LITEM
A CHILD'S ADVOCATE IN COURT

Division of Statutory Responsibilities of the Guardian ad Litem Volunteer, Attorney Advocate, and Guardian ad Litem Staff (N.C.G.S. § 7B-601)

To make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs.

Staff	Receives and reviews petition and any background information DSS shares about the case. Determines which available volunteer should be assigned to case
Staff	Assigns volunteer to case, sending copy of petition and GAL appointment order to volunteer. Shares any background information available with volunteer
Attorney Advocate / Staff / Volunteer	Reviews petition
Staff	Notifies volunteer of dates for non-secure, adjudication, disposition hearings
Staff	As needed, assists volunteer in planning steps and priorities of GAL investigation
Volunteer	Has direct and sufficient contact with the child-client (typically monthly) to carry out an independent and valid investigation of the child's circumstance and what the child wants so as to be able to make sound, thorough and objective recommendations in the child's best interest
Volunteer	Interviews parents and family members
Volunteer	Gathers and reviews data from various records, including DSS, Mental Health, education and other community service providers to ascertain needs of the child
Volunteer	Verifies accuracy of information gained during investigation
Staff	Assists the volunteer as necessary to gather and review data from various records, including DSS, Mental Health, education and other community service providers
Staff	Consults with volunteer to ensure all needs are identified
Volunteer	Determines what services are necessary to meet the child's needs; determines appropriate placement for the child
Staff	Notifies volunteer of foster care reviews and court hearings
Volunteer	Identifies which resources are available to meet the child's needs
Staff	Provides information regarding community resources; assists the volunteer in identifying which resources are available to meet the child's needs
Volunteer	Formulates recommendations for services to meet the child's needs
Staff	Helps volunteer identify additional resources to meet the child's needs
Staff	Consults with volunteer prior to hearings to review recommendations and court report
Staff	Coordinates the sharing of information between the volunteer and attorney advocate prior to the hearing as needed
Attorney Advocate	Reviews volunteer recommendations with volunteer and/or staff and determines need for witnesses

To facilitate, when appropriate, the settlement of disputed issues.

Attorney Advocate / Staff / Volunteer	Identifies and clarifies issues in the case which are known to be in dispute and agreement
Attorney Advocate / Staff / Volunteer	Determines the limits within which a settlement can be reached with other parties
Attorney Advocate / Volunteer	Discusses case issues with other parties to determine areas of agreement
Attorney Advocate	Communicates with volunteer and/or staff about possible settlements
Attorney Advocate / Staff / Volunteer	Facilitates agreement among parties when possible

To offer evidence and examine witnesses at adjudication.

Attorney Advocate	Consults with volunteer to determine what evidence is needed for the court hearing
Attorney Advocate	Reviews cases and clarifies disputed issues
Attorney Advocate	Identifies what evidence is needed, ensures that subpoenas are issued and documents that need to be introduced are secured
Attorney Advocate	Interviews witnesses to prepare them for court, including child when appropriate
Attorney Advocate	Performs legal research on disputed legal questions and prepares court presentation of case

To explore options with the judge at the dispositional hearing.

Volunteer	Writes court report, including the child's wishes, the child's needs and the resources available to meet those needs, and recommendations for achieving the goal of a permanent safe home for the child
Staff	Reviews court report to ensure that it includes the child's wishes, the child's needs and the resources available to meet those needs, and recommendations for achieving the goal of a permanent safe home for the child
Attorney Advocate	Reviews volunteer court report
Attorney Advocate	Advocates for the needs of the child, including the volunteer's recommendations as to how those needs might be met
Attorney Advocate	Brings the child's wishes to the attention of the court and lets the court know if the child's wishes and the child's best interests are not the same

To conduct follow-up investigations to insure that the orders of the court are being properly executed.

Attorney Advocate / Volunteer	Reviews the court order
Volunteer	Visits the child (typically monthly), and maintains sufficient contact with parents, relatives, foster parents and agency personnel to determine if the orders of the court are being properly executed
Staff	Notifies volunteer of foster care reviews, court hearings, and of any relevant information that they receive regarding the case
Staff	Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate
Volunteer	Verifies accuracy of information gained during follow-up investigation
Volunteer	Notifies staff and attorney advocate if the orders of the court are not being properly executed
Attorney Advocate / Staff / Volunteer	Contacts those who are responsible for carrying out the orders of the court to address issues surrounding non-compliance
Staff / Volunteer	Identifies facts and changes in situation that may necessitate the case's return to court
Attorney Advocate	Files necessary motions and schedules hearings as needed

To report to the court when the needs of the juvenile are not being met.

Attorney Advocate / Volunteer	Reviews the court order
Volunteer	Visits the child (typically monthly), and maintains sufficient contact with parents, relatives, foster parents and agency personnel to determine if the needs of the juvenile are not being met
Staff	Notifies volunteer of foster care reviews, court hearings, and of any relevant information that they receive regarding the case
Staff	Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate
Volunteer	Verifies accuracy of information gained during follow-up investigation
Volunteer	Notifies staff and attorney advocate if the needs of the juvenile are not being met
Attorney Advocate / Staff / Volunteer	Contacts those who are responsible for carrying out the orders of the court to address issues surrounding non-compliance
Staff / Volunteer	Identifies facts and changes in situation that may necessitate the case's return to court
Attorney Advocate	Files necessary motions and schedules hearings as needed

To protect and promote the best interest of the juvenile until formally relieved of the responsibility by the court.

Volunteer	Regularly monitors the child in his/her home setting, evaluating appropriateness of placement and whether the child is receiving court ordered services, identifying any unmet needs
Staff	Consults with volunteer throughout the life of the case to ensure adequate investigation and monitoring of the case
Volunteer	Ensures that the child's wishes are known to the court at every review hearing and that the child-client is appropriately informed about relevant case issues (impending court hearings, the issues to be presented, and the resolution of those issues) in an age appropriate manner
Volunteer	If the Volunteer's recommendations for the best interest of the child are in conflict with the wishes of the child, the Volunteer informs the child-client of the reasons for the Volunteer's recommendations
Attorney Advocate	Ensures that the child's wishes are known to the court at every review hearing
Volunteer	Determines if additional services are needed for the child
Attorney Advocate / Volunteer	Advocates for interventions and services that are designed to ensure that as soon as possible, the child is in a permanent safe home and GAL involvement will no longer be necessary
Staff	Provides support to the volunteer who advocates for interventions and services that are designed to ensure that as soon as possible, the child is in a permanent safe home and GAL involvement is no longer be necessary
Staff / Volunteer	Identifies facts and changes in situation that may necessitate the case's return to court
Attorney Advocate	Files necessary motions and schedules hearings as needed
Attorney Advocate	Files appeals as approved by the State GAL office
Staff	Maintains awareness of all cases assigned to volunteers and has ready access to information to discuss case when necessary and appropriate

NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Guardian ad Litem
Cindy Bizzell
Administrator

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POLICY AND PROCEDURES
CONFLICT ATTORNEY REPRESENTATION
Effective July 1, 2009; Revised July 1, 2015

Guardian ad Litem (GAL) conflict attorney representation is paid by the Administrative Office of the Courts (AOC) and is not paid by Indigent Defense Services (IDS). Assignment and payment of GAL conflict attorneys is made in accordance with the procedures and forms set forth herein. If you have questions about the policy and procedures, or analysis of a conflict of interest, please contact Deana Fleming, GAL Associate Counsel, at (919) 890-1322 or deana.k.fleming@nccourts.org.

I. Identification of Conflict

The identification of conflicts is based on **actual attorney conflicts** in representing GAL child clients. The focus of the analysis is the application of the Revised Rules of Professional Conduct related to GAL attorney advocate representation. The children served by the GAL Program are the clients of attorney advocates. Rule 1.7 prohibits representation of current clients who have a conflict of interest and Rule 1.9 requires certain duties to former clients. Note that while the Rules permit a client to give informed consent to waive an attorney's conflict, child clients by virtue of their minority cannot give informed consent. However, former child clients who are age 21 or older may give informed consent to waive a conflict.

There may also be conflicts related to the GAL Program such as personal conflicts of staff. Most conflicts will be identified by the GAL Program staff or attorney advocate and request for appointment of a GAL conflict attorney will be made and reflected in the court file.

Please refer to the Appendix for examples of common conflict scenarios. Contact GAL Associate Counsel for case-specific questions. Additionally, attorneys may contact the Ethics/Professional Responsibility section of the N.C. State Bar at (919) 828-4620.

II. Assignment of GAL Conflict Attorneys

GAL Conflict Attorneys will be assigned from the **GAL Conflict Attorney List**—*not* from the indigent defense list. GAL District Administrators are responsible for compiling the list of approved GAL conflict attorneys. The **GAL Attorney Conflict List** will be provided to the juvenile clerk and judge, and assignment will be made by local procedure. GAL conflict attorneys will be appointed to a specific case using "Order to Appoint or Release Guardian ad Litem and Attorney Advocate" (AOC-J-207) which is part of the court file.

The GAL District Administrator is responsible for completing the **GAL Conflict Attorney Approval Request Form** and sending it to Deana Fleming, GAL Associate Counsel, by mail, courier, fax (919) 890-1903, or scanned and emailed to deana.k.fleming@nccourts.org. The form is essential in tracking GAL conflict attorneys and ensuring proper payment.

GAL conflict attorneys may be paired with a GAL volunteer or GAL staff person in a dual representation model of attorney and GAL; or the conflict attorney fulfills all statutory duties using an attorney-only model. Flexibility of the model depends on local GAL Program resources and the circumstances of the conflict.

III. Responsibilities of GAL Conflict Attorneys

GAL conflict attorneys fulfill the statutory responsibilities as set forth in N.C. Gen. Stat. § 7B-601 by representing the child-client's best interests until released by the court upon achievement of a permanent plan or ceasing of juvenile court jurisdiction.

Hearings

GAL conflict attorneys will represent the best interests of the child or children to whom he or she is appointed in all hearings under Subchapter I of Chapter 7B including: non-secure custody hearings, adjudicatory proceedings, dispositional proceedings including reviews and permanency planning hearings, proceedings to terminate parental rights, and post termination of parental rights review hearings. GAL conflict attorneys will also attend any court ordered pre-trial conferences.

Legal Advocacy

GAL conflict attorneys will provide effective and zealous representation of child client's best interest, including informing the court of the child's wishes age-permitting. This advocacy includes the following:

- Ensure that all relevant evidence and witnesses to be introduced in court are identified and secured.
- Interview witnesses when appropriate, including the child client, and preparing witnesses for court.
- Ensure that subpoenas are issued and motions to quash are filed in a timely manner.
- Introduce relevant evidence in court, and examine witnesses. If possible, a GAL court report is introduced into evidence on behalf of the child.
- Make relevant and appropriate arguments to the court.
- Review court orders for accuracy and taking appropriate action when corrections are required. Additionally, help ensure that orders are entered timely.
- Advocate that all hearings are timely scheduled and held, including the filing of motions for such hearings on behalf of the child client if necessary.
- Discuss case issues with other parties to ensure complete familiarity with facts and issues in the case and to determine areas of agreement and disagreement and the legal limits within which a settlement can be reached.
- If working with a GAL volunteer or staff, ensure effective communication with the GAL volunteer and only enter into settlement agreements after consultation with the GAL volunteer or staff supervising the case.

Appeals

In accordance with current policy, appellate assignment is made by the GAL State Office. GAL conflict attorneys are not expected to represent the child client on appeal.

Training & Resources

GAL conflict attorneys are provided continuing legal education training with CLE credit from the GAL Program State Office. Typically this one-day training is scheduled for early fall and is currently offered to new and seasoned attorney advocates. Additional training for GAL conflict attorneys may also be developed on the local and regional level. GAL conflict attorneys may contact Deana Fleming, Associate Counsel, as a resource to answer questions about GAL advocacy. GAL conflict attorneys may access to the Guardian ad Litem Attorney Practice Manual 2007 Edition.[1]

IV. Payment of GAL Conflict Attorney

GAL conflict attorneys are paid a rate of $50.00 per hour. Upon approval of the conflict assignment (District Administrator submits **GAL Conflict Attorney Approval Request Form**), the GAL conflict attorney will be approved for up to 20 hours of legal work. Additional hours will be approved in increments on an as needed basis depending on the complexity and length of the case in court. If the conflict attorney wants direct deposit, he or she may complete the **AOC Vendor Payment Method Verification Form** (AOC-A-225) and return to AOC-Fiscal Services Division, Attn: Sue Cunningham, P.O. Box 2448, Raleigh, NC 27602.

Payment Procedure

After designated hearings and entry of the written order by the court, GAL conflict attorneys complete and submit the **Request for Payment of GAL Conflict Attorney Services** form with a time sheet attached.[2] This form will be submitted to the District Administrator who will forward the form to AOC, GAL Services Division, Attn: Sandra Paul, P.O. Box 2448, Raleigh, NC 27602. Upon receipt, GAL Services Division will forward payment requests to AOC Fiscal Services Division for disbursement of funds.

Designated Hearings

The conflict attorney may submit the request for payment upon entry of the written order after the following hearings:

- ✓ **Disposition** (the submission will include time spent for nonsecure custody hearings, the adjudicatory hearing, and disposition hearing)
- ✓ **Review and Permanency Planning** hearings held pursuant to G.S. § 7B-906.1
- ✓ **Termination of Parental Rights**
- ✓ **Post TPR Review** hearings held pursuant to G.S. § 7B-908

In some cases, there may be other types of hearings such as a motion pursuant to Rule 60. Time for these hearings may be submitted with the above designated hearings, or separately if necessary. Time spent when a case is continued will be part of the time requested when the hearing is completed and order entered.

[1] Note that section 12.7 on conflicts is revised and amended by this policy.

[2] GAL conflict attorneys track their "billing hours" according to their regular practice. GAL/AOC needs some verification of the billable time spent on each conflict case.

Billable Time (Note that the table is a sampling and not exhaustive)

	Billable Time	Non-Billable Time
In Court	- In trial - Negotiations - Presence at pretrial conference - Waiting time > 1 hour may bill **1 hour total** even if actual time is greater	- Waiting time if less than one hour
Out of Court	- Preparing for trial including witness preparation - Reviewing court orders & documents - Preparing motions or other pleadings such as responses or subpoenas - Meeting with child client or GAL staff or volunteer - Discussing case with other parties - Investigative work such as talking with social worker or a therapist	- Travel time

Fees

Receipts for fees such as service by certified mail may be submitted with the payment form. Note there should not be a fee for sheriff's service since the child client is considered indigent.

Parking fees are not covered. Copying fees are not covered. The GAL Office should be used to make necessary copies of documents.

Expert witness fees must be approved on a case-by-case basis by contacting Deana Fleming at (919) 890-1322 or deana.k.fleming@nccourts.org.

Mileage

If a child client is in an out-of-county placement, GAL/AOC will pay $0.50 per mile for the GAL Conflict Attorney to visit the child on a monthly basis using AOC-A-25. Travel time is not billable.

V. Common GAL Conflict Scenarios

1) Minor mother has a baby and neglect petitions have been filed on both. This scenario creates a current conflict of interest between clients of the attorney advocate. The attorney advocate may only represent one child client and a GAL Conflict Attorney is assigned to the other child client. If the attorney advocate was already representing a child client who becomes a mother, the attorney advocate continues to represent the minor mother and a GAL Conflict Attorney is assigned to represent the baby who may also be assigned a GAL volunteer. District resource permitting, one GAL staff person would supervise the GAL paired with the attorney advocate and a different GAL staff person would supervise the GAL paired with the GAL conflict attorney.

2) Conflict among sibling group where allegations that the older brother sexually abused the younger sister. This scenario also creates a conflict of interest among current clients. The structure of representation would be the similar to example #1.

3) Generational conflict. Former GAL client is now 25 years old, is addicted to alcohol, and a juvenile petition is filed on her 3 year old. The same attorney advocate and same district administrator are still employed by the GAL Program, but there is a new program supervisor. The attorney advocate has a duty to the former client and unless the 25 year old waives the conflict, a GAL conflict attorney must be appointed. A volunteer is appointed and supervised by the program supervisor. The old file is not reviewed.

4) Generational conflict #2. Former GAL client is 23 and is the father of a child for whom DSS has filed an abuse petition. He aged out of foster care with many anger issues. The GAL staff is the same and remembers his problems. There is a new attorney advocate. Although there is not an attorney conflict, because of bias of the program staff, it may be necessary to assign a GAL conflict attorney without a volunteer.

5) Personal conflict of GAL staff. A juvenile petition is filed against a cousin of a GAL staff person and this staff person wishes to be a possible placement for the child. The case would be referred to a conflict attorney and probably not paired with a GAL volunteer.

6) Personal conflict of attorney advocate. Contract attorney advocate represented the respondent father on a charge of driving under the influence, and the father refuses to waive the conflict of interest. This case is not assigned a GAL conflict attorney. Under the contract with AOC, the attorney advocate is responsible for making payment arrangements with a GAL backup attorney who will work with the assigned volunteer. Some districts hold back attorney retainer funds to cover these type of personal conflicts. Personal conflicts of GAL staff attorneys (state employees) are covered by GAL conflict attorneys.

TELL ME ABOUT YOUR CHILD

Please write a letter or a list to your child's foster parent or relative caregiver to help your child during the time he or she is out of your home.

The following list will give you some ideas about what to write.

- **Your Child's name and any nickname he or she has**
- **Age and Date of Birth**
- **Your child's sleeping habits** (for example: bedtime, wakes up during the night, naps, needs a nightlight, has nightmares, sleeps soundly, hard time waking up, etc.)
- **Your child's bathing, grooming, dressing and bathroom routine** (for example: uses diapers or training pants, needs help with bathing, can care for him/herself, has special skin needs or allergies, dresses without help, bed wetting, special hair/skin care etc.)
- **Your child's eating habits** (for example: favorite foods, special diet, infant formula, skips meals, fussy eater, does not like certain foods, has food allergies, foods likes/dislikes etc.)
- **Your child's health** (for example: doctor, dentist, immunization history, history of illnesses, allergies, asthma, takes medicine, vision or hearing problems, hospitalizations, any upcoming appointment, attends therapy or counseling etc.)
- **Your child's education** (for example: school, grade, favorite subject, homework habits, reports/projects due, special school needs, takes medication, receives medication at school, needs help with homework, attendance, behavior, performance, early intervention services, special education, vocational or education goals etc.)
- **Your child's household chores (**for example: does dishes, helps with younger children, feeds a pet, can shop for groceries, gets an allowance, specific chores they enjoy etc.)
- **Your child's interests** (for example: likes playing with others, has a favorite game or sport, likes reading or drawing, likes playing alone, special interests, favorite TV show, are they a part of any organized activities, involvement with a mentor (i.e. girl scouts, sports, church groups etc.)
- **Your child's talents (**for example: singing, dancing, sports, musical instrument, writing**,** drawing)
- **Your family's culture, religious and holiday traditions (**for example: member of religious community, attends religious services regularly, requires special diets, celebrates religious/culture holidays, observes religious practices, family traditions etc.)
- **People important to your child** (for example: siblings, grandparents, aunts, uncles, neighbors, friends, classmates, teachers, coaches, church members etc. Include any household rules about sleepovers)
- **About your older child** (for example: job history, driver's permit, social group, sexual behavior, interest in using alcohol or drugs, curfew, etc.)

7/28/17

STATE OF NORTH CAROLINA
COUNTY OF _____

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO: _____

IN THE MATTER OF:

Motion for GAL Program to Comply with Statutory Duties

NOW COMES the Respondent **[Name]**, by and through counsel, and moves the Court for an order requiring the Guardian ad litem program to comply with their statutory duties. In support of this motion, the undersigned states the following:

1. G.S. 7B-601 sets forth the duties of the guardian ad litem (GAL). *In re R.A.H.,* 171 N.C. App. 427 (2005), held that it is prejudicial when a juvenile is not represented by a GAL at a critical stage of the proceeding. Likewise, it is prejudicial when the GAL fails to adequately perform their duties. *In re A.D.L.*, 169 N.C. App. 701 (2005) (no prejudice when the court file had no guardian ad litem appointment papers for the juveniles but "it was clear that the guardian ad litem followed her statutory duties.")

2. In this case, **[Name]** was appointed as the juvenile's GAL. The GAL has not followed his/her statutory duties in that he/she has failed to: **[check all that apply]**
   - ☐ make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs;
   - ☐ facilitate, when appropriate, the settlement of disputed issues;
   - ☐ offer evidence and examine witnesses at adjudication;
   - ☐ explore options with the court at the dispositional hearing;
   - ☐ conduct follow-up investigations to ensure that the orders of the court are being properly executed;
   - ☐ report to the court when the needs of the juvenile are not being met;
   - ☐ protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

3. **[Give details about the GAL's actions and the efforts Movant made to address the concerns outside of court]**

WHEREFORE, the undersigned requests the following relief:

1. That the Court enter an Order requiring the GAL to:
   - ☐ Interview the following persons **[List of names]** by **[Date]**
   - ☐ Meet with the juvenile's parent by [**Date]**
   - ☐ Observe a visit between the **[Name]** and the juvenile
   - ☐ Visit the home of **[Name]** by **[Date]**

2. For any such other and further relief as the Court deems just and proper.

This the ____ day of_____, 2017.

_____

[Name]
Attorney for **[Name]**
Address
Phone Number
Bar number:

PARENTS' RIGHTS AFTER REMOVAL

Parents' Rights After Removal

Karen Jackson
Allyson Shroyer
Annick Lenoir-Peek

Rights Following Non-Secure Custody

Rights Following Disposition

Rights Following Guardianship

Rights Following Custody Award to Another

Rights Following Post-Termination of Parental Rights

Any Questions?

- Karen Jackson
  - Private counsel in Guilford County
  - karenjacksonlaw@gmail.com
  - 336-273-0049
- Allyson Shroyer
  - Private counsel in Rutherford County
  - as@rutherfordlegal.com
  - 828-748-3367
- Annick Lenoir-Peek
  - Assistant Appellate Defender
  - Annick.lenoir-peek@nccourts.org
  - 919-354-7230

Parents' Rights After Removal

Karen Jackson
Allyson Shroyer
Annick Lenoir-Peek

HANDOUTS INCLUDED:

- NC Rights ABA Flyer
- School Enrollment Statute
- School Affidavits
- Statutory Form Health Care Power of Attorney
- Temporary Guardianship Agreement
- Reasonable and Prudent Parenting Activities Guide Draft
- Applying the Reasonable and Prudent Parenting Standard
- Foster Care Licensing List of Rights
- *In re M.B.*, published May 16, 2017
- Visitation Agreement
- Checklists (to be handed out during presentation)

Understanding Your Rights as a Parent

What parents in **North Carolina** need to know **after a child's removal:**

You have the right to:

- **Visitation with your child**
- **Approve non-emergency surgery and major medical care for your child**
- **Consent to your child's marriage**

These rights may be limited. Please read more in this document and talk to your lawyer about how to exercise these rights.

You should be informed about:

- **Your child's placement moves**
- **Your child's emergency medical procedures**

Informed means that you, as the parent, do not have to be involved in the decision making process, but once a decision is made you will notified of that decision.

The child welfare agency must help return your child to you. The court will want to know what the agency is doing to help you. Remember, your lawyer works for you. Ask your lawyer for help with any of these issues.

State policy gives you rights and responsibilities as a parent after your child is removed and placed in someone else's care. This includes the right to visit your child unless a judge orders otherwise and the right to consent to your child's marriage.

Education and School Rights

While your child is in foster care, you should help make decisions about your child's education. You should be able to attend school meetings, ask questions, and get answers about your child's education. You should be told about how your children are doing in school.

Medical Rights

While your child is in foster care, you should help make medical decisions and attend appointments for your child. You should be notified of any medical emergencies. In some instances, your child can choose not to share their medical information with you. You have the right to approve any surgery or serious medical care your children need unless it is an emergency and you cannot be reached. You should be told as soon as possible if any emergency procedures are needed for your child.

Placement Decisions

Be prepared to suggest a relative or other placement with an adult who knows your child and would be supportive of you and your family. You should be told when your child moves to another home.

Right to Counsel

According to state statute, you have the right to be represented by a lawyer at all hearings. If the court finds you cannot afford a lawyer, it will appoint one for you. You must be informed of this right by the court.[1]

Due Process Rights

While your child is in foster care you have the right to request an appeal, request an interpreter if you need one, and Indian Child Welfare Act protections. You also have the right to:

- Have input on the Out of Home Family Services Agreement;
- Attend agency reviews of your child's case;
- Have an attorney represent you in court; and
- Receive notice of and attend any court action held about your child or your parental rights unless the court acts in an emergency situation.

This information and more can be found:
North Carolina Division of Social Services Family Support & Child Welfare Services Understanding Foster Care: A Handbook for Parents
http://info.dhhs.state.nc.us/olm/forms/dss/dss-5201.pdf
American Bar Association Center on Children and the Law Parent Representation
http://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation.html
Rise Magazine for Parents http://www.risemagazine.org/
Birth Parent National Network http://bpnn.ctfalliance.org/

[1] N.C. Gen. Stat. §§ 7A-451(a)(12), 7B-602.

SCHOOL ENROLLMENT

(a3) A student who is not a domiciliary of a local school administrative unit may attend, without the payment of tuition, the public schools of that unit if all of the following apply:

(1) The student resides with an adult, who is a domiciliary of that unit, as a result of any one of the following:

a. The death, serious illness, or incarceration of a parent or legal guardian.

b. The abandonment by a parent or legal guardian of the complete control of the student as evidenced by the failure to provide substantial financial support and parental guidance.

c. Abuse or neglect by the parent or legal guardian.

d. The physical or mental condition of the parent or legal guardian is such that he or she cannot provide adequate care and supervision of the student.

e. The relinquishment of physical custody and control of the student by the student's parent or legal guardian upon the recommendation of the department of social services or the Division of Mental Health.

f. The loss or uninhabitability of the student's home as the result of a natural disaster.

g. The parent or legal guardian is one of the following:

1. On active military duty and is deployed out of the local school administrative unit in which the student resides. For purposes of this sub-sub-subdivision, the term "active duty" does not include periods of active duty for training for less than 30 days.

2. A member or veteran of the uniformed services who is severely injured and medically discharged or retired, but only for a period of one year after the medical discharge or retirement of the parent or guardian.

3. A member of the uniformed services who dies on active duty or as a result of injuries sustained on active duty, but only for a period of one year after death. For purposes of this sub-sub-subdivision, the term "active duty" is as defined in G.S. 115C-407.5

Assignment under this sub-subdivision is only available if some evidence of the deployment, medical discharge, retirement, or death is tendered with the affidavits required under subdivision (3) of this subsection.

(2) The student is:

a. Not currently under a term of suspension or expulsion from a school for conduct that could have led to a suspension or an expulsion from the local school administrative unit, or

b. Currently under a term of suspension or expulsion from a school for conduct that could have led to a suspension or an expulsion from the local school administrative unit and is identified as eligible for special education and related services under the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400, et seq., (2004). Assignment under this sub-subdivision is available only if evidence of current eligibility is tendered with the affidavit required under subdivision (3) of this subsection.

(3) The caregiver adult and the student's parent, guardian, or legal custodian have each completed and signed separate affidavits that do all of the following:

a. Confirm the qualifications set out in this subsection establishing the student's residency.

b. Attest that the student's claim of residency in the unit is not primarily related to attendance at a particular school within the unit.

c. Attest that the caregiver adult has been given and accepts responsibility for educational decisions for the student.

If the student's parent, guardian, or legal custodian is unable, refuses, or is otherwise unavailable to sign the affidavit, then the caregiver adult shall attest to that fact in the affidavit. If the student is a minor, the caregiver adult must make educational decisions concerning the student and has the same legal authority and responsibility regarding the student as a parent or legal custodian would have even if the parent, guardian, or legal custodian does not sign the affidavit. The minor student's parent, legal guardian, or legal custodian retains liability for the student's acts.

Upon receipt of both affidavits or an affidavit from the caregiver adult that includes an attestation that the student's parent, guardian, or legal custodian is unable, refuses, or is otherwise unavailable to sign an affidavit, the local board shall admit and assign as soon as practicable the student to an appropriate school, as determined under the local board's school assignment policy, pending the results of any further procedures for verifying eligibility for attendance and assignment within the local school administrative unit.

If it is found that the information contained in either or both affidavits is false, then the local board may, unless the student is otherwise eligible for school attendance under other laws or local board policy, remove the student from school. If a student is removed from school, the board shall provide an opportunity to appeal the removal under the appropriate policy of the local board and shall notify any person who signed the affidavit of this opportunity. If it is found that a person willfully and knowingly provided false information in the affidavit, the maker of the affidavit shall be guilty of a Class 1 misdemeanor and shall pay to the local board an amount equal to the cost of educating the student during the period of enrollment. Repayment shall not include State funds.

Affidavits shall include, in large print, the penalty, including repayment of the cost of educating the student, for providing false information in an affidavit.

STATE OF NORTH CAROLINA
COUNTY OF _____

AFFIDAVIT PURSUANT TO G.S. 115C-366
(Person With Whom Student Is Residing)

Now comes the affiant _____ having been duly sworn, who testifies as follows:

1. My name is _____. I reside at _____, _____ County, North Carolina. I am _____ years old.

2. _____(student's name), has resided with me since _____, 20__.

3. The student resides with me because: (Check the appropriate statement.)

_____ The parent or legal guardian of the student has died, suffers from a serious illness, or is incarcerated.

_____ The parent or legal guardian of the student has abandoned complete control of the student and is not providing substantial financial support and parental guidance to the student.

_____ The parent or legal guardian has neglected or abused the student.

_____ The parent or legal guardian suffers from a physical or mental condition that prevents the parent from providing adequate care and supervision of the student.

_____ The parent or legal guardian relinquishes physical custody and control of the student upon the recommendation of the department of social services of the Division of Mental Health. (Attach PCP or letter from DSS or DMH recommending placement.)

_____ The parent or legal guardian's home has been lost or rendered uninhabitable by a natural disaster.

_____ The parent or legal guardian is on active military duty and is deployed out of the local school administrative unit in which the student resides. For purposes of this sub-subdivision, the term "active duty" does not include periods of active duty for training less than 30 days. Assignment under this sub-subdivision is only available if some evidence of the deployment is tendered with the affidavits required under subdivision (3) of this subsection.

4. The student is not currently under a term of suspension or expulsion from a school for conduct that could have led to a suspension or an expulsion from the _____ County Schools.

5. The student has not been convicted of a felony in this state or any other state.

6. I have been given and accept the responsibility for educational decisions for the child, including receiving notices of discipline under G.S. 115C-191, attending conferences with school personnel, granting permission for school related activities and taking appropriate action in connection with the student's records.

7. (Please check the appropriate statement.)

_____ The affidavit of the student's parent or guardian or legal custodian will be forthcoming.

_____ The affidavit required of the student's parent, guardian or legal custodian cannot be provided because the parent, guardian or legal custodian has refused to sign the affidavit, is unable to sign the affidavit, or is otherwise unavailable to sign the affidavit.

8. The student's claim of residency in this local school administration unit is not primarily related to attendance or at a particular school within this local school administrative unit.

9. I UNDERSTAND THAT IF IT IS FOUND THAT I HAVE WILLFULLY AND KNOWINGLY PROVIDED FALSE INFORMATION IN THIS AFFIDAVIT THAT I SHALL BE GUILTY OF A CLASS 1 MISDEMEANOR AND SHALL PAY TO THE LOCAL BOARD AN AMOUNT EQUAL TO THE COST OF EDUCATING THE STUDENT DURING THE PERIOD OF ENROLLMENT. REPAYMENT SHALL NOT INCLUDE STATE FUNDS.

Further this affiant sayeth not.

_____
Person with whom student is residing, Affiant

Sworn to and subscribed before me:

_____
Notary Public

This the ___ day of _____, 20__
My commission expires: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

AFFIDAVIT PURSUANT TO G.S. 115C-366
(Parent or Legal Guardian's Affidavit)

Now comes the affiant _____ having been duly sworn, who testifies as follows:

1. My name is _____. I am the parent, legal guardian or custodian of _____(student's name).

2. _____(student's name), has resided with _____(name of person with whom student is residing) since _____, 20__.

3. The student resides with _____ because: (Check the appropriate statement.)

_____ I suffer from a serious illness or am incarcerated.

_____ I have abandoned complete control of the student and am not providing substantial financial support and parental guidance to the student.

_____ I have neglected or abused the student.

_____ I suffer from a physical or mental condition that prevents me from providing adequate care and supervision to the student.

_____ The parent or legal guardian relinquishes physical custody and control of the student upon the recommendation of the department of social services of the Division of Mental Health. (Attach PCP or letter from DSS or DMH recommending placement.)

_____ My home has been lost or rendered uninhabitable by a natural disaster.

_____ The parent or legal guardian is on active military duty and is deployed out of the local school administrative unit in which the student resides. For purposes of this sub-subdivision, the term "active duty" does not include periods of active duty for training less than 30 days. Assignment under this sub-subdivision is only available if some evidence of the deployment is tendered with the affidavits required under subdivision (3) of this subsection.

4. The student is not currently under a term of suspension or expulsion from a school for conduct that could have led to a suspension or an expulsion from the _____ County Schools.

5. The student has not been convicted of a felony in this state or any other state.

6. I have given _____(person with whom the student is residing) the responsibility for educational decisions for the child, including receiving notices of discipline under G.S. 115C-191, attending conferences with school personnel, granting permission for school related activities and taking appropriate action in connection with the student's records.

7. The student's claim of residency in this local school administration unit is not primarily related to attendance or at a particular school within this local school administrative unit.

9. I UNDERSTAND THAT IF IT IS FOUND THAT I HAVE WILLFULLY AND KNOWINGLY PROVIDED FALSE INFORMATION IN THIS AFFIDAVIT THAT I SHALL BE GUILTY OF A CLASS 1 MISDEMEANOR AND SHALL PAY TO THE LOCAL BOARD AN AMOUNT EQUAL TO THE COST OF EDUCATING THE STUDENT DURING THE PERIOD OF ENROLLMENT. REPAYMENT SHALL NOT INCLUDE STATE FUNDS.

Further this affiant sayeth not.

_____
Parent/Legal Guardian, Affiant

Sworn to and subscribed before me:

_____
Notary Public

This the ___ day of _____, 20__
My commission expires: _____

§ 32A-34. Statutory form authorization to consent to health care for minor.

The use of the following form in the creation of any authorization to consent to health care for minor is lawful and, when used, it shall meet the requirements and be construed in accordance with the provisions of this Article.

"Authorization to Consent
to Health Care for Minor."

I, _____, of _____ County, _____, am the custodial parent having legal custody of_____, a minor child, age_____, born_____, ____ . I authorize_____, an adult in whose care the minor child has been entrusted, and who resides at_____, to do any acts which may be necessary or proper to provide for the health care of the minor child, including, but not limited to, the power (i) to provide for such health care at any hospital or other institution, or the employing of any physician, dentist, nurse, or other person whose services may be needed for such health care, and (ii) to consent to and authorize any health care, including administration of anesthesia, X-ray examination, performance of operations, and other procedures by physicians, dentists, and other medical personnel except the withholding or withdrawal of life sustaining procedures.

[Optional: This consent shall be effective from the date of execution to and including_____,_____].

By signing here, I indicate that I have the understanding and capacity to communicate health care decisions and that I am fully informed as to the contents of this document and understand the full import of this grant of powers to the agent named herein.

(SEAL)
Custodial Parent Date

STATE OF NORTH CAROLINA

COUNTY OF

On this _____ day of_____, ____, personally appeared before me the named_____, to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledges that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

Notary Public

My Commission Expires:

(OFFICIAL SEAL). (1993, c. 150, s. 1; 1999-456, s. 59.)

Temporary Guardianship Agreement

I, _____, of _____
(print your full name) (street)

_____, as the custodial parent of:
(city, state, zip)

List the full names of each child	List each child's birth date

Do hereby grant temporary guardianship of the above listed children to:

List the full names of the individual (s) to whom you are granting temporary custody	List each person's relationship to the child(ren)

Contact information of temporary guardians listed above:

Address: _____

Phone numbers: _____

Statement of Consent: (To be signed in the presence of a legalized notary public.)

I, _____, *hereby grant temporary guardianship of the above children, whom*

I have legal custody of to _____:

☐ From _____ to _____
(mm/dd/yyyy) (mm/dd/yyyy)

☐ For as long as necessary, beginning on _____
(mm/dd/yyyy)

In addition, in the event of an emergency or non-emergency situation requiring medical treatment, I hereby grant permission for any and all medical and/or dental attention to be administered to my child/children, in the event of an accidental injury or illness. This permission includes, but is not limited to, the administration of first aid, and the use of an ambulance, and the administration of anesthesia and/or surgery, under the recommendation of qualified medical personnel. I also grant permission for the guardian(s) named above to make educational decisions for my child/children.

Signature: _____ Date: _____

Signature: _____ Date: _____

Notarization:

On this _____ day of _____, _____, _____
(date) *(month)* *(year)* *(name of parent)*
personally appeared before me in _____, _____ and, in my presence,
(city) (state)
has/have satisfactorily identified him/her/themselves as the signer(s) of this Temporary Guardianship Form.

Name of Notary Official: _____ *Affix Notary Seal Here*

Signature: _____ Commission Expires: _____

REASONABLE AND PRUDENT PARENTING ACTIVITIES GUIDE DRAFT

The Reasonable & Prudent Parenting Standard is a requirement for IV-E agencies per Federal Law PL 113-183 and it became SL 2015-135 in North Carolina. The reasonable and prudent parent standard means the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of North Carolina to participate in extracurricular, enrichment, cultural, and social activities. Normal childhood activities include, but are not limited to, extracurricular, enrichment, and social activities, and may include overnight activities outside the direct supervision of the caregiver for a period of over 24 hours and up to 72 hours.

This tool is a guide to identify what activities caregivers have the authority (includes signing permissions/waivers) to give permission for a child or youth's participation without the prior approval of their local child welfare agency or licensing agency. The first column in the table shows a category of activities, the second column identifies specific activities within that category that a caregiver has the authority to give permission (or sign whatever might be a part of the activity) without obtaining the agency's approval. The third column identifies those activities that do require the agency's or court's approval.

It is important to realize this is simply a guide as to who has the authority to provide permission. It does not automatically mean that every foster child or youth can participate in any of these activities. It does mean that a reasonable & prudent parent standard is applied in making the decision. The standard is applied to each child and youth individually, based on the totality of their situation. One tool that can be used by caregivers to help apply critical thinking in making these decisions is the Applying the Reasonable & Prudent Parent Standard.

Child Activity Category	Examples of normal Childhood Activities caregivers can approve independently	Examples of childhood activities the local child welfare agency or licensing agency must approve or obtain a court order
(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
1. Family Recreation	• Movies • Community Events such as concert, fair, food truck rodeo • Family Events • Camping • Hiking • Biking using a helmet • Other sporting activities using appropriate protective gear • Amusement park • Fishing (must follow NC General Statute Chapter 113: Any one over age 16 must have a license)	• Any of these events or activities lasting over 72 hours • Target Practice (gun, bow and arrow, cross bow at either formal range or private property) must have local child welfare agency approval and be supervised by adult age 18 or over, abiding by all laws.
2. Water Activities (Children must be closely supervised and use appropriate safety equipment for water activities)	• Structured water activities with trained professional guides and /or lifeguards: river tubing, river rafting, water amusement park, swimming at community recreation pool. • Unstructured water activities with adult supervision: boating wearing a life jacket, swimming	• Any of these events or activities lasting over 72 hours

Child Activity Category	Examples of normal Childhood Activities caregivers can approve independently	Examples of childhood activities the local child welfare agency or licensing agency must approve or obtain a court order
(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
3. Hunting (using gun, bow and arrow)		Must have local child welfare agency approval, should have biological parent approval and would require the following: • Child/youth must take the NC Hunter's Safety Class • Supervision by a person at least 18 years old or over, who has also taken the above safety course • Documentation that the requirements are met are provided to the local child welfare agency in advance
4. Social/Extra-curricular activities	• Camps • Field Trips • School related activities such as football games, dances • Church activities that are social • Youth Organization activities such as Scouts • Attending sports activities • Community activities • Social activities with peers such as dating, skateboarding, playing in a garage band, etc • Spending the night away from the caregiver's home	• Any of these events or activities lasting more than 72 hours • Target Practice (gun, bow and arrow, cross bow at either formal range or private property) must have local child welfare agency approval and be supervised by adult age 18 or over, abiding by all laws. • Playing on a sports team such as school football would require both the birth parents' approval and the local child welfare agency approval

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(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
5. Motorized Activities	Children and caregivers must comply with all laws and use appropriate protective/safety gear. Any safety courses that are required or available to operate any of the vehicles/equipment listed must be taken. Children <u>riding in</u> a motorized vehicle with an adult properly licensed if required including but not limited to: • Snowmobile • All-terrain vehicle • Jet ski • Tractor • Golf cart • Scooter • Go-carts • Utility vehicle • Motorcycle State laws must be followed regarding operating motorized equipment or vehicle including but not limited to: • Snowmobile	• Children may not be a passenger on a lawnmower.

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(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
	• All-terrain vehicle (must be 8 years of age to operate and anyone less than 12 years of age may not operate an engine capacity of 70 cubic centimeter displacement or greater; no one less than 16 may operate an engine capacity of 90 cubic centimeter displacement or greater and NO ONE under 16 may operate unless they are under the continuous visual supervision of a person 18 years or older per NC § 20-171.15) • Jet ski (may be 14 years of age with boating safety certification, otherwise must be 16 or older- NC § 75A-13.3) • Tractor (must be 15 to operate NC § 20-10) • Golf cart (must be 16 to operate NC § 153A-245) • Scooter/Moped (No one under age 16 may operate a moped and no license is required NC § 20-10.1)	

Child Activity Category	Examples of normal Childhood Activities caregivers can approve independently	Examples of childhood activities the local child welfare agency or licensing agency must approve or obtain a court order
(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
	• Go-carts • Utility vehicle • Lawn mower may not be operated by anyone below age 12 • Motorcycle (No one under 16 may acquire a license or learner's permit. No one less than 18 may drive a motorcycle with a passenger. NC § 20-7)	

Child Activity Category	Examples of normal Childhood Activities caregivers can approve independently	Examples of childhood activities the local child welfare agency or licensing agency must approve or obtain a court order
(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
6. Driving	The following persons can be the required second signature for a youth's permit or license: • Youth's parent or guardian • A person approved by the parent or guardian • A person approved by the Division • Specifically for children in custody: Guardian ad litem or attorney advocate; a case worker; or someone else identified by the court of jurisdiction The youth who is 16 or older may acquire insurance and is responsible for the premium and any damages caused by the youth's negligence. This does not preclude a foster parent from adding a youth to their insurance. A driver's permit is required to "practice" driving in NC and cannot be obtained prior to age 15.	

Child Activity Category	Examples of normal Childhood Activities caregivers can approve independently	Examples of childhood activities the local child welfare agency or licensing agency must approve or obtain a court order
(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
7. Travel	All travel within the United States less than 72 hours	• All travel more than 72 hours • All travel outside the country
8. Employment/Babysitting	Youth 14 years and older and following NC § 95-25.5. • Interview for employment • Continuation of current employment • Does not interfere with school *Sexually aggressive and physically assaultive youth may not babysit other children	Youth is 13 years or younger
9. Religious Participation	Attend or Not attend a religious service of the child's choice	Notify worker when the child and the biological parent and/or foster parent choices are in conflict.
10. Cell Phone		This is a collaborative decision between the placement provider, the local child welfare agency worker, and the youth.

Child Activity Category	Examples of normal Childhood Activities caregivers can approve independently	Examples of childhood activities the local child welfare agency or licensing agency must approve or obtain a court order
(Local child welfare agency or licensing agency approval or new court order is needed any time an activity is in conflict with any court order or supervision/safety plan)		
11. Child's Appearance	• Interventions requiring medical treatment for lice and ring worm	• When the child and biological parent choices are in conflict such as with perms, color, style, relaxers, etc. • Ear piercings must include biological parent in decision • Permanent or significant changes including but not limited to: ○ Piercing (Per NC § 14-400 it is illegal for anyone under 18 to receive a piercing (other than the ears) without consent of custodial parent or guardian. ○ Tattoos (Per NC § 14-400 it is illegal for anyone under 18 to receive a tattoo.)
12. Leaving child home alone		• The issue of being left alone (in any situation) needs to be discussed and agreed upon in CFT.

*Adapted from Washington State Caregiver Guidelines for Foster Childhood Activities

Applying the Reasonable and Prudent Parent Standard

1. Is this activity reasonable and age-appropriate?
2. Are there any foreseeable hazards?
3. How does this activity promote social development?
4. How does this activity normalize the experience of foster care?
5. Will this activity violate a court order, juvenile justice order, a safety plan, a case plan, or a treatment plan or person-centered plan (PCP)?
6. Will this activity violate any policy or agreement of my licensing agency or the child's custodial agency?
7. If appropriate, have I received consultation from my case worker and/or the child's caseworker?
8. If able and appropriate, have I consulted with this child's birth parents about their thoughts and feelings about their child participating in this particular activity?
9. Will the timing of this activity interfere with a sibling or parental visitation, counseling appointment, or doctor's appointment?
10. Who will be attending the activity?
11. Would I allow my birth or adopted child to participate in this activity?
12. How well do I know this child?
13. Is there anything from this child's history (e.g. running away, truancy) that would indicate he may be triggered by this activity?
14. Does this child have any concerns about participating in this activity?
15. Has this child shown maturity in decision making that is appropriate for his age and ability?
16. Does this child understand parental expectations regarding curfew, approval for last minutes changes to the plan and the consequences for not complying with the expectations?
17. Does this child know who to call in case of an emergency?
18. Does this child understand his medical needs and is he able to tell others how to help him if necessary?
19. Can this child protect himself?
20. When in doubt, refer to number 7.

Adapted from Florida's *Caregiver Guide to Normalcy*

http://www.kidscentralinc.org/caregiver-guide-to-normalcy/

CHANGE #01-2014
May 1, 2014

VII. SECTION .1100 | STANDARDS FOR LICENSING

This set of rules covers the basis for sound foster parenting. A review of this section provides the applicant and the foster home licensing social worker with an overview of the purpose and function of foster parenting. Beginning with client rights and ending with the rules for training, this section addresses most of the aspects of fostering. Foster parent applicants, licensed foster parents, and foster home licensing social workers should be familiar with each of the rules in 10A NCAC 70E .1100. Each of these rules is included on the Foster Home License Application (DSS-5016). A mastery of these rules helps the licensing social worker guide the applicant and speeds up the licensing process.

A. 10A NCAC 70E .1101 CLIENT RIGHTS

Foster parents are protectors of children in their care; they are defenders of each child's rights. The idea that the parent's preferences and desires are secondary to the rights of a child may be new to some parents. Understanding children's rights helps foster parents appreciate that parenting children in care may be different from parenting their own birth children. Child welfare experience and research show that these rights are essential to caring for children in foster care. Foster parents need to understand, accept, and agree to implement each of these of these rights.

The subsection of this rule reads:

(a) Foster parents shall ensure that each foster child:
(1) Has clothing to wear that is appropriate to the weather;

Foster parents are required to provide suitable and presentable clothes for the children in their care. This includes warm coats and jackets in cold weather, long sleeve shirts, trousers, dresses, skirts, and blouses as needed for the child to feel suitably attired for the climate. Summer clothes include short sleeve shirts, shorts, tee shirts, and suitable shoes for warm weather. Children should have underwear and socks appropriate to their age. All such clothing should be clean and in good condition. The intent of this rule is for the child to be able to engage in activities with other children without feeling conspicuous.

Licensing social workers should anticipate each child's need for appropriate clothing and discuss wardrobe issues with foster parents before the seasons change. A good time to do this is during a discussion of family rules and practices. Questions that can be asked to raise this subject include: How does the family dress for holiday outings, such as Christmas, Easter, Fourth of July, and Labor Day? How will the foster parents help the child to be acceptably dressed? This can be touchy, since the child may be attached to clothing that has strong emotional meaning. Making sure that a child is appropriately attired is not as simple as it may seem to new foster parents.

(2) Is allowed to have personal property;

Children may come into care with few belongings. Such belongings may be their only connection with the home of their birth parents, and should be respected. These belongings may need to be protected and the child assured that their property is safe and secure. Sometimes children's property may be offensive to the foster parents (e.g., posters of music artists that portray rebellious behavior, music with lyrics the foster parents find objectionable, etc.). Sometimes these belongings may not meet the hygiene standards of the foster parents. In such cases, the foster parents may need help in accepting children's property in their homes. You may need to provide guidance to help foster parents resist the temptation to forbid, clean, or sanitize the child's personal belongings. As long as the belongings do not pose a health or safety hazard, the child has a right to have personal belongings.

This right is a conditional right requiring foster parents to exercise judgment. A child's safety and health are more important than belongings. An example of belongings that pose a health hazard would be clothing infected with lice. Belongings that may pose a safety hazard are weapons, such as a knife or brass knuckles. Although foster parents must tolerate some items in their home they consider undesirable, they must use good judgment to restrict items that are unsafe or unhealthy. Licensing social workers should counsel foster parents to help them understand the range and limits of a child's right to have personal property.

(3) Is encouraged to express opinions on issues concerning care;
A child may not be pleased to be in a foster home, even if the home is materially better than the home of the child's birth family. The child may miss the home of his parents and express feelings of loss. Loss can elicit feelings of deep anger. Children in care may express this anger by rejecting or denigrating the foster home.

By accepting the child's feelings, foster parents show the child that it is safe to be honest and open in their home. Some children move several times in foster care and may not trust that the current placement will last. In such situations, the child may keep an emotional distance to avoid being disappointed again. One way to keep emotional distance is to criticize the home.

You may need to provide guidance to help foster parents control their own emotional responses if the child makes unflattering comments about them. The licensing social worker can prepare foster parents by helping them to anticipate criticism and plan how they will respond when such comments and feelings are expressed. Children need to know that it is safe to express any opinion in appropriate ways.

(4) Is provided care in a manner that recognizes variations in cultural values and traditions;

Each child comes into care with a set of cultural values and traditions. This connection with family is essential to the child's ability to develop a sound self-image and sense of identity. Foster parents are expected not only to accept these values and traditions, but also to help the child maintain and practice these traditions. For example, a foster family used to hugging and touching will need to respect the needs and preferences of children who come from families that do not easily touch each other. Understanding family traditions is important. For children of African ancestry, the practice of Kwanzaa may be as important as celebrating Christmas. Foster parents are expected to become experts on the cultural needs and traditions of the children in their care.

Shared parenting offers foster parents an excellent way to practice this right. Asking the birth parent for guidance on cultural issues and other preferences can be the starting point of a working relationship. This is an excellent opportunity to reinforce with the foster parent the expectation they work with the birth parents. The licensing social worker can help prepare the foster parents for communication with birth parents and set up contacts. The licensing social worker, operating as facilitator between foster parent, the child's social worker, and the birth parent, can show the way that shared parenting and working in partnership benefits the child and his family. (Please refer to: Section 1201; Chapter XI of the Child Placement Manual http://info.dhhs.state.nc.us/olm/manuals/dss/csm-10/man/)

(5) Is provided the opportunity for spiritual development and is not denied the right to practice religious beliefs;

Child rearing involves helping a child develop morally and spiritually. This is as important as helping the child grow physically and psychologically. At a minimum, each child needs to learn the basic values of honesty, respect for others, and integrity. Many children receive this support and instructions through religious beliefs and practices.

Foster parents help children develop spiritually and morally by instructing children in basic values. They also encourage a child to grow spiritually and morally by maintaining religious practices of the child's family of origin. To develop spiritually, a child needs instruction that is caring and accepting. For a child to practice his or her religious beliefs may require foster parents to be involved in religious practices different from their own. For example, caring for a child from a Catholic family may require the foster parent to take the child to Catholic Mass, confession, etc.

Children in foster care have a right to be free of attempts to change their religious beliefs. Foster parents may not insist that the child participate in the religious activity of the family. An effective way to support children's spiritual development is to ask questions and then listen very carefully for the reply. The licensing social worker may encourage this practice by demonstrating this technique to the foster parents. By asking questions of the foster parents (such as "How do you

know if something is right or wrong?") the licensing social worker can demonstrate how to listen without evaluating or correcting the answer. By asking the foster parents to describe spiritual values important to them, the licensing social worker shows the parents how to engage the child. Acceptance is crucial in helping a child develop spiritually. This value can be demonstrated in conversations with foster parents about their own spiritual development.

(6) Is not identified in connection with the supervising agency in any way that would bring the child or the child's family embarrassment;

A child is not a walking advertisement for the child-placing agency. As much as possible, a child in foster care should not stand out from other children in the family or the neighborhood. The child shall not have his or her image (photograph) displayed or circulated in reference to foster care, social services, mental health services, or any other circumstance, which led to the placement of the child. Foster parents may need help so that they do not inadvertently disclose the status of a child in a way that embarrasses the child.

(7) Is not forced to acknowledge dependency on or gratitude to the foster parents;

A child incurs no obligation or duty of gratitude by coming into care. Requiring expressions of gratitude and obligation from a child in foster care can be harmful and dishonest. To require such expressions is an unloving request that hints at power and dominance rather than love and compassion. Licensing social workers can prepare foster parents for the possibility that a child placed in their home may never express gratitude or acknowledge the help received from the foster parents. Foster parents are expected to care for the child with the hope that some day the child will appreciate what was done for them.

(8) Is encouraged to contact and have telephone conversation with family members, when not contraindicated in the child's visitation and contact plan;

Because our origins are important to our development, well-being, and identity, children in care need help maintaining and increasing contact with their families. The best hope for children in foster care is to strengthen their birth family network so they will be nurtured and protected in the care of their birth parents or extended family. This is the central conviction of family-centered practice.

Since many children come into foster care due to abuse or neglect by their birth family, this goal may be difficult for foster parents to grasp. Indeed, encouraging contact with parents who have been neglectful or abusive may seem wrong to the foster parents. If it is not contraindicated in child's visitation and contact plan, foster parents need to presume that contact with family members is to be encouraged, respected, and facilitated. Foster parents will need guidance and instruction to accomplish this.

(9) Is provided training and discipline that is appropriate for the child's age, intelligence, emotional makeup, and past experience;

Effective parents teach their children to master the skills, knowledge, and attitudes they need to be more self-reliant and eventually become independent. In a way, training and discipline are a gift a parent gives the child. Foster parenting is no different. Foster parents are expected to train and teach the children in their care. Neglecting this parenting duty leaves a child less able to contend with the demands of the larger society.

Training and providing discipline requires an understanding of child development. Children develop physical and mental abilities as they age. Effective foster parents take this into account when training and disciplining children. For example, to tell a preschool child who is taking candy from the display in a store, “Now, we do not eat things that do not belong to us” is ineffective because the child has not yet developed the capacity for abstract thinking. A preschool child needs direct instructions, such as, “If you take the candy off the shelf, we will have to leave the store without getting any at all.” Such a specific statement with direct consequences is more age-appropriate and therefore a more effective method.

An understanding of child development involves an understanding of intelligence levels. Quoting Bible passages on the basis of right and wrong to a child of less than average intelligence may frustrate the child and have limited success. It would be better to accept that such a child needs direct, explicit instructions.

Another factor in child development is being aware of differences in personality. One child may be introverted and need time to think before speaking. Another may be extroverted and need to talk to know what he is thinking. Effective training gives quiet children time to reflect on the lesson and talkative children parental attention while they talk their way to understanding.

Each child comes into care having mastered some developmental tasks. Understanding this and building on this progress makes training and discipline easier. For example, a child who has been helping care for siblings may have learned to make decisions involving other people. Building on this skill by asking the child to help solve problems may enhance their learning.

There are many ways foster parents train and discipline children in their care. By preparing and explaining the house rules to children, the parents help the child understand and respect boundaries. By using positive reinforcement, foster parents can motivate a child to adopt desired behaviors. By giving specific and sincere feedback to a child, a child quickly learns what is expected.

Encourage foster parents to acquire knowledge about child development, since much of child welfare practice uses technical terms such as ‘boundaries,’ ‘stages,’ and ‘needs.’ Provide parents with training, references, and materials in

this area. Some experienced foster parents may have learned what new parents need to know. Introduce these experienced foster parents to new ones. The right of the child to effective training and discipline is a key component of a productive experience in foster care.

(10) Is not subjected to cruel or abusive punishment;

Punishment, the imposition of a penalty (something negative or unpleasant), is a tool some parents use in their efforts to discipline children. The ultimate goal of discipline is to teach children what to do and set clear limits about what not to do so that, over time, children learn self-discipline and behave appropriately on their own. As they discipline children, parents have a wide variety of strategies to choose from, including time out for younger children, behavior contracts, motivation systems, natural consequences, etc.

Often used after a problem surfaces, punishment can be less effective than other techniques because it: tends to focus on what's wrong instead of what needs to be done right; frequently consists of penalties unrelated to the misbehavior; puts responsibility for enforcement on the parent instead of teaching children to be responsible for their actions. Licensing social workers should make sure that licensed foster parents and foster parent applicants understand both the disadvantages of punishment and more effective methods of managing child behavior.

Some forms of discipline are cruel and abusive and not permitted when it:

- is an act of retribution and intended to inflict pain;
- involves in any way eating, drinking, smelling, seeing, urinating, or having a bowel movement; and
- is intended to show who is boss, demonstrate power and influence, or unduly embarrass someone.

Other forms of cruel and abusive punishment include confining a child, locking a child in a room, time-outs that are not appropriate for the child's age, permanent loss of privileges (e.g., use of the phone), and anything motivated by the desire to invoke fear. If a foster parent is embarrassed or reluctant to tell the licensing social worker or other individuals how they punished a child, the punishment is not acceptable.

Licensing social workers should discuss this topic openly with the foster parents; ask them about their use of discipline strategies. Licensing social workers may need to have multiple conversations with potential foster parents on this topic to get a good indication of how applicants intend to discipline children. Foster parents must understand that at times they may need to be assertive and direct with children who exhibit little or no respect for authority. However, this cannot be done in a cruel or abusive manner. Any "red flags" must be addressed before a placement is made. Encourage the foster parent to call you about this topic any time.

(11) Is not subjected to corporal punishment;

Corporal punishment is the invoking of physical pain as a form of punishment. This restriction prohibits the use of corporal punishment in any form, including the following: hitting, spanking, slapping, pinching, ear pulling, striking, kicking, spitting, eye gouging, or any other form of causing pain to the body of a child.

Make sure foster parents understand this limitation. Some may have been raised by parents who used corporal punishment. Some may have used it raising their own children. With such parents, emphasize that there are no exceptions to the prohibition on using corporal punishment with foster children. Discuss what they should do when they feel a behavior needs to be changed and the child needs consequences in order to make this change. Foster parents should have an action plan ready because some children expect to be hit and may test foster parents to see if they truly are safe. Train foster parents in other forms of discipline; help them problem solve and select appropriate means of discipline for children in their care. Encourage foster parents to be consistent with discipline methods; patience is also important; it takes time for children to learn new ways of managing behaviors. Foster parents need more assistance and need to be visited more frequently when a child is first placed in their home. Appropriate discipline and behavior modification techniques are important subjects to discuss during these visits. Help foster parents prepare a behavior modification or a discipline plan before a confrontation with the child occurs.

(12) Is not deprived of a meal or contacts with family for punishment or placed in isolation time-out except when isolation time-out means the removal of a child to an unlocked room or area from which the child is not physically prevented from leaving;

The foster parent may use isolation time-out as a behavioral control measure when the foster parent provides it within hearing distance of a foster parent. The length of time alone shall be appropriate to the child's age and development; Depriving a child of necessities is cruel, inappropriate and an unacceptable disciplinary practice. Help foster parents understand that withholding necessities such as food, contact with family, warm clothes in the winter, access to the house when it is hot or cold outside, all are considered deprivations and are not effective or appropriate forms of discipline. Locking a child in a room or closet is not allowed. Many children in care have experienced the trauma of being physically or emotionally abandoned. Any form of deprivation may trigger feelings of terror and helplessness. Children in foster care need to know that they will never be abandoned.

One effective discipline technique is “time out,” during which a child is asked to go to an area where there is nothing fun, amusing, or stimulating for the child to do. This area cannot be locked and the child cannot be physically prevented from leaving. Time out is not punishment. Rather, the intent is to allow the child

to regain emotional composure so he or she can comply with the parent's request. Time out should be tailored to the developmental level of the child. Time out periods are usually about a minute for each year of the child's age. Children placed in time out should be within hearing distance of the foster parent.

(13) Is not subjected to verbal abuse, threats, or humiliating remarks about himself/herself or his/her families;

Words can be cruel, especially when used on someone who is dependent on you for the basic necessities. Young children are unable to leave a home where they are verbally abused; teenagers are restricted by law from leaving. Name-calling is not allowed in foster homes when a child is in placement. If name-calling is a usual practice in a home, the licensing social worker should be very cautious about using such a home. Name-calling ranges from calling a child a "brat" to name calling about a child's race or ethnicity or place of origin. Words such as 'dummy,' 'shorty,' 'beanpole,' 'tubby,' 'fatty,' 'carrot top,' 'four eyes,' etc. are inappropriate, even if used in jest. Children in foster care are aware of many of the societal prejudices and opinions about themselves, their parents, and their families. Many feel the shame such labels and prejudicial statements incur. For many children in foster care even nicknames are experienced as a type of name-calling. Therefore, the use of any term except their name is not appropriate unless the child voluntarily requests that he or she be called by his or her nickname. Some families give each other nicknames as a sign of affection. Some families use verbal threats as a means to emphasize they are serious about a topic. Such habits need to be curtailed when foster children are in the home.

(14) Is provided a daily routine in the home that promotes a positive mental health environment and provides an opportunity for normal activities with time for rest and play;

Effective foster homes encourage growth and development. In these homes the daily foster home routine assures that each person feels seen, heard, wanted, and appreciated. Meeting each person's needs in the home is imperative. Each person's strengths should be identified, appreciated, and utilized. In effective foster homes, the routine includes times for rest and sleep, recreation and play. There are times to work and improve the home, as well. These times are predicable and reliable. When asked, the foster parents can describe a 'typical' day in the life of their family.

Often children come from homes that are chaotic and unreliable. People may eat, play, and sleep at random times. Meeting individual needs is not the concern in such families; each person is expected to meet his own individual needs. The environment may be competitive and self-centered. Children in foster care may find it strange to be in an environment of positive mental health. It may be a new experience to be appreciated, recognized as special, and

welcomed into a household where family members show concern and care for each other.

Initially, the child may not accept the routine in the home. Foster parents need to be patient and persistent. Most children will soon begin to feel comfortable and thrive in the homes where a dependable routine of compassion and nurturance is provided.

(15) Is provided training in good health habits, including proper eating, frequent bathing, and good grooming. Each child shall be provided food with nutritional content for normal growth and health. Any diets prescribed by a licensed medical provider shall be provided;

Some children come into care not knowing how to care for themselves. If the child has not developed age-appropriate habits, foster parents provide this instruction and provide appropriate meals. This should be done in an accepting and non-judgmental manner. It is important to understand and accept that children come from different cultures. Other cultures are neither better nor worse. They are simply different. From this perspective, foster parents may instruct children in how things are done in their home without implying criticism of the child's birth parents. If a child has a prescribed diet, foster parents must assure that diet is followed. This may be a point of contention, as it may require preparing separate menus for the child. The child may not like the diet and ask for food not prescribed. The licensing social worker can reduce any confrontation by helping the foster parent understand the importance of the diet, providing some recipes that follow the diet, and suggesting ways to handle a child's request for foods not on the diet.

(16) Is provided medical care in accordance with the treatment prescribed for the child;

Children need medical care. Even a healthy child needs a regular check up. Foster parents are expected to have professional medical care available. In addition to professional care, foster parents need to maintain emergency medical supplies in the home. A Red Cross First Aid kit is an effective way to assure a child will get emergency care until professional care is provided.

Some children have special medical needs and foster parents are expected to implement this care, under professional supervision. It is important to review with the foster parent what they will do if the child gets sick, has an accident, or cuts himself. Make sure the foster parents have a Medicaid card for the child or another form of insurance. Make sure the foster family has phone numbers of medical personnel and agency personnel posted and readily accessible. Preparation is a key ingredient to providing necessary medial care.

(17) Of mandatory school age maintains regular school attendance unless the child has been excused by the authorities;

It is a foster parent's duty to make sure the child gets to school. The child's social worker must make sure the foster parent knows where the school is located and how to get the child to the school. The child's social worker may need to assist the foster parent in registering the child in school. The foster parent should have the names and contact information of the child's teachers. Foster parents need to be responsive to the updates and messages from teachers about the child's progress or school needs. Children frequently need assistance with homework and school projects. The agency, foster parents, and school system must work together to obtain any special educational assistance the child may require.

(18) Is encouraged to participate in neighborhood and group activities, have friends visit the home and visit in the homes of friends;

Learning to get along with others is a necessary life skill. Foster parents' help children gain this skill by providing opportunities for the child to play and socialize with other children. It is not appropriate for a child to spend all his unscheduled time alone. If a foster family does not live in an area where children can easily engage with others, ask them how they plan to assure that children in their care will have social opportunities. Let foster parents know that the child is permitted to visit their friends' homes, and to have their friends visit the foster home. Children may need to be encouraged to go to parties and celebrations with other children. It is permissible for children to visit in the homes of other families and go to sleepovers as long as the foster parents know the families and have no concerns about safety. It is the responsibility of foster parents to encourage children to develop socially.

(19) Assumes responsibility for himself/herself and household duties in accordance with his/her age, health, and ability. Household tasks shall not interfere with school, sleep, or study periods;

Developing a sense of community and participation is a major developmental task. Foster parents should show children how to take care of their own room and possessions in accordance with their age, health, and ability. To ask a toddler to clean up in the kitchen is unreasonable; asking a ten-year-old to take his dishes to the sink is reasonable. A reasonable regimen of chores and tasks complements school, study, personal care, recreation, and sleep. A regimen of personal care tasks and family chores should help the child fit into the family. Before placement, ask the foster parents what chores they will expect children in their home to undertake. Provide advice to foster parents that assuming personal care tasks, such as: putting dirty clothes in a hamper, putting the cap on the toothpaste, hanging up wet towels, and putting the milk back in the refrigerator helps the child feel part of the family.

(20) Is provided opportunities to participate in recreational activities;

Children need recreation to help their minds and bodies grow and develop. Organized recreation develops social skills as well. Foster parents should encourage children to play with other children in the neighborhood, participate in community and afterschool activities, join sports leagues, go to the YMCA or YWCA, etc. Regular family outings, hikes, outdoor adventure sports, and other activities provide excellent recreational opportunities. Foster parents with a more sedentary life style may need help and suggestions on how to fulfill this very necessary part of parenting.

(21) Is not permitted to do any task, which is in violation of child labor laws, or not appropriate for a child of that age;

Foster parents must obey child labor laws. For specific information on this topic, refer foster families to the county department of social services in the community where they live. Foster families that operate a family farm or a family business may need additional guidance with this right. Children are excluded from certain work requirements or tasks that birth children may perform. Before a child in foster care engages in labor for which a person would be paid, encourage the foster parents to discuss this with their supervising agency.

(22) Is provided supervision in accordance with the child's age, intelligence, emotional makeup, and experience; and

Children need to be kept safe, yet develop independence and self-reliance. Foster parents must supervise this process. The foster parent is the child's protector. Safety is paramount in deciding how much freedom a child should have. Allowing a toddler to play in the front yard or on a busy street while the parent is in the house is not safe. Allowing a teenager to play unsupervised in the same yard most likely is safe. Using specific scenarios in discussion with the foster parents is an effective way to illustrate the range and limits of appropriate supervision. Do not assume that foster parents who have raised their own children understand that supervising children in foster care may take more attention. Some children have been left on their own in their birth families and feel free to wander off. Older and more mature children may be left alone for short periods of time. However, foster parents need to discuss this and obtain approval from their supervising agency before leaving children alone. Children should never be left unattended if they feel fearful or anxious. Children left alone need to know how to call for help and how to contact their foster parents. Neglect and inadequate supervision kill and injure more children than actual physical abuse.

(23) If less than eight years of age and weighs less than 80 pounds is properly secured in a child passenger restraint system that is approved and installed in a manner authorized by the Commissioner of Motor Vehicles;

All passengers in motor vehicles need to be restrained. In a collision, secondary impact causes serious injury if a person is not restrained by a seat belt. Special

car seats keep smaller children safe. Small children (under age of 8 or fewer than 80 pounds) are required by law to be in a special car seat in the back seat. The licensing social worker must make sure that foster parents accept this requirement. Have the foster parent demonstrate to you that they have an appropriate car seat and that they can place the child in the seat correctly.

When applicants sign the Foster Home License Application (DSS-5016), they are agreeing they understand these 23 rights and responsibilities, and that they and all household members will comply with them. Signing the DSS-5016 is a good time for a final review of these rules, item by item. Ask all adults in the home if they understand the specific right and agree to enforce the right for each child in care. Spending time at the signing of the DSS-5016 can prevent misunderstanding later on.

(b) Foster parents shall initially and at relicensure sign a Discipline Agreement that specifically acknowledges their agreement as specified in Subparagraphs (a)(9), (10), (11), (12), and (13) of this Rule, as well as discipline requirements outlined in the out-of-home family services agreement or person-centered plan. The foster parents and the supervising agency shall retain copies of these agreements.

Client rights of children are not negotiable. Foster parents are expected to know these rights and make sure they are protected for each child in care. Violation of these rights can result in immediate revocation of the foster home license. These specific rights are listed in the "Discipline Agreement" (this form is developed by the supervising agency) and require the signature of foster parents. These specific issues are:

(a) (9) Provided training and discipline that is appropriate for the child's age, intelligence, emotional makeup, and past experience, (a)(10) is not subjected to cruel or abusive punishment,
(a) (11) is not subjected to corporal punishment, and
(a) (12) Is not deprived of a meal or contacts with family for punishment or placed in isolation time-out except when isolation time-out means the removal of a child to an unlocked room or area from which the child is not physically prevented from leaving.

The foster parent may use isolation time-out as a behavioral control measure when it is provided within hearing distance of a foster parent. The length of time alone shall be appropriate to the child's age and development.

Review the Discipline Agreement with each foster parent as well as any adult members of the household who will supervise or provide care for a child. Foster parents and any adult household member who provide supervision and care for a child are required to sign the agreement.

When licensing social workers spend time on client rights early in the application process, the rest of the process goes much easier. Many of the applicants'

questions and issues are raised and resolved by discussing each of these 23 rights of children in care.

B. 10A NCAC 70E .1102 MEDICATION

Foster parents are responsible for the following regarding medication:

Many children in foster care need ongoing medical services and supervision. This usually means the child has been prescribed a regimen of medications by a licensed medical provider. Foster parents are the key in making sure the child receives needed medical care and must administer medications in the manner prescribed by the medical provider. It is important that foster parents understand and accept the rules regarding medication administration. These rules are strict and follow precise procedures. This may be very different from a family approach to medication, where strict guidelines are not required. Foster parents will need training in how to administer medications.

The subsections of this rule read:

(1) General requirements:
(a) Retain the manufacturer's label with expiration dates visible on non-prescription drug containers not dispensed by a pharmacist;

(b) Administer prescription drugs to a child only on the written order of a person authorized by law to prescribe drugs;

(c) Allow prescription medications to be self-administered by children only when authorized in writing by the child's licensed medical provider;

(d) allow non-prescription medications to be administered to a child taking prescription medications only when authorized by the child's licensed medical provider; allow non-prescription medications to be administered to a child not taking prescription medication, with the authorization of the parents, guardian, legal custodian, or licensed medical provider;

(e) allow injections to be administered by unlicensed persons who have been trained by a registered nurse, pharmacist, or other person allowed by law to train unlicensed persons to administer injections;

(f) Record in a Medication Administration Record (MAR) provided by the supervising agency all drugs administered to each child. The MAR shall include the following: child's name; name, strength, and quantity of the drug; instructions for administering the drug; date and time the drug is administered, discontinued, or returned to the supervising agency or the person legally authorized to remove the child from foster care; name or initials of person administering or returning the drug; child requests for changes or clarifications concerning medications; and child's refusal of any drug; and

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1165

Filed: 16 May 2017

Durham County, No. 12 JA 239

IN THE MATTER OF: M.B.

Appeal by respondent-mother from order signed 29 August 2016[1] by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 3 May 2017.

Senior Assistant Durham County Attorney Robin K. Martinek for petitioner-appellee Durham County Department of Social Services.

Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant mother.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

ZACHARY, Judge.

Ms. E.B. ("respondent") appeals from an order establishing a guardianship for her minor child M.B. ("Max").[2] We affirm.

I. Background

The Durham County Department of Social Services ("DSS") initiated the underlying juvenile case on 10 December 2012, when it obtained non-secure custody of Max and filed a petition alleging that he was a neglected and dependent juvenile.

[1] The trial court signed the order on 26 August 2016; however, the file stamp is illegible and, as a result, we cannot determine when the order was formally entered.

[2] We have used pseudonyms to protect the juvenile's identity and for ease of reading.

The trial court adjudicated Max to be a dependent juvenile by order entered 16 January 2013. In its disposition order entered 15 March 2013, the trial court continued custody of Max with DSS, granted respondent weekly supervised visitation with Max, and ordered respondent to: (1) obtain substance abuse and mental health evaluations and follow any recommendations; (2) establish and maintain mental health services and comply with all recommendations; (3) submit to testing for Huntington's disease; (4) obtain stable housing and a stable source of income; and (5) participate in a parenting program. *In re M.B.*, __ N.C. App. __, 782 S.E.2d 785 (2016) (unpublished) ("*M.B. I*")

The court initially set the permanent plan for Max as reunification with a parent, but respondent's mental health deteriorated and she failed to comply with the trial court's orders. *See M.B. I.* On 3 April 2014, the trial court appointed a guardian ad litem ("GAL") for respondent, finding that she lacked sufficient capacity to proceed on her own behalf. In an order entered 28 May 2014, the court ceased reunification efforts with respondent and changed the permanent plan for Max to custody with Ms. J.M. ("Ms. Metz"), his paternal great-grandmother, with an alternative plan of reunification with respondent. Max has lived in the home of Ms. Metz "continuously since June 6, 2014, during which time [Ms. Metz] has been both a placement provider and a guardian of the child." By order entered 15 December 2014, the trial court changed Max's permanent plan to guardianship with Ms. Metz,

appointed Ms. Metz as his guardian, and suspended respondent's visitation until she could show that "her mental health has stabilized."

Respondent attempted to appeal from the trial court's 15 December 2014 order, but the trial court dismissed her appeal. By order entered 28 May 2015, this Court issued a writ of certiorari to review both the 15 December 2014 permanency planning review order and the order dismissing respondent's appeal. In our opinion in *M.B. I,* this Court affirmed the trial court's order dismissing respondent's appeal of right, but vacated and remanded the trial court's permanency planning order because the court had failed to verify that Ms. Metz had adequate financial resources to care for Max.

On 8 August 2016, the trial court conducted another permanency planning review hearing, wherein it considered further evidence of Ms. Metz's financial ability to care for Max. On 26 August 2016, the trial court signed an order appointing Ms. Metz as Max's guardian. In its order, the court found that Ms. Metz, Max, and other members of Ms. Metz's family were living in Cleves, Ohio. The court further found that Ms. Metz had adequate resources to care for Max and that she understood the legal rights and responsibilities she would have as Max's guardian. The court directed respondent to participate in services recommended by DSS, suspended respondent's visitation with Max until she showed to the court that her mental health had stabilized, ceased further reviews in the juvenile case, and released DSS, Max's GAL, and the parties' counsel of further duties. Within a month of the entry of this order,

Ms. Metz moved back to Durham, North Carolina. Accordingly, when respondent filed a notice of appeal, she served it on Ms. Metz at her address in Durham, North Carolina.

II. Interstate Compact on the Placement of Children

Respondent first argues that the trial court erred by appointing Ms. Metz as Max's guardian without first complying with the requirements of the Interstate Compact on the Placement of Children ("ICPC" or "Compact"). Respondent contends that because Ms. Metz "was a resident of Ohio at the time" of the entry of the permanency planning order, the trial court's order must be "reversed and vacated, and this matter should be remanded for compliance with the ICPC[.]" We conclude that this argument has been rendered moot by Ms. Metz's return to North Carolina.

An issue "is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Black's Law Dictionary 1008 (6th ed. 1990). 'Courts will not entertain or proceed with a cause merely to determine abstract propositions of law.' " *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (quoting *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)). "It is well-established that 'courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for

contingencies which may hereafter rise, or give abstract opinions.' " *In re Accutane Litig.*, 233 N.C. App. 319, 326, 758 S.E.2d 13, 19 (2014) (quoting *Baxter v. Jones*, 283 N.C. 327, 332, 196 S.E.2d 193, 196 (1973)). For example, in *In re Stratton*, 159 N.C. App. 461, 583 S.E.2d 323, *appeal dismissed*, 357 N.C. 506, 588 S.E.2d 472 (2003), the respondent appealed from an adjudication of neglect and dependency. During the pendancy of the appeal, respondent's parental rights to the child were terminated. This Court dismissed the respondent's appeal as moot, holding that the "questions raised by [respondent] on this appeal are now academic given [the trial court's] order terminating his parental rights." *Stratton*, 159 N.C. App. at 463, 583 S.E.2d at 324.

In the present case, appellee DSS contends that we should dismiss as moot respondent's argument that the trial court erred by failing to comply with the ICPC prior to designating Ms. Metz as Max's guardian. DSS argues that because "the Guardian has moved back to North Carolina, there is no longer an issue of controversy related to the ICPC." Respondent has requested that this case be remanded for "for further proceedings consistent with the ICPC." We agree with DSS that "[s]ince the ICPC no longer applies, there is no hearing for the [trial court] to conduct in accordance with the ICPC."

We note that respondent's appeal on this issue is premised on the fact that "[Ms. Metz] was a resident of Ohio *at the time*" that the permanency planning order was entered. (emphasis added). At no point in her appellate brief does respondent

contend that Ms. Metz continues to reside in Ohio, and respondent has not disputed DSS's assertion that Ms. Metz no longer lives in Ohio. Moreover, review of the record shows that respondent served her notice of appeal on Ms. Metz at 606 Hugo Street, Durham, North Carolina, 27704. Thus, respondent clearly is aware that Ms. Metz returned to North Carolina shortly after the entry of the order from which she appeals. In addition, respondent does not argue that the facts of this case fall within an exception to the mootness doctrine. We conclude that the issue of the applicability of the ICPC has been rendered moot by Ms. Metz's return to North Carolina. Accordingly, we do not address this issue.

III. Parental Rights Retained by Respondent

Respondent also argues that the trial court erred in failing to designate what parental rights, if any, she retained following the establishment of the guardianship. Respondent contends that the trial court failed to comply with the requirements of N.C. Gen. Stat. § 7B-906.1(e)(2) (2015), which provides that:

> (e) At any permanency planning hearing where the juvenile is not placed with a parent, the court shall additionally consider the following criteria and make written findings regarding those that are relevant:
>
> . . .
>
> (2) Where the juvenile's placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents.

On appeal, respondent asserts that the trial court was required to make findings about her rights in regard to the following:

> [A]mong the intended rights for consideration and designation by the court are: (1) the right to attend or know about health care procedures for Max; (2) the right to communicate with the guardian about Max; (3) the right to attend special events in which Max was a participant; (4) the right to know about changes in Max's address or custody; (5) the right to know about Max's illnesses and prescribed treatments; (6) the right to know about Max's progress in school; and, (7) the right to send gifts for Christmas and birthdays.

Respondent has not cited any authority or offered any legal argument in support of her assertion that the rights identified by respondent are "among the intended rights for consideration and designation by the court." Nor has respondent cited any authority holding, as respondent appears to contend, that the trial court was required to make specific findings about every right that respondent might possibly retain. Respondent asserts that N.C. Gen. Stat. § 7B-906.1(e)(2) "requires the lower court to establish the rights and responsibilities" that remain with a respondent following the establishment of a guardianship, and cites *In re R.A.H.*, 182 N.C. App. 52, 641 S.E.2d 404 (2007), for the proposition that "failure to make findings about these rights is reversible error." *R.A.H.* did not, however, articulate a general rule on the extent to which a trial court is required to address specified rights that a parent might retain after guardianship is established. In *R.A.H.* the record showed that the trial court had placed responsibility for determining the appellant's

visitation rights with the minor child's guardian. We noted that the trial court may not delegate its responsibility for awarding visitation and remanded "on that issue to the trial court for clarification[.]" *R.A.H*, 182 N.C. App. at 61, 641 S.E.2d at 410. *R.A.H.* does not support respondent's contention that the trial court was required to make extensive findings on a number of possible "rights" of a parent. *See also In re T.R.M.*, 188 N.C. App. 773, 780, 656 S.E.2d 626, 631 (2008) (holding under identical language of a prior statute, N.C. Gen. Stat. § 7B-907(b)(2) (2007), that in granting guardianship of a child to the child's grandparents, the trial court sufficiently addressed the respondent-mother's rights and responsibilities "by providing her visitation rights and clear guidance as to the limitations upon those visitation rights").

Respondent would append to N.C. Gen. Stat. § 7B-906.1(e)(2) an additional requirement that a trial court make findings that constitute individual decisions on whether a parent retains every right or responsibility the parent had prior to the grant of custody or guardianship. We conclude that when a child is placed in the custody or guardianship of another person, the parent's rights and responsibilities, apart from visitation, are lost if the trial court's order does not otherwise provide.

Here, the trial court's order specifically provided that respondent's visitation with Max shall remain suspended until she shows that her mental health has stabilized. The court did not list any other right or responsibility that respondent

retained to Max, and thus she retained none. Accordingly, we find the trial court complied with the requirements of N.C. Gen. Stat. § 7B-906.1(e)(2), and we overrule this argument.

Respondent does not otherwise challenge the trial court's order granting guardianship of Max to Ms. Metz, and we affirm the order.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
COUNTY OF

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

File No.

IN THE MATTER OF:

Minor child

VISITATION AGREEMENT

Visitation Schedule

I. REGULAR VISITATION:

a. _____ shall have supervised visitation a minimum of one day biweekly for two hours. _____ will be required to set up an intake with the _____ County Supervised Visitation and Safe Exchange Center (000) 000-0000.

b. _____ shall have unsupervised visitation a minimum of one day per week for two hours.

c. Visits shall occur (location): To be determined by _____ according to the agreement with the Visitation Center for _____.

d. If _____ is unable to attend the scheduled visit, she/he shall do the following: Contact _____ via text message or phone call within three hours of the visit schedule time.

e. _____ should contact _____ at least 24 hours to confirm attendance at the visits.

f. _____ and _____ will share responsibility for transporting the child to/from visits and will coordinate transportation as appropriate.

II. **TELEPHONE CALLS:**

a. _____ shall conduct phone calls/face time/skype with _____ at least three times per week at a time to be determined between _____ and _____.

b. _____ shall conduct phone calls/face time/skype with _____ at least three times per week at a time to be determined between _____ and _____.

c. The phone calls/face time/skype shall be _____ supervised/ _____unsupervised.

d. _____ and _____ shall initiate the phone calls/face time/skype.

III. **HOLIDAY VISITATION:** The following Holiday Schedule supersedes the Regular Visitation Schedule in the ways specified below. The Regular Visitation schedule resumes at the end of each holiday.

There shall be no presence of illegal substance, alcohol or any drugs during any visitation. There shall be no incidence of domestic violence during any visit. Visitation for _____ will be coordinated with the _____ County Supervised Visitation and Safe Exchange Center. Upon completion of requirements, _____ can petition the courts for an amended visitation schedule.

a. **Mother's Day.** All Mother's Days shall be spent with the mother. The mother shall have a minimum of _____ visits on Mother's Day.

b. **Father's Day.** Visitation with the father will be coordinated through the _____ County Supervised Visitation and Safe Exchange Center.

c. **Child's Birthday.** In EVEN NUMBERED YEARS, Visitation with the father will be coordinated through the _____ County Supervised Visitation and Safe Exchange Center.

In ODD NUMBERED YEARS, _____ shall have a minimum of _____ (hours) with the child at location to be determine by _____ and _____. The visit shall be unsupervised.

If the child has a birthday party, In ODD NUMBERED YEARS _____ shall be invited to the birthday party. The party shall be combined with the mother's time.

d. **THANKSGIVING.** IN EVEN NUMBERED YEARS, Visitation with the father will be coordinated through the _____ County Supervised Visitation and Safe Exchange Center.

In ODD NUMBERED YEARS, child shall spend Thanksgiving Day with the mother for a minimum of _____ hours at location determined by _____ and _____. The visit shall be unsupervised.

_____ shall be responsible for transporting the child to and from visit.

e. **Christmas.** In EVEN NUMBERED YEARS, Visitation with the father will be coordinated through the _____ County Supervised Visitation and Safe Exchange Center.

In ODD NUMBERED YEARS, child shall spend Christmas with the mother for a minimum of _____ hours location determined by _____ and _____. The visit shall be unsupervised. _____ shall be responsible for transportation in ODD numbered years.

f. **Easter.** In EVEN NUMBERED YEARS, Visitation with the father will be coordinated through the _____ County Supervised Visitation and Safe Exchange Center.

In ODD NUMBERED YEARS, child shall spend Easter with mother for a minimum of _____ hours at location determined by _____ and _____. The visit shall be unsupervised.

_____ shall be responsible for transporting the child to and from visit.

g. **Spring Break:** Overnight/Weekend Visits should not be authorized unless _____ and/or _____ petition the court with updated information regarding their successful completion of case plan objectives.

h. _____ must approve anyone else's contact with (child) during the _____ mother/ _____ father's scheduled visitation.

i. _____ mother/ _____ father shall be allowed to attend any _____ school programs/ _____ church/ _____ extracurricular activities where _____ is participating. The father must not have any unsupervised contact with _____.

j. _____ mother/ _____ father shall contact _____ (hours) in advance of the visit to confirm attendance at visit.

IV. **OTHER PROVISIONS:**

a. _____ mother/ _____ father shall have _____ complete access to all school records and information, _____ the right to participate in school conferences, _____ events, and _____ activities, and _____ the right to consult with teachers and other school personnel.

b. _____ mother/ _____ father shall have _____ the right to access medical records and information, and _____ the right to consult with physicians and other medical practitioners.

c. _____ mother/ _____ father/ _____ guardian/custodian shall share any and all information pertinent to the child/children including but not limited to information regarding the child's general health, education, welfare, and progress. The parties shall communicate information to each other about any and all doctor's visits or medications prescribed for the child/children. Any emergency involving the child/children shall be immediately communicated to the other party.

d. The _____ mother/ _____ father/ _____ guardian/custodian shall keep each other informed of all changes in address, phone number, or employment phone number within forty-eight hours of the change. The _____ mother/ _____ father/ _____ guardian/custodian shall provide phone numbers to the other party during all vacations with the child/children.

e. The _____ mother/ _____ father/ _____ guardian/custodian shall not degrade or criticize the other parent in the presence of the minor child/children or allow him to remain in the presence of others so doing. The _____ mother/ _____ father/ _____ guardian/custodian shall make efforts to avoid any confrontation with the other party in the presence of the minor child/children. Any discussions between the _____ mother/ _____ father/ _____ guardian/custodian parents regarding the minor child/children shall be made directly between the parties and not within the presence or hearing of the child/children.

f. If the _____ mother/_____ father wants the child involved in any activity, and the activity doses not conflict with the guardian/custodian's schedule or the child's schedule, then the _____ mother/ _____ father shall be responsible for the entire expense of the activity. Should the parties be unable to agree regarding these activities, _____ guardian/custodian shall have the final decision making authority. The _____ mother/ _____ father/ _____ guardian/custodian shall be responsible for providing transportation _____ to/ _____ from the activity.

g. The _____ child/children shall have unlimited access to initiate contact with each parent by telephone, email, or any other means of communication.

h. The _____ mother/ _____ father _____ guardian/custodian shall allow the child/children to speak to his/her/their other parent and receive letters and packages from that other parent while the child/children is/are with the party.

i. The _____ mother/ _____ father/ _____ guardian/custodian shall not consume alcohol or consume any illegal substance while the minor child/children is/are in the care, or allow the minor child/children to remain in the company of other so doing.

j. Toys and clothes belonging to the child should travel freely between households and shall be returned with the child in a clean and orderly manner.

k. If the _____ mother/ _____ father/ _____ guardian/custodian is unable to attend any visitation provided in this agreement, the _____ mother/ _____ father/ _____ guardian/custodian shall notify the _____ mother/ _____ father/ _____ guardian/custodian as soon as reasonably possible on each such occasion.

l. It is important to be aware that this agreement is for the purpose of providing assured minimum amounts of visitation between _____ mother/ _____ father and the child.

m. The _____ mother/ _____ father shall have the unrestricted right to send appropriate cards, letters, and packages to the child.

n. **EMERGENCY/MEDICAL:** In the event of an emergency involving the child's health or welfare, the party in possession of the child shall promptly notify the guardian. In the event of any injury or illness to the child involving a doctor's appointment or hospitalization, the _____ mother/ _____ father/ _____ guardian/custodian shall notify the _____ mother/_____ father/ _____ guardian/custodian within _____ hour _____ (time limit) or as soon as reasonably possible. The _____ guardian/custodian shall keep the _____ mother/ _____ father apprised of the child's ongoing medical appointments and any medical treatment _____ receives.

o. **NOTICE OF MOVING:** If either party plans to move to a location far enough away to make this appointment impractical or impossible to follow, the _____ mother/ _____ father/ _____ guardian/custodian shall notify the _____ mother/ _____ father/ _____ guardian/custodian at least _____ days in advance to allow time to obtain a new court ordered visitation schedule.

p. **TERMINATION:** The guardian retains the right to suspend visitation for any reason they feel places the child at imminent risk. The parties understand that the terms of this agreement will remain in effect, binding and enforceable until or unless replaced by another court order pertaining to custody and/or visitation.

q. **Other Relative Visits:**

i. **Thanksgiving:** In EVEN NUMBERED YEARS, child shall spend Thanksgiving Day with _____ for a minimum of _____ hours at location determined by _____ and _____. The visit shall be unsupervised.

ii. **Christmas:** In EVEN NUMBERED YEARS, child shall spend Christmas Day with the _____ for a minimum of _____ hours at location determined by _____ and _____. The visit shall be unsupervised. Pick-up and Drop off will be at a location in _____ predetermined by _____ and _____.

iii. **Easter:** In EVEN NUMBERED YEARS, child shall spend Easter with _____ for a minimum of _____ hours at location determined by _____ and _____. The visit shall be unsupervised.

iv. **Spring Break:** In EVEN NUMBERED YEARS, child shall spend Spring Break with the _____beginning the Sunday of the break at ____ pm through the Saturday of the break at _____ pm. The dates for Spring Break will be determined by the school calendar of the district the child currently resides in. Pick-up and Drop off will be at a location in _____ predetermined by _____ and _____. In years that _____ has Spring Break visit this will take the place of the monthly visit for the month that Spring Break falls in.

v. **Monthly Visits:** Monthly visits shall occur with the _____ the 2nd weekend of every month beginning Friday at ____ pm and ending Monday at ____pm until the child is enrolled in school at which time it will end on Sunday at ___pm.

vi. **Summer Visits:** Summer visits shall occur for a minimum of _____ week during the summer months (June, July, or August). The dates shall be determined by _____ and _____. The week shall begin Sunday of the designated week at _____pm and end the following Sunday at ____pm. The dates of the visit shall be confirmed with _____ by _(month/date)___ of the year of the visit.

vii. **Telephone Contact:** Phone call will occur weekly for a minimum of ____ hour a day at a time to be determined by _____ and _____.

viii. **Birthday:** In EVEN NUMBERED YEARS, _____ shall have a minimum of _____ hours with the child at location to be determined by _____ and _____. The visit shall be unsupervised.

If the child has a birthday party, In EVEN NUMBERED YEARS, _____ shall be invited to the birthday party. The party shall be combined with the other relative's time.

During the visit there shall be no contact or communication with or between _____.

Non-Secure Custody Checklist

	Placement & Visits
	Health & Safety Standard – test is 7B-503 in determining whether CNSC is warranted [7B-506(c)][1] "removal shall not be considered until reasonable efforts are made to meet children's needs for safety and nurture in their own homes" [DHHS Social Services Manual, 1201, IV pre-amble]
	Placement priorities: • Return home • Other parent • Someone with care of half-sibling • Relatives • Foster Care o Group home placement last!!!!
	DSS recommendation can be overridden by judge's specific placement based upon best interest [7B-507(a)(4)]
	Rylan's law (requiring SW to observe two visits of one hour or longer, at least 7 days apart before returning child) DOES NOT apply to non-removal parent
	Rylan's law (requiring SW to observe two visits of one hour or longer, at least 7 days apart before returning child) DOES NOT apply until disposition stage [7B-903.1(c)]
	Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 requires *due diligence* by DSS to notify all relatives that child is in care & be given an opportunity to participate in care [DHHS Social Services Manual, 1201, IV, p. 1] Parents should be asked to help identify relatives and kin who can serve as potential resources for the child (1201 - Child Placement, IV. Placement Decision Making, B. Choosing the Best Placement Resource)
	Motion on for review of placement! 7B-506(g)
	The primary consideration for the child's return home should be whether the child can be assured of at least a minimally sufficient level of care. [DHHS Social Services Manual, 1201, Child Placement, IV. Placement Decision Making, A. Reunification]
	Homestudies in State: [7B-505(d)] • In county placement: • Out of county placement • Kinship Care Initial Assessment (DSS-5203, to be completed ____ days from placement) • Kinship Care Comprehensive Assessment (DSS-5204, to be completed with 30 days from placement)
	Homestudies out of state: [7B-505(d)] • No ICPC required for other parent • ICPC required for relatives (note that half-siblings custodians and non-relative kin not covered) • Expedited criteria met? Placement with relative (including parent) + one of these: o At least one child under age 4

[1] This is NOT overruling another's judge's decision because it has to be determined based on the facts presented at each hearing.

	o Unexpected dependency due to sudden or recent incarceration, incapacitation or death of parent or guardian o At least one child has "substantial relationship" with placement o Child is in emergency placement
	Visitation: Least restrictive, most frequent[2]
	Who can supervise? (Even if not placement possibility, can a friend/relative supervise?) Can it be modified supervision? (i.e. supervisor not in same room but nearby?)
	Special conditions or occasions: • Breastfeeding moms (need more access & time) • Upcoming events (birthdays, religious holidays, etc) • Previously scheduled medical or school or other functions (prom, graduation, team games)
	Prison/jail visits
	Phone contact allowed?
	Social media contact allowed?
	CFTs: to be held within 24 hours of removal for parents' input if not obtained previously. [DHHS Social Services Manual, 1201, IV.1]

	Medical
	Routine medical or dental treatment – DSS can consent to routine medical and dental care or treatment, including, but not limited to, treatment for *common pediatric* illnesses and injuries that require prompt intervention [7B-505.1(a)] – but parent has right to be promptly notified and receive frequent status reports. On request, results or records of treatment. [7B-505.1(d)]
	Routine appointments to be scheduled with parent's schedule in mind, ask for transportation to be provided
	Parent's attendance at all appointments is allowed, ask for transportation to be provided
	CMEs: No CME prior to continued NSC hearing unless written findings of compelling interest for CME prior to CNSC [7B-505.1(b)]
	Require parents' consent (court can only authorize director to override consent on clear and convincing evidence that care is in best interest): [7B-505.1(c)] • Prescriptions for psychotropic medications • Participation in clinical trials • Immunizations when parent has a bona fide religious objection • CMEs, comprehensive clinical assessments, or other mental health evaluations • Surgical, medical, or dental procedures or tests that require informed consent • Psychiatric, psychological, or mental health care or treatment that requires informed consent
	No need for parent to consent (because juvenile own right): [90-21.5, 90-21.7] • Birth control • Decisions for own child (minor parents) • Substance abuse

[2] SHOULD NOT be based on providing a number of drug screens (although can be turned away if high or drunk).

	Education & School Rights
	School to attend • DSS required to keep in original school [McKinney-Vento Act of 1987] • Keep community ties • Are there special programs they participate in which need to be maintained? (AP classes, sports, etc)
	IEPs: Part of the team [Individual with Disabilities Education Act – IDEA] • Written permission to do initial testing and evaluation • Written permission for child to receive special education and services
	Parent nights
	School conferences

	Due Process Rights
	Right to counsel [7B-602(a)]
	Right to GAL if a minor [7B-602(b)]
	Right to GAL if incompetent [7B-602(c)]
	Right to hearing: • First continued NSC hearing within 7 days of removal [7B-506(a)] • Subsequent CNSC hearing within 7 business days [7B-506(e)] • Other CNSC hearings no more than 30 calendar days [7B-506(e)] • Hearing to address placement may be scheduled by any party [7B-506(g)]
	Right to present evidence at any NSC or CNSC hearing [7B-506(b)], including calling witnesses
	Right to court interpreter in foreign language and sign language, based on your home language [Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et. seq. (Title VI), and implementing regulation as found at 45 C. F. R. Part 80] [AOC policy]

	Prudent Parent Standard & Other Miscellaneous Issues
	Sports or other after school activities
	Refer to Reasonable and Prudent Parenting Activities Guide • Hunting (should have biological parent approval) • Playing on a sports team (require both the biological parents' approval and DSS approval) • Driving: 2nd signature on permit or license can be parent, person approved by parent, person approved by DSS, GAL or AA, case worker, or someone identified by court
	Religious participation of their child • Maintain what was in the home • Respect wishes of that religion (i.e. no birthday celebrations for Jevohas' Witnesses, dietary restrictions for Jews]
	Consent to marry [51.2, 51.2.1]
	Consent to enlist
	Consent to adoption
	Child's Appearance: DSS or court to approve when conflicts over perms, color, style, relaxers, etc.
	Permanent or significant changes must include biological parent
	Piercings: • Ear piercings include biological parent in decision • Other piercings require the consent of custodial parent [14-400]
	Tattoos: Illegal for anyone under 18 [14-400]
	Leaving child home alone: discussion and agreement in CFT
	Miscellaneous:
	• School Shopping
	• Sports (team games & practices)
	• Calendaring program (to increase communication between foster parent & parents about significant events and appointments) (alternative is using a shared Google Calendar)
	• Other (ask parent):

Disposition and Post-Disposition Custody Checklist

	Placement & Visits
	Unless parent is unfit (usually caused the adjudication) or acted inconsistently with constitutionally protected status, they are entitled to custody. Argue at disposition and reviews how their status has changed so that they have priority placement!
	Placement priorities: [7B-903] • Return home • Other parent • Someone with care of half-sibling • Relatives • Foster Care o Group home placement last!!!!
	Court has placement authority it finds in best interest [7B-903]
	Motion on for review! [7B-906.1(n)(4)]
	Rylan's law (requiring SW to observe two visits of one hour or longer, at least 7 days apart before returning child) DOES NOT apply to non-removal parent
	Rylan's law (requiring SW to observe two visits of one hour or longer, at least 7 days apart before returning child) DOES NOT apply until disposition stage [7B-903.1(c)]
	The primary consideration for the child's return home should be whether the child can be assured of at least a minimally sufficient level of care. [DHHS Social Services Manual, 1201, Child Placement, IV. Placement Decision Making, A. Reunification] [Avoid creep of seeking "perfection."]
	Homestudies in State: [7B-505(d)] • In county placement: • Out of county placement • Kinship Care Initial Assessment (DSS-5203, to be completed ____ days from placement) • Kinship Care Comprehensive Assessment (DSS-5204, to be completed with 30 days from placement)

	Homestudies out of state: [7B-903(a1)]
	• No ICPC required for other parent
	• ICPC required for relatives (note that half-siblings custodians and non-relative kin not covered)
	• Expedited criteria met? Placement with relative (including parent) + one of these:
	  o At least one child under age 4
	  o Unexpected dependency due to sudden or recent incarceration, incapacitation or death of parent or guardian
	  o At least one child has "substantial relationship" with placement
	  o Child is in emergency placement

	Visitation: Least restrictive, most frequent[3]
	Who can supervise? (Even if not placement possibility, can a friend/relative supervise?) Can it be modified supervision? (i.e. supervisor not in same room but nearby?)

[3] CANNOT be based on providing a number of drug screens (although can be turned away if high or drunk).

	Special conditions or occasions: • Breastfeeding moms (need more access & time) • Upcoming events (birthdays, religious holidays, etc) • Previously scheduled medical or school or other functions (prom, graduation, team games)
	Prison/jail visits
	Phone contact allowed?
	Social media contact allowed?
	CFTs: notification to include attorney
	School lunches

	Medical
	Ask for routine appointments to be scheduled with parent's schedule in mind and transportation be provided
	Ask parent's attendance be allowed at all appointments, and transportation be provided
	Ask parent to be included on decisions regarding non-urgent and non-routine matters (similar to 7B-505.1(c))
	No need for parent to consent (because juvenile own right): [90-21.5, 90-21.7] • Birth control • Decisions for own child (minor parents) • Substance abuse

	Education & School Rights
	School to attend • DSS required to keep in original school [McKinney-Vento Act of 1987] • Keep community ties • Are there special programs they participate in which need to be maintained? (AP classes, sports, etc)
	IEPs: Part of the team [Individual with Disabilities Education Act – IDEA] • Written permission to do initial testing and evaluation • Written permission for child to receive special education and services
	Ask for parent to be included in all activities involving parents such as Parent nights, school conferences, and special functions

	Due Process Rights
	Right to counsel [7B-602(a)]
	Right to GAL if a minor [7B-602(b)] or incompetent [7B-602(c)]
	Right to hearing and notice of hearing [7B-906.1(a) and (b)] • Reviews • Permanency Planning
	Right to present evidence at any review or permanency planning hearing [7B-906.1(c)], including calling witnesses

	Right to court interpreter in foreign language and sign language, based on your home language [Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et. seq. (Title VI), and implementing regulation as found at 45 C. F. R. Part 80] [AOC policy]

	Prudent Parent Standard & Other Miscellaneous Issues
	Sports or other after school activities
	Refer to Reasonable and Prudent Parenting Activities Guide • Hunting (should have biological parent approval) • Playing on a sports team (require both the biological parents' approval and DSS approval) • Driving: 2nd signature on permit or license can be parent, person approved by parent, person approved by DSS, GAL or AA, case worker, or someone identified by court
	Religious participation of their child • Maintain what was in the home • Respect wishes of that religion (i.e. no birthday celebrations for Jehova's Witnesses, dietary restrictions for Jews]
	Consent to marry [51.2, 51.2.1] [although DSS or custodian/guardian can too]
	Consent to enlist
	Consent to adoption
	Child's Appearance: DSS or court to approve when conflicts over perms, color, style, relaxers, etc.
	Permanent or significant changes must include biological parent
	Piercings: • Ear piercings include biological parent in decision • Other piercings require the consent of custodial parent [14-400]
	Tattoos: Illegal for anyone under 18 [14-400]
	Leaving child home alone: discussion and agreement in CFT
	Miscellaneous:
	• School Shopping
	• Sports (team games & practices)
	• Calendaring program (to increase communication between foster parent & parents about significant events and appointments) (alternative is using a shared Google Calendar)
	• Other (ask parent):

Permanent Plan Achieved
Custody Checklist (7B-911)

	Placement & Visits
	Which parent has primary custody? Secondary custody to other parent?
	Visitation rights: Least restrictive, most frequent
	Who can supervise? (Even if not placement possibility, can a friend/relative supervise?) Can it be modified supervision? (i.e. supervisor not in same room but nearby?)
	Special conditions or occasions: • Holidays and special days (birthdays, religious holidays, mother's/father's day, etc) • School vacations
	Prison/jail visits
	Phone contact
	Social media contact
	Notification of address and phone number of child's residence

	Medical
	Parent to be consulted or notified on routine, emergency or surgical care?
	Parent to be notified on routine, emergency or surgical care?
	No need for parent to consent (because juvenile own right): [90-21.5, 90-21.7] • Birth control • Decisions for own child (minor parents) • Substance abuse
	Other? (Consider children with special issues or needs for therapy)

	Education & School Rights
	School to attend • If joint custody or transfer to Ch. 50 per 7B-911
	IEPs: Part of the team [Individual with Disabilities Education Act – IDEA] • If joint custody or transfer to Ch. 50 per 7B-911
	If custody or transfer to Ch. 50 per 7B-911: • Right to be notified of school and access to school records, including photos • Right to participate in school activities, including school conferences

	Prudent Parent Standard & Other Miscellaneous Issues
	• Calendaring program (to increase communication between foster parent & parents about significant events and appointments) (alternative is using a shared Google Calendar)
	• Other (ask parent):

	Due Process Rights
	Right to counsel [7B-602(a)] [Per IDS policy, judge to decide if this is a "critical stage."] • No right to counsel if case transferred to Chapter 50 per 7B-911
	Right to GAL if a minor [7B-602(b)] [Per IDS policy, judge to decide if this is a "critical stage."] • No right to counsel if case transferred to Chapter 50 per 7B-911
	Right to GAL if incompetent [7B-602(c)] [Per IDS policy, judge to decide if this is a "critical stage."] • No right to counsel if case transferred to Chapter 50 per 7B-911
	Right to hearing: • If custody but not transferred to Chapter 50: Right to review visitation plan [7B-905.1(d)] • If custody but not transferred to Chapter 50: Right to review [7B-906.1(n) or 7B-1000]
	Right to present evidence at any review hearing [7B-905.1, 7B-906.1(c))], including calling witnesses
	Right to court interpreter in foreign language and sign language, based on your home language [Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et. seq. (Title VI), and implementing regulation as found at 45 C. F. R. Part 80] [AOC policy]

Permanent Plan Achieved
Guardianship Checklist

	Placement & Visits
	Visitation rights: Least restrictive, most frequent
	Who can supervise? (Even if not placement possibility, can a friend/relative supervise?) Can it be modified supervision? (i.e. supervisor not in same room but nearby?)
	Special conditions or occasions: • Holidays and special days (birthdays, religious holidays, mother's/father's day, etc) • School vacations
	Prison/jail visits
	Phone contact
	Social media contact
	Notification of address and phone number of child's residence

	Medical
	Parent to be notified on routine, emergency or surgical care?
	No need for parent to consent (because juvenile own right): [90-21.5, 90-21.7] • Birth control • Decisions for own child (minor parents) • Substance abuse
	Other? (Consider children with special issues or needs for therapy)

	Education & School Rights
	If guardianship: • Right to be notified of school and access to school records, including photos • Right to participate in school activities, including school conferences

	Prudent Parent Standard & Other Miscellaneous Issues
	Miscellaneous:
	• Calendaring program (to increase communication between guardian & parents about significant events and appointments) (alternative is using a shared Google Calendar)
	• Other (ask parent):

	Due Process Rights
	Right to counsel [7B-602(a)] [Per IDS policy, judge to decide if this is a "critical stage."] • No right to counsel if case transferred to Chapter 50 per 7B-911
	Right to GAL if a minor [7B-602(b)] [Per IDS policy, judge to decide if this is a "critical stage."] • No right to counsel if case transferred to Chapter 50 per 7B-911
	Right to GAL if incompetent [7B-602(c)] [Per IDS policy, judge to decide if this is a "critical stage."] • No right to counsel if case transferred to Chapter 50 per 7B-911
	Right to hearing: • Right to review visitation plan [7B-905.1(d)] • Right to review [7B-906.1(n) or 7B-1000] o To terminate guardianship: ▪ Relationship between guardian and juvenile no longer in best interest ▪ Guardian is unfit ▪ Guardian has neglected their duties, OR ▪ Guardian unwilling or unable to continue
	Right to present evidence at any review hearing [7B-905.1, 7B-906.1(c))], including calling witnesses
	Right to court interpreter in foreign language and sign language, based on your home language [Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et. seq. (Title VI), and implementing regulation as found at 45 C. F. R. Part 80] [AOC policy]

Post-TPR/Relinquishment Checklist

	Placement & Visits
	None

	Medical
	None

	Education & School Rights
	None

	Prudent Parent Standard & Other Miscellaneous Issues
	None

	Due Process Rights
	Hearings held every six months until decree of adoption is filed [7B-908] • Parent not entitled to notice
	Review of agency's plan for placement (if decree of adoption not filed within 6 months) [7B-909] • If missing a relinquishment or consent but no TPR being pursued, court may order any relinquishment to be voided per 48-3-707(a)(4). 15 days' notice to hearing to restore rights. • Subsequent reviews require notice to parent if appeal of TPR is pending and court has stayed the order pending appeal [7B-909(c)]
	If permanent plan is no longer adoption, possibility of reinstatement of parental rights [7B-1114- • Juvenile at least 12 • No legal parent, not in adoptive placement, and not likely to be adopted in reasonable time • TPR more than 3 years or GAL/DSS stipulate (or court finds) that permanent plan is no longer adoption • If parent contacts DSS or GAL for reinstatement of rights, DSS/GAL notify the juvenile of right to file motion • Right to notice of the hearing (no right to counsel) [7B-1114(d)] • Right to present evidence at hearing to reinstate parental rights
	Right to court interpreter in foreign language and sign language, based on your home language [Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et. seq. (Title VI), and implementing regulation as found at 45 C. F. R. Part 80] [AOC policy]

CHANGING VISITATION TO FAMILY TIME

2017 Parent Attorney Conference
Looking Back and Moving Forward
The Next Ten Years of Parent Representation

Changing Visitation to Family Time

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I. PAST
   a. Standard View of visitation
   b. Minimal Change
   c. Location of the visit
   d. Court's View and Court Orders

II. CURRENT
   a. August 5, 2016 Child welfare Visitation Project
   b. Mecklenburg County's Team composition/ Action Plan
   c. Changed court summary-
   d. Changed Court orders
   e. Changed Visitation Observation Checklists
   f. Developed Handbook

III. FUTURE
   a. Mecklenburg County Visitation Handbook for Parents and Families—
   b. Teen Health Handbook
   c. Making Connections Form
   d. Visitation notes
   e. Partnership with Park and Rec Department
   f. Challenge to social workers
   g. Parenting Resource Sheet
   h. Additional trainings to juvenile court stakeholders

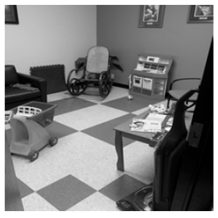
CHANGING VISITATION TO FAMILY TIME

LOOKING BACK AND MOVING FORWARD

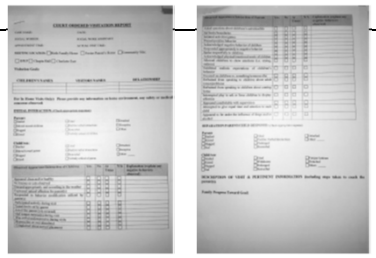
THE PAST WHAT DID/DOES VISITATION LOOK LIKE?

- **STANDARD COURT ORDERED VISITATION**: ONE TIME PER WEEK FOR ONE HOUR SUPERVISED BY YFS AT A YFS LOCATION.
- **LITTLE MOVEMENT EVEN IF VISITS WERE GOING WELL**: INCREASED TO TWO HOURS PER WEEK/STILL SUPERVISED DEPENDING ON THE AGE OF THE JUVENILE AND STILL NORMALLY AT A YFS LOCATION

THE PAST: TYPICAL VISITATION ROOM



THE PAST: VISITATION REPORTS



THE PAST: COURT SUMMARY AND ORDERS

TYPICAL LANGUAGE IN COURT SUMMARY

"At the Non-secure hearing on 3/21/2017, the court ordered the mother to a supervised four-hour minimum weekly visitation with the children. In addition, the mother is allowed to contact the children via phone. At the beginning of the review period, the mother had been compliant with visitation; however, has recently fell off. She has missed three scheduled visitations with the children."

TYPICAL LANGUAGE IN COURT ORDER

"The Father's visitation shall remain as previously Ordered. The Father shall have a minimum 4 hours of visitation every other week, with YFS supervising a portion of every other visit. The Paternal Grandmother can supervise the remaining visitation time. During any visitation with the Juvenile, the parents shall not have the child around cigarette smoke and not smoke around the child. Other forms of communication between the parent and child shall occur as follows: cards, letters, gifts, and Face Time."

WHAT WE KNOW:

- Emotional and developmental harm occurs when children are removed from their home and placed in foster care.
- Children in foster care need frequent and meaningful contact with their primary caregiver.
- Multiple studies have shown that more frequent parent-child visits are associated with shorter placements in foster care.
- Multiple barriers in NC inhibit contact between parents and children in foster care including lack of training, lack of knowledge about best practices related to visitation, lack of agency resources, and lack of advocacy by parent and child representatives.

WHAT DO WE DO?

HOW CAN WE IMPROVE?

CHILD WELFARE VISITATION PROJECT

- Overview
- Challenges the way we look at visitation
- Visitation can be used as a reunification tool
- How can we enhance visitation?
- No more cookie cutter approaches
- Address visits at each hearing

MECKLENBURG COUNTY'S RESPONSE

- Team Composition: YFS (Legal, Upper Management, Social Worker Assistant), GAL, Parent Attorneys, and Community Partner)
- Explored how other jurisdictions address visitation
- Developed Action Plan with specific tasks for all team members.

Child Welfare Courts Visitation Project-Action Planning Worksheet

Goal/Objective (Specific, Measurable, Actionable, Realistic, Timely)	Task (s) (What needs to be accomplished to make this goal a reality?)	Timeline (Indicate tasks and specific due dates. Think short and long terms)	Roles & Responsibilities (Clear roles and responsibilities)	Strategic Plan (Identify where this will fit into your strategic plan)	Measureable Objectives (How will this goal/objective be measured?)
• Develop training around importance of visitation. (Possible Training Topic: Visitation through a child's eye. Visitation-the key to permanence). • Ensure parent attorneys, YFS, GAL complete family tree at earliest contact. • Amend court orders to ensure that visitation is addressed and captured during court hearings. • Identify community resources that could host visitation sites as visitation hosts. • Parents/discussion about front end conversation. Prepare parents and let them know what the expectations are.	• Identify individuals that can provide. • Explore family tree forms/Making connection form. (Denise) • Change court orders/YFS summary. (Twyla) • Explore changing post custody CFT visitation conversation. • Explore visitation expectation checklists (Sherrida, Gal, Parent attorney-Lindy)	• Denise have conversation with Jordan Institute (Tuesday August 9, 2016). • Twyla obtain information from Miss Alverne about other jurisdiction prior to September meeting. (Casey, GAL) • Denise will speak with Park and Rec directors using centers visitation resources. • Talk with congregation for kids / sororities / fraternities/other community organizations MCYC.	• YFS form changes: (Twyla) • Research form: (Team) • Develop training: (Team) • Identify/engage community resources: (GAL) • Parent attorneys initially then follow up @ CFT. • Family forms/Connection forms: (Denise) • Court orders/YFS summary: (Twyla) • Visitation check list: (GAL, Lindy) • Talking to other jurisdiction: (Twyla, Casey, GAL interns)	• Mecklenburg County is focusing in on timeliness to permanence. • YFS is working on developing practice model. • Mecklenburg county model court, one of the goal is the fatherhood initiatives. • YFS is addressing placement stability for children in foster care and strong, collaborative visitation plans may increase placement stability. (READ) • YFS in the process identifying resources to enhance visitation.	• Establishing training guidelines circle. Measured by Pre- and Post-surveys • Visitation recommend changes. • Permanence increased. Measured by data collected by YFS annually

ACTIONS TAKEN: CHANGED COURT SUMMARY

Child Name: **File #:**

VISITATION (FAMILY TIME):

(Include the frequency of the visits; place/location of visits; supervised or unsupervised; who supervises the visits; why should the visit be supervised; timeframe/hours of visits; length of the visits; rules for visitation: transportation arrangements for visits; expectations of visits; phone calls allowed; monitored phone calls, why should be monitored; who should monitor; Facebook communication allowed, SKYPE, FaceTime allowed, hours of telephone contact, who should initiate contact, time of contact, length of contact; rules for contact, email/ text contact allowed, who should initiate, how should be sent, should anyone be copied on email, does email need to be sent to another individual first, should emails be monitored, who should monitor; observations, compliance; parent/child engagement; use of appropriate parenting skills—Was DSS 5242 completed? If so then attach each time visitation rules change; If visits should be suspended, then why? Are the kids involved in any extracurricular activities? Were the parents invited to the extracurricular activities? Did the parents attend the activity? Were there any barriers to the parents attending the extracurricular activity? Steps used to address barriers? Please be specific

ACTIONS TAKEN: CHANGED COURT ORDERS

ACTION TAKEN: CHANGED VISITATION OBSERVATION CHECKLIST

IN THE FUTURE

- Provide "Mecklenburg County A Visitation Handbook for Parents and Families" to all parents.
- Handbook discusses expectations at visits including a copy of the Visitation Observation Checklist.
- Will discuss visitation expectations at Post Custody CFT's.
- Provide Teen Health Handbook to parents.
- Handbook provides information on how to talk to teens about certain subjects.
- Handbook provides resource information.

IN THE FUTURE:

- Plan to distribute the "Making Connections" form to parents and juveniles so they can identify possible visitation hosts and/or locations.
- Plan to share visitation notes on an ongoing basis rather than waiting until the scheduled hearings.
- Partnered with Mecklenburg County Parks and Recreation Department to utilize their locations for visits.
- Developed a Parenting Resources Sheet to assist social workers and parent attorneys identify quality parenting education.

IN THE FUTURE:
CHANGE CURRENT CLIMATE

Plan to develop training to discuss the importance of visitation

Mecklenburg County

A Visitation Handbook for Parents and Families

CONTACT INFORMATION FOR KEY PEOPLE IN YOUR CASE

Your Lawyer:

Name:	
Address:	
Telephone:	Best Time to Call:
Email:	

Your Social Worker:

Name:	
Address:	
Telephone:	Best Time to Call:
Email:	

Your Social Worker Assistant:

Name:	
Address:	
Telephone:	Best Time to Call:
Email:	

Your Child's Guardian ad Litem (GAL):

Name:	
Address:	
Telephone:	Best Time to Call:
Email:	

Others:

Visiting With Your Child

We know visits with your child can be tough. Many parents have a lot of feelings about visits, including guilt, anger, frustration, depression, grief, and anxiety.

For example, you may be happy to see your child, but you may also feel angry that you can only visit during time dictated by court or DSS. Also, you may be nervous about how your child will react to the visit and the fact that the visit is supervised.

Why Visits Matter

Even though these emotions are difficult, visits are very important. Visits:

- Give you a chance to connect and bond with your child. Visits are the best way for you to maintain a relationship with your child while your child is in foster care. Visits can also be a chance to heal your relationship with your child.
- Are a time to have fun with your child.
- Can help your family reunify. Research shows that children who visit more with their parents while they are in foster care are more likely to return home.
- Make the separation from you more bearable for your child and help your child feel more at ease during this temporary placement.

Your Visit Plan

You should have a visitation plan that outlines when and where visits will occur. Your plan should answer the following questions:

- How often will you visit with your child?
- Where will you visit with your child?
  - ✓ *Tip: be sure to arrange transportation to and from the visit in advance. Ask your attorney to advocate for visits outside of the DSS agency.*
- *When will you visit with your child?*
  - ✓ *Tip: create a calendar with reminders of your visits.*
- *What time will you visit with your child?*
  - ✓ *Tip: alert your social worker of any conflicts with work, school or other appointments.*
- *Must visits be supervised? If so, who will supervise them?*
  - ✓ *Tip: if your visits are supervised, ask your attorney or social worker what you have to do to have unsupervised visits.*

Sources: Hess, 2013; Leathers, et al., 2010; Nesmith, 2013; Smariga, 2007; Wolff, 2011

Jordan Institute for Families
February 2015

Planning for Visits

We know you want to make the most of your visits with your child. Planning for ***each visit*** increases the likelihood that things will go well. Here are some things you may want to consider as you plan for your visit:

1) **Know the purpose of visits**—which is to allow you to connect with your child. Focus on maintaining, repairing, or building your relationship with your child.

2) **Have your own goals for visits.** Is there anything specific you want to accomplish during the visit? Is there anything you need to talk about with your child?

3) **Make visits fun and comfortable for your child.** Plan what you will do with your child during visits. What does your child enjoy doing? What does she need in the visit to make her feel more comfortable (toys, stuffed animal, etc.)?

4) **Think about and plan for problems that may come up during the visit.** Parents sometimes struggle when unexpected problems arise during visits. Spend time thinking about issues that may come up during visits.

   You may even want to talk with your social worker or attorney about possible issues and how you should handle them. The following questions may help you think through common problems that can arise during visits:

   - How do I respond if my child asks when he can come home?
   - What if my child starts "acting out?" How do I respond?
   - How will I handle my emotions during visits—especially if I get upset at my social worker or someone else? When you stay calm in the visit, it helps your child feel calmer too.
   - It's hard seeing someone else parent my child. How do I find a way to work with the foster parent?

5) **Think about how you will support, set limits, and discipline your child during the visit.** If your visits are supervised, your social worker may be looking at how you interact with and parent your child during the visit. This is an opportunity for you to show your worker that you have learned things from the services or activities in your case plan, like parenting classes.

6) **Have a plan for managing transitions.** Children often struggle during the transitions into and out of visits. Be prepared for how your child may react as they say "hello" or "goodbye" and offer more support to them. This also means being prepared to handle your own emotions, since saying "goodbye" will be difficult for you too! Try to stay positive and "keep it light" at the end of visits. Taking a picture together, drawing pictures for each other, or making some kind of reminder about your next visit can help make ending this one less painful for your child.

Sources: Haight, et al., 2002; Wolff, 2011

Jordan Institute for Families
February 2015

Show Protective Capacity in Visits

You may be concerned about being evaluated during visits. Often parents have questions about what a worker looks for during family time. One thing that can be helpful is to look for ways to show ***protective capacity*** during visits. This means that the things you do and say show you can protect your child. Here are some examples of things the agency may look at:

Your Parenting Role

- You put your child's needs first and are on your child's side.
- You keep your child safe no matter where you are. You're able to create a reasonable plan to make sure your child is safe in different situations or settings.
- You can consistently meet your child's basic needs (for things like food, clothes, shelter, education, and medical care).
- You fulfill your role as parent consistently, and do not push others to do so instead.
- You understand your child's behaviors and needs, and what they can and can't do based on their age and developmental level.
- You are aware of your strengths and where you need help as a parent and how this affects your child.

Your Behavior & Emotions

- You can manage your emotions and control your impulses.
- You meet your own emotional needs; you rely on other adults for support and do not rely on your child for emotional support.
- You demonstrate the mental health, energy, and emotional stability needed to care for and protect your child, even in tough situations.
- You keep appointments and are working on the goals of your case plan.

Your Relationship with Your Child

- You consistently provide emotional, social, and physical support to your child.
- You show acceptance, understanding, and respect for your child.
- You have and show a strong bond with your child.
- You express affection, compassion, warmth, and sympathy toward your child.

Adapted from Action for Child Protection, 2005

Jordan Institute for Families
February 2015

Developmentally-Related Visit Information

0 to 12 months

At this age, children can attach to more than one caregiver. Optimal frequency for visits is 3 to 4 times per week. Focus on consistency of care rather than who provides it. One person should be the primary provider of the child's care. Be careful not to introduce the child to too many new people.

1 to 3 years

At this age, the child's connection to an adult depends on frequent contact. Focus on having visits as often as possible rather than on the duration of the visits. Determine duration based on the child's emotional needs and how long the parent can manage the child's behavior in visits.

4 to 7 years

At this age, the child likely has significant ties to certain caregivers. Here, attachment hinges more on trusting the parent to be available when needed rather than frequency of contact. Encourage contact between visits via phone calls or video chat sites such as Skype or FaceTime. Consider allowing the parent to attend important events or meetings such as school plays and the child's medical appointments. Consider increasing the duration of visits.

8 to 12 years

Continue to encourage contact between visits with phone calls, Skype, etc. Involve the parent in the child's daily life when possible. Continue to involve the parent in important activities in the child's life.

13 to 18 years

At this age, the child becomes focused on independence, particularly from adults and caregivers. As a result, children can become ambivalent about their relationship with parents and/or visits. They may show indifference to or avoid visits. Give the youth more voice in the frequency, duration, and location of visits. Encourage the youth to visit the parent regularly. Visits at this age can be beneficial, even if duration is only 30 to 45 minutes. Older children in this age group (i.e., 17 to 18 year olds) can have briefer and less frequent visits.

VISITATION OBSERVATION CHECKLIST

CASE NAME: _____ FILE NO.: _____
DATE OF SUPERVISED VISIT: _____ WITH WHOM: _____
TIME OF VISIT: _____ LOCATION: _____ SUPERVISING STAFF PERSON: _____

ACTIVITY	YES	NO (IF NO, EXPLAIN)	NOTES
PARENT'S STATUS AT VISIT			
Parent arrives on time			
Parent received copy of this document in advance			
Parent shows attention to personal hygiene, no signs of substance abuse (vs. Parent is disheveled or under the influence of drugs and/or alcohol)			
Parent brought games and/or toys to the visit			
Parent brought food and/or snacks to the visit			

Parent brought clothing for the child to the visit			
Parent arrived with a plan for activities at the visit			
COMMUNICATION SKILLS			
Parent is sensitive to child's feelings and expresses compassion and sympathy toward the child (vs. Parent ignores or changes what the child says)			
Parent uses child friendly language (vs. Parent uses adult language and comments)			
Parent demonstrates warmth toward child verbally or non-verbally (vs. Parent being remote, hostile, or distracted)			
Parent is verbally respectful to child (vs. Parent "quizzes" the child or seeks inappropriate reassurances from the child)			

Parent exhibits shared parenting with the placement provider, where appropriate			
PHYSICAL SPACE AND INTIMACY NEEDS			
Parent shows respect for child's physical space (vs. Parent violates space, kisses child inappropriately, grabs, or puts squirming child in lap, etc.)			
Parent joins in with child's play or lets child initiate play (vs. Parent is under-involved or over-involved)			
Parent provides a safe and comfortable interaction for child overall (vs. Parent has a threatening, intimidating, or intrusive style)			
CONFLICT EXPLORATION RESOLUTION			
Parent sets appropriate behavior limits and/or discipline (vs. Parent uses negative terms, curses, criticizes, or orders the child around, etc.)			
Parent handles child's frustrations and anger appropriately and seeks to calm the child (vs. Parent escalates the conflict)			

Parent has the goal of mutual enjoyment of the interaction (vs. Parent implements his or her own agenda for revenge, guilt-inducing, or other negative manipulators)			
Parent provides consistently appropriate modeling during interactions (vs. Parent has inconsistent, erratic, and argumentative style)			
Parent manages the transition into and out of the visit in a positive manner and offers reassurance to the child (vs. Parent does not offer support to the child and reacts negatively in the child's presence)			
UNDERSTANDING OF CHILD'S DEVELOPMENTAL STAGE			
Parent responds to child's verbal and non-verbal cues (vs. Parent doesn't acknowledge child's cry or responds inappropriately)			
Parent has appropriate expectations of child's abilities (vs. Parent plays inappropriately, becomes frustrated by child's limitations, etc.)			
Parent provides care necessary for child's developmental stage (vs. Parent does not change diaper, help to tie shoes, hold and rock, talk to or reassure child)			

Parent separated from child appropriately (vs. parent causes the child to become upset, failed to comfort and reassure child)			
Parent understands the impact of their behavior on child (vs. Parent brings inappropriate food, doesn't focus on child or address safety)			
Parent is able to engage all children according to their respective developmental stages where multiple children are present for the visit (vs. Parent only concentrates on engaging one child during the visit and ignores the other children present)			
Need for intervention during the visit (Explain what happened, how you handled it, and how the Parent reacted)			
Concerns expressed by the Parent during the visit			
Concerns expressed by the child during the visit			

Issues to follow-up on after the visit			
Overall impression of the visit			

[MONTH]

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday

Mon [Date]	Tue [Date]	Wed [Date]	Thur [Date]	Fri [Date]
8	8	8	8	8
9	9	9	9	9
10	10	10	10	10
11	11	11	11	11
12	12	12	12	12
1	1	1	1	1
2	2	2	2	2
3	3	3	3	3
4	4	4	4	4
5	5	5	5	5
6	6	6	6	6
Evening	Evening	Evening	Evening	Evening

Making & Keeping Connections

Protocol for Permanency Planning Social Workers

1. Follow state protocol for finding family during the first 30 days in custody (letter to relatives, etc.)

2. Develop family trees with the biological mother and biological father – bring this document to mediation giving the parents an opportunity to add to the family tree

3. Use the **Making and Keeping Connections** document with biological parents at the initial CFT to identify relatives and non-relatives who can support their child(ren). Use the ideas list to help parents identify ways individuals can support and stay connected. Bring the document to mediation giving the parents and opportunity to add to the document.

4. Continue to add to the **Making and Keeping Connections** document at meetings with biological parents

5. Use the **My Connections** document with children in care who are verbal. The social worker should write and draw as directed by the child for younger children who can not yet read or write. This document can also be used by the Guardian ad Litem Volunteer and should be updated on a regular basis. The social worker and the GAL should agree who should use the document with the child to prevent both from repeating the same activity and confusing the child.

6. Updates regarding family connections and the information gathering using these documents should be included in the Court Summary **Section VII; Paragraph B Research on Relatives for Placement/Fostering Connections** as well as **Section XII Update**

Making & Keeping Connections

Child's Name:______________________________

Relatives	Non-Relatives
Date:	**Date:**
Name:	Name:
Relationship to Child:	Relationship to Child:
Address:	Address:
Phone:	Phone:
Ways this person can provide support and connection to this child:	Ways this person can provide support and connection to this child:
Date:	**Date:**
Name:	Name:
Relationship to Child:	Relationship to Child:
Address:	Address:
Phone:	Phone:
Ways this person can provide support and connection to this child:	Ways this person can provide support and connection to this child:
Date:	**Date:**
Name:	Name:
Relationship to Child:	Relationship to Child:
Address:	Address:
Phone:	Phone:
Ways this person can provide support and connection to this child:	Ways this person can provide support and connection to this child:

Making & Keeping Connections

Children in Foster Care need to keep connections with family, friends, kin, etc. Even if you are unable to provide placement for the child, there are ways to stay connected.

Here are just a few great ideas.....

- Mail a card
- Write a letter
- Send family pictures
- Write or find and send a funny story
- Send a book
- Write or find and send a poem
- Make and send a craft
- Make a phone call
- Send a care package
- Send an email
- Invite to a family gathering
- Send a family recipe
- Shopping
- Trip to McDonalds
- Attend a school event
- Attend a sports or dance event

Remember that your contact should be positive and uplifting to the child. Talk to the Social Worker about ways you can stay connected.

MY CONNECTIONS

Date: _____

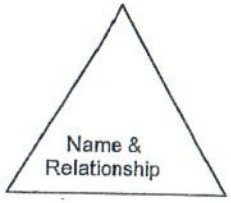
1. Put your name and age in the center circle
2. Put names of relatives and their relationship to you in the rectangles
3. Put names of people with whom you have had a connection and list how you know them in the triangles
4. You can draw more triangles and rectangles if needed – list as many people as you can think
5. Draw lines to connect the people to you using heavy lines between you and the people to whom you feel most connected and soft or dotted lines between you and the people to whom you feel less connected
6. Draw circles or hearts around those people to whom you have the strongest connection

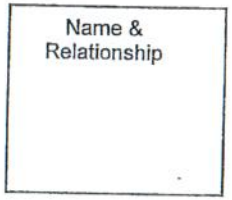
MY CONNECTIONS

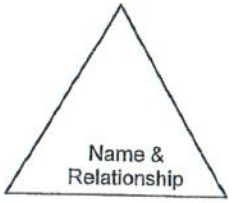
= Relative

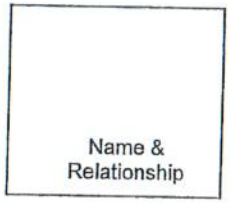
= Non-Relative (Family Friends, Neighbors, Teachers, Ministers, etc.)

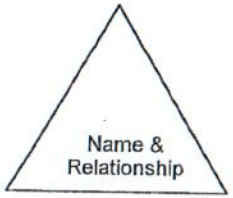
Date: _____

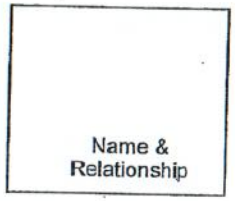


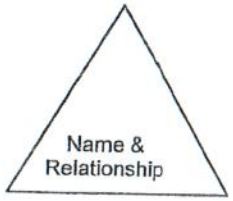


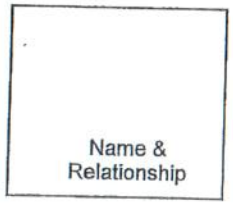


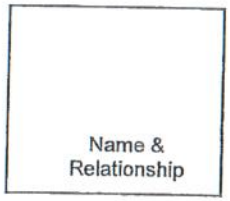


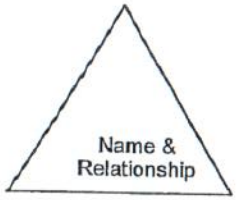












IMPLICIT BIAS

Boxes, Survival and Our Better Angels

James Drennan
August, 2017

Your Job

- As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

0.1 PREAMBLE: A LAWYER'S RESPONSIBILITIES
North Carolina Rules of Professional Conduct of the North Carolina State Bar

- Competent Representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

Rule.1.1 Competence
North Carolina Rules of Professional Conduct of the North Carolina State Bar

Why This Matters

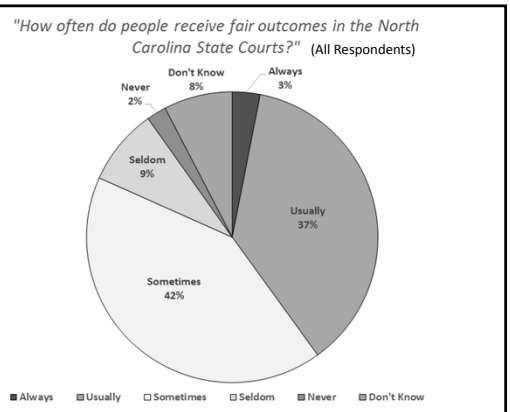
It's about "GOOD PEOPLE"

And its universal

From The NCCALJ Final Report:

"Ask citizens what they want from a court system and an immediate answer is likely to be "fairness." A system is fair when cases are decided based on the law as applied to the relevant facts. Bias arising from characteristics such as wealth, social class, ethnicity, race, religion, gender, and political affiliation have no place in a fair decision."

Does that include advocates' decisions?



Many of Your Decisions As Advocate Are Discretionary

Between "have to"

AND

Can't

Questions For An Advocate

TRIAGE

Is the evidence favoring the client credible? (*weak case)*

Do I think a judge or jury will find them "worthy"?

Do any of my interactions discourage a client from trusting me? (*body language, facial expressions)*

Will I accept without strenuous argument a greater punishment for some clients? (*perceived dangerousness)*

Do I "go the mat" for this client?

Do I believe the client?

See Richardson and Goff, *'Implicit Bias in Public Defender Triage', 122* YALE L.J. 2626 (2013)

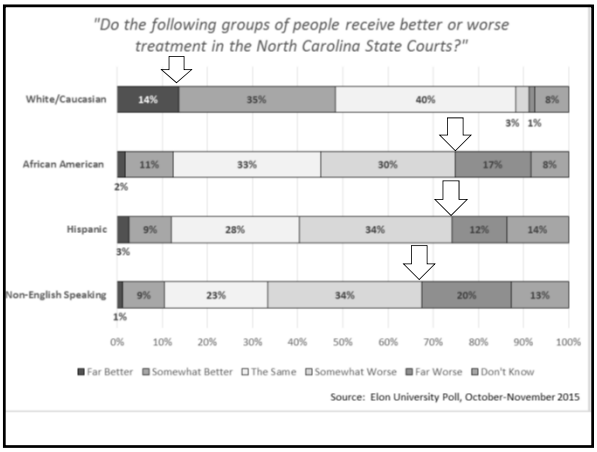
What People Are Saying or Thinking

For example, many of our anti-discrimination policies focus on finding the bad apples who are explicitly prejudiced. In fact, the serious discrimination is implicit, subtle and nearly universal. Both blacks and whites subtly try to get a white partner when asked to team up to do an intellectually difficult task. In computer shooting simulations, both black and white participants were more likely to think black figures were armed. In emergency rooms, whites are pervasively given stronger painkillers than blacks or Hispanics. Clearly, we should spend more effort rigging situations to reduce universal, unconscious racism.

David Brooks,
New York Times
January 11, 2013

Perceptions of Fairness

- In a 2016 Gallup Survey 46% of whites believed that blacks are treated less fairly in a variety of community interactions. That was up from 37% who had that perception in 2004.
- In that same period, the percentage of blacks who had that perception remained largely unchanged at 84%.
- Implications for the courts? Besides racial groups, what other clusters of people might have perceptions and/or the reality of being treated unfairly?



"Maybe we now realize the way a racial bias can infect us even when we don't realize," he said. "So that we are guarding against not racial slurs but also going against the subtle impulse to call Johnny back for a job interview but not Jamal. Barack Obama, June 26, 2015

"Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract the *unconscious prejudices* and disguised animus that escape easy classification as disparate treatment."
TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS V INCLUSIVE COMMUNITIES PROJECT, INC., ET AL, p. 17
July 27, 2015.
.

And in Art: From the Whitney 2017 Exhibition of Modern American Art

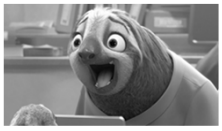
From the *What* To the *How*

Areas of Research Into Decision Making--Heuristics

- Anchoring
- Confirmation Bias
- Recency
- Availability
- Stereotypes and classification
  - Employment
  - Police shootings
  - Public defenders caseloads
  - Sentencing
  - Medical treatments

How We Think Matters

Vs.



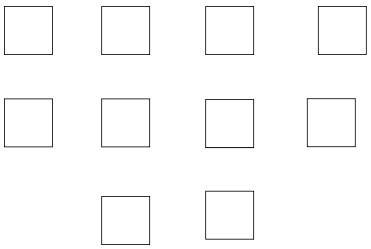
"The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way. You like or dislike people long before you know much about them; you trust or distrust strangers without knowing why. . .

Daniel Kahneman

Automatic Processing and Interference:
Read the Word

BLUE BLACK GREEN
YELLOW RED BLUE
RED BLACK GREEN

Say the Color of the Square



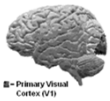
Automatic Processing and Interference:
Say the Color of the Word

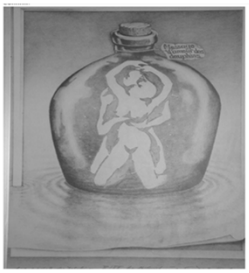
BLACK BLACK GREEN
YELLOW BLUE RED
RED COLORS! BLUE

What You See Is Not All There IS

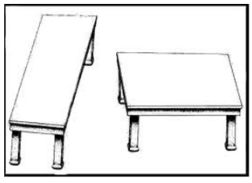
You Don't See With Your Eyes, Only

PLUS





Which Table is Longer?



In Case You Don't Believe Me

Can You Read This?

- I cnnoat blveiee I aulaclty uesdnatnrd waht I am rdanieg. Aoccdrnig to rscheearch at Cmabrigde Uinervtisy, it deosn't mttaer in waht oredr the ltteers in a wrod are, the olny iprmoatnt tihng is taht the frist and lsat ltteer be in the rghit pclae. The rset can be a taotl mses and you can sitll raed it wouthit a porbelm. Tihs is bcuseae the huamn mnid deos not raed ervey lteter by istlef, but the wrod as a wlohe.

You Don't See With Your Eyes, Only

PLUS

And You Always FILL IN THE GAPS

Survival Is Job One, So Give Me Some Boxes

Two Problems With Automatic Thinking

- Classification, association, and stereotype
- The quicker you decide, the more automatic it is
- So what we flavor our classification system with matters

The Dilemma

- We all have human brains, hard-wired to make rapid decisions making survival more likely . .

- . . . But fairness requires a brain more concerned with accuracy than survival.

You have no control over what your brain does first.

You have a choice about what happens next.

It's not Hopeless

Don't have a Dream

Consciously take note of differences (and similarities, too).

Increased risk of in-group bias

Increased risk of out-group bias

Us and Them

When faced with inconsistent information

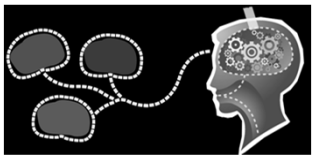
- We sometimes revise our beliefs

-BUT-

- We are more likely to create a subgroup category (an "exception") thus leaving our belief intact

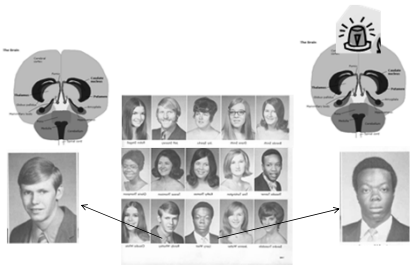
Think about your thinking.

Make a conscious effort --engage in an intentional thought process.



Implicit Association Test

www.implicit.harvard.edu/implicit



Consciously confront stereotypes.

- IAT www.implicit.harvard.edu/implicit
- "Reverse" the parties?
- Seek images and relationships that defy stereotypes

Take your time.

- Are interactions with some groups or types of people usually longer? Shorter? Why?

When it matters, avoid autopilot

Hurried

Tired

Upset

Stressed

Angry

Good Habits Help

Develop capacity to focus attention

Avoid decisional fatigue.

Resist shortcuts

Make a conscious effort to wait until all facts are present before judging; i.e.do what we tell jurors to do every day

Maximize accountability.

- Ask a colleague to observe
- Get staff input
- Look for patterns in your decisions.

Keep Learning

Engage in constant vigilance.

People with low-prejudiced beliefs are assisted by reminding themselves or being reminded by others of those beliefs.

Best Individual Advice

- Intention
- Attention
- Effort
- Take your time
- Recognize that we all need to improve

*Credit to Professor Jack Glaser, Goldman School of Public Policy, UC Berkely.

It's Also a System Issue

- Acknowledge the importance of minimizing bias as an institutional goal
- Educate
- Think about processes
- Structure decisions—e.g., sentencing, bonds
- Create checklists
- Promote an inclusive environment
- Ensure diversity in appointments, images, etc. on system projects

It's Also A System Issue

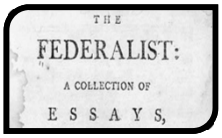
- Provide officials the resources (ex. time) to minimize automatic processing decisions in important matters
- Promote personal and systemic accountability
- Learn from other disciplines—medical review panels, mortality reviews, etc.
- Promote mentorships to provide honest feedback
- Develop measures and collect the data

It's not really new

- (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, **except by the lawful judgment of his equals or by the law of the land.**
- + (40) To no one will we sell, to no one **deny or delay right or justice.**

Or Ever Finished

Justice is the end of government. It is the end of civil society.
It ever has been and ever will be pursued until it be obtained,
or until liberty be lost in the pursuit.



No. 51

May It Be So

'when again touched, as surely they will be, by the better angels of our nature.'

In other words, don't give

To people who deserve

Decision-making and Fairness References

Drennan/School of Government, UNC

June 2017

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3. *Project Implicit® Web site*: **http://projectimplicit.net/**
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UCLA LAW REVIEW

Implicit Bias in the Courtroom

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ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge[1] who seek to answer these difficult questions in accordance with behavioral realism.[2] Our general goal is to educate those in the legal profession who are

1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.

2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus.[3] We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

Bias and the Law, 58 UCLA L. REV. 465, 490 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 997–1008 (2006). Jon Hanson and his coauthors have advanced similar approaches under the names of "critical realism," "situationism," and the "law and mind sciences." *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1339 n.28 (2010) (listing papers).

3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.

examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. IMPLICIT BIASES

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.[4] We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements.[5] We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday.[6] The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.[7]

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An *attitude* is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.[8] A *stereotype* is an association between a concept (again, in this case a social group) and a trait.[9] Although interconnected, attitudes and stereotypes

4. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 667 (1999) (describing anchoring).
5. *See generally* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).
6. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).
7. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).
8. In both common and expert usage, sometimes the word "prejudice" is used to describe a negative attitude, especially when it is strong in magnitude.
9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word "stereotype," the correlation between social group and trait is far from perfect. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC),[10] have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).[11]

10. Implicit social cognition (ISC) is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. *See generally* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

11. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) (introducing the Implicit Association Test (IAT)). For more information on the IAT, see Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for *both* White and harmless item; a different key is used for *both* African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly.[12] Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.[13]

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data[14] on reaction-time measures of "implicit biases," a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held),[15] large in magnitude (as compared to standardized measures of explicit bias),[16] dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

12. *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 17 (2007).

13. This D score, which ranges from –2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants' latencies pooled across schema-consistent and -inconsistent conditions. *See, e.g.*, Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual's IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen's *d*.

14. The most prominent dataset is collected at PROJECT IMPLICIT, http://projectimplicit.org (last visited Mar. 22, 2012) (providing free online tests of automatic associations). For a broad analysis of this dataset, see Nosek et al., *supra* note 12.

15. Lane, Kang & Banaji, *supra* note 10, at 437.

16. Cohen's d is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen's d, on various stereotypes and attitudes range from medium to large. *See* Kang & Lane, *supra* note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. *See id.* at 474–75 tbl.1.

separate mental constructs),[17] and predicts certain kinds of real-world behavior.[18] What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind.[19] Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking.[20] In the psychology journals, John Jost and colleagues responded to sharp criticism[21] that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore.[22] Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.[23] In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.[24]

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart

17. *See* Anthony G. Greenwald & Brian A. Nosek, *Attitudinal Dissociation: What Does It Mean?*, *in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 65 (Richard E. Petty, Russell E. Fazio & Pablo Briñol eds., 2008).
18. *See* Kang & Lane, *supra* note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).
19. *See* Kang & Lane, *supra* note 2, at 473–90; *see also* David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008).
20. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319–26 (2010).
21. *See, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1108–10 (2006).
22. *See, e.g.*, John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 41 (2009).
23. *See id.*
24. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of r=0.24, whereas explicit attitude scores had correlations at an average of r=0.12. *See id.* at 24 tbl.3.

out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue.[25] In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, *explicit* bias, it may be ineffective to adopt means that are better tailored to respond to *implicit* bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection *and* endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels "explicit" and "implicit" as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one's explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent's conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

25. *See generally* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011).

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.[26]

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called "structural." Other names include "institutional" or "societal." These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.[27] In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian's biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are *explicit* biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of *concealed* bias (explicit bias that is hidden to manage impressions).

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26. *See, e.g.*, Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 95–96 (2003).

27. *See, e.g.*, Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117–22 (2002) (applying lock-in theory to explain the inequalities between Blacks and Whites in education, housing, and employment); john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–800 (2008) (adopting a systems approach to describe structured racialization); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 743–48 (2000) (describing lock-in theory, drawing on antitrust law and concepts).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for $10 or a cheeseburger for $3. Unfortunately, she has only $5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive.[28] To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

28. *See, e.g.*, GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23–30 (2002) (discussing self-reinforcing stereotypes); john powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE, Sept./Oct. 2011, at 3, 6 (explaining why "implicit bias insights are crucial to addressing the substantive inequalities that result from structural racialization").

that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.[29]

II. TWO TRAJECTORIES

A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,[30] implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

1. Police Encounter

Blackness and criminality. If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.[31] These biases could contribute to the substantial racial disparities that have been widely documented in policing.[32]

29. *See* Jerry Kang, *Implicit Bias and the Pushback From the Left*, 54 ST. LOUIS U. L.J. 1139, 1146–48 (2010) (specifically rejecting complaint that implicit bias analysis must engage in reductionism).
30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.
31. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–77 (2002).
32. *See, e.g.*, Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas's major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, *Drug War 'Focused' on Blacks*, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 *USA*

Since the mid–twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.[33] Those biases persist today, as measured by not only explicit but also implicit instruments.[34]

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.[35] When participants are subliminally primed[36] with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.[37] In other words, by implicitly thinking *Black*, they more quickly saw a weapon.

Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.[38] Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.[39] The research suggests both that

Today study that 41 percent of those arrested on drug charges were African American whereas 15 percent of the drug-using population is African American); Billy Porterfield, *Data Raise Question: Is the Drug War Racist?*, AUSTIN AM. STATESMAN, Dec. 4, 1994, at A1 (citing study showing that African Americans were over seven times more likely than Whites to be arrested on drug charges in Travis County in 1993).

33. *See generally* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995).

34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically "Black" words prompted participants to evaluate ambiguous behavior as more hostile. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included "Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation." *Id.* at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person's actions as more hostile than those who received a milder dose (20 percent). *Id.* at 11–12; *see also* John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).

35. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

36. The photograph flashed for only thirty milliseconds. *Id.* at 879.

37. *See id.* at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. *Id.* at 881.

38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. *See id.* at 881 (describing dot-paradigm as the gold standard in visual attention measures).

39. *See id.* at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).

the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail?[40] Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers' perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they "were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed."[41]

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed *subliminally*. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants' conscious awareness.

Shooter bias. The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks[42] and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.[43]

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

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In this study, the crime primes were not pictures but words: "violent, crime, stop, investigate, arrest, report, shoot, capture, chase, and apprehend." *Id.* at 886.

40. *See* Carbado, *supra* note 31, at 966–67 (describing existential burdens of heightened police surveillance).

41. Eberhardt et al., *supra* note 35, at 887.

42. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. *Id.* at 184. When primed by the Black face, participants identified guns faster. *Id.* at 185.

43. For N=85,742 participants, the average IAT D score was 0.37; Cohen's *d*=1.00. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen's *d*=0.31. *See* Nosek et al., *supra* note 12, at 11 tbl.2.

the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes.[44] If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White.[45] Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets.[46] Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes.[47] Correll also found comparable amounts of shooter bias in African American participants.[48] This suggests that negative attitudes toward African Americans are not what drive the phenomenon.[49]

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated.[50] In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

44. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002) (describing the procedure).

45. *Id.* at 1317.

46. *Id.* at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll's general findings. *See, e.g.*, Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).

47. Correll et al., *supra* note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. *Id.* at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly held. *Id.* at 1323.

48. *See id.* at 1324.

49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. *See* Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).

50. *See* E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005).

most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.[51]

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that "[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias."[52] By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.[53] It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors' charging decisions.[54]

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51. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1016–17 (2007) (describing the results from two studies).

52. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 169 (2008).

53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).

54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, "at virtually every stage of pre-trial negotiation, whites are more successful than non-whites." Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: "It's a feeling, 'You've got a nice

Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor's charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.[55] Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.[56] At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.[57]

While these studies are suggestive, other studies find no disparate treatment.[58] Moreover, this kind of statistical evidence does not definitively tell us that biases

person screwing up,' as opposed to feeling that 'this minority is on a track and eventually they're going to end up in state prison.'" Christopher H. Schmitt, *Why Plea Bargains Reflect Bias*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 1A; *see also* Christopher Johns, *The Color of Justice: More and More, Research Shows Minorities Aren't Treated the Same as Anglos by the Criminal Justice System*, ARIZ. REPUBLIC, July 4, 1993, at C1 (citing several reports showing disparate treatment of Blacks in the criminal justice system).

55. *See* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985).

56. *See* Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1493 (2000) (citing Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441–47 (1979)); Radelet & Pierce, *supra* note 55, at 615–19.

57. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 12 n.41 (2000), *available at* http://www.protectcivilrights.org/pdf/reports/justice.pdf (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)); *see also* Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004) (compiling studies on the death penalty).

58. *See, e.g.*, Jeremy D. Ball, *Is It a Prosecutor's World? Determinants of Count Bargaining Decisions*, 22 J. CONTEMP. CRIM. JUST. 241 (2006) (finding no correlation between race and the willingness of prosecutors to reduce charges in order to obtain guilty pleas but acknowledging that the study did not include evaluation of the original arrest report); Cyndy Caravelis et al., *Race, Ethnicity, Threat, and the Designation of Career Offenders*, 2011 JUST. Q. 1 (showing that in some counties, Blacks and Latinos are more likely than Whites with similar profiles to be prosecuted as career offenders, but in other counties with different demographics, Blacks and Latinos have a lesser likelihood of such prosecution).

generally or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors' and defense attorneys' implicit biases and attempt to correlate them with those individuals' charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality,[59] might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans.[60] Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors.[61] That said, there is no reason to

59. *See* Gordon B. Moskowitz, Amanda R. Salomon & Constance M. Taylor, *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155–56 (2000) (showing that "chronic egalitarians" who are personally committed to removing bias in themselves do not exhibit implicit attitudinal preference for Whites over Blacks).

60. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. *Id.* at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. *Id.* at 1553. The findings by Moskowitz and colleagues, *supra* note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in *United States v. Armstrong*, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. *Id.* at 460–61. The claim foundered when the U.S. Attorney's Office resisted the defendants' discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney's Office's refusal to provide discovery. *Id.* at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that "similarly situated individuals of a different race were not prosecuted." *Id.* at 465.

presume attorney exceptionalism in terms of implicit biases.[62] And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.[63] They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below[64]—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

3. Trial

a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder's decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race ("racial outgroups"). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

62. Several of the authors have conducted training sessions with attorneys in which we run the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 28–31 (2010).

63. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012) (undertaking a step-by-step consideration of how prosecutorial discretion may be fraught with implicit bias).

64. *See infra* Part II.B.

both verdicts and sentencing.[65] The magnitude of the effect sizes were measured conservatively[66] and found to be small (Cohen's d=0.092 for verdicts, d=0.185 for sentencing).[67]

But effects deemed "small" by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions,[68] then an effect size of Cohen's d=0.095 would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.[69]

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite.[70] Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their

65. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). *Id.* at 625. All studies involved experimental manipulation of the defendant's race. Multirace participant samples were separated out in order to maintain the study's definition of racial bias as a juror's differential treatment of a defendant who belonged to a racial outgroup. *See id.*

66. Studies that reported nonsignificant results (p>0.05) for which effect sizes could not be calculated were given effect sizes of 0.00. *Id.*

67. *Id.* at 629.

68. *See* TRACY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1, 3 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf ("Seventy-nine percent of trials resulted in a guilty verdict or judgment, including 82% of bench trials and 76% of jury trials."); *see also* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting the "typical" outcome as three out of four trials resulting in convictions).

69. This translation between effect size *d* values and outcomes was described by Robert Rosenthal & Donald B. Rubin, *A Simple, General Purpose Display of Magnitude of Experimental Effect*, 74 J. EDUC. PSYCHOL. 166 (1982).

70. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.[71]

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about "the precise psychological processes through which the influence of race occurs in the legal context."[72] Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be "unintentional and even non-conscious processes."[73]

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.[74] The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant's guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.[75]

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question "How guilty is the defendant?" The guilt mean score was M=66.97 for

71. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.

72. Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007).

73. *Id.* at 175.

74. Levinson & Young, *supra* note 20, at 332–33 (describing experimental procedures).

75. *Id.* at 334.

dark skin and M=56.37 for light skin, with 100 being "definitely guilty."[76] Measures of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants' weighing of the evidence or assessment of guilt.[77] More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it.[78] Moreover, their recollections did not correlate with their judgments of guilt.[79] Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent).[80] They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty.[81] More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of *evidence evaluation* was a function of both the implicit attitude and the implicit stereotype.[82] On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred).[83] In sum, a subtle change

76. *See id.* at 337 (confirming that the difference was statistically significant, F=4.40, p=0.034, *d=0.52*).
77. *Id.* at 338.
78. This finding built upon Levinson's previous experimental study of implicit memory bias in legal decisionmaking. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–406 (2007) (finding that study participants misremembered trial-relevant facts in racially biased ways).
79. Levinson & Young, *supra* note 20, at 338.
80. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Bias: The Guilty–Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).
81. *Id.* at 204. For the attitude IAT, D=0.21 (p<0.01). *Id.* at 204 n.87. For the Guilty–Not Guilty IAT, D=0.18 (p<0.01). *Id.* at 204 n.83.
82. Participants rated each of the twenty pieces of information (evidence) in terms of its probity regarding guilt or innocence on a 1–7 scale. This produced a total "evidence evaluation" score that could range between 20 (least amount of evidence of guilt) to 140 (greatest). *Id.* at 202 n.70 (citation omitted). The greater the Black = guilty stereotype or the greater the negative attitude toward Blacks, the higher the guilty evidence evaluation. The ultimate regression equation was: Evidence = 88.58 + 5.74 x BW + 6.61 x GI + 9.11 x AI + e (where BW stands for Black or White suspect; GI stands for guilty stereotype IAT score; AI stands for race attitude IAT score; *e* stands for error). *Id.* at 206. In normalized units, the implicit stereotype β=0.25 (p<0.05); the implicit attitude β=0.34 (p<0.01); adjusted R^2=0.24. *See id.* at 206 nn.93–95.
83. *Id.* at 206 n.95.

in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place *more* often in experimental settings when the case is *not* racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail,[84] deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption.[85] Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.[86]

84. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

85. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

86. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges (*N*=85) showed an IAT effect *M*=216 ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges (*N*=43) showed a small bias *M*=26 ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. *See id.*

Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found.[87] That said, the researchers found a *marginally* statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.[88]

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other,[89] the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.[90]

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge's race, a judge's IAT score, and a defendant's race. No effect was found for White judges; the core finding concerned, instead, Black

87. *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

88. *See* Rachlinski et al., *supra* note 86, at 1215. An ordered logit regression was performed between the judge's disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at p=0.07. *See id.* at 1214–15 n.94.

89. This third vignette did not use any subliminal primes.

90. *See id.* at 1202 n.41.

judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlatively, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.[91]

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.[92] Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves "whatever else, make sure not to treat the Black defendants worse") than Black judges (who may think "give the benefit of the doubt to Black defendants"). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges' motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges' behavior.

4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,[93] and Black defendants are subject disproportionately to the death penalty.[94]

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91. *Id.* at 1220 n.114.

92. *See id.* at 1223.

93. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (examining federal judge sentencing under the Sentencing Reform Act of 1984).

94. *See* U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview,*

Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

Probation officers. In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as "Harlem" or "dreadlocks." This subliminal priming led the officers to recommend harsher sentencing decisions.[95] As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method.[96] But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

Afrocentric features. Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida[97] and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine.[98] The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance.[99] In other words, White and Black defendants were sentenced without discrimination based on race. According to the

With Recent Findings From Philadelphia, 83 CORNELL L. REV. 1638, 1710–24 (1998) (finding mixed evidence that Black defendants are more likely to receive the death sentence).

95. *See* Graham & Lowery, *supra* note 87.

96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery's. *See* Rachlinski et al., *supra* note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). *See id.* at 1206 (providing numerical count of judges' prime); *id.* at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing "to arrive at a presentation time that would allow the primes to be detectable but not identifiable." Graham & Lowery, *supra* note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.

97. *See* Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 675 (2004) (selecting a sample of 100 Black inmates and 116 White inmates).

98. *Id.* at 676. Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. *See id.* at 674 n.1.

99. *Id.* at 676.

researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.[100]

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.[101] How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.[102]

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.[103] If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.[104] If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

* * *

Where does this whirlwind tour of psychological research findings leave us? In each of the stages of the criminal trial process discussed, the empirical research

100. *Id.* at 677.

101. *Id.* at 676–77. Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. *See id.* at 385.

102. *See* Blair et al., *supra* note 97, at 677–78.

103. *See id.* at 678 (hypothesizing that "perhaps an equally pernicious and less controllable process [is] at work").

104. *See id.* at 677.

gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.[105]

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).[106] For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is r=0.1 at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.[107] To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual

105. *See* Greenwald et al., *supra* note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).

106. *See* Rachlinski et al., *supra* note 86, at 1202; Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of 'Affirmative Action*,' 94 CALIF. L. REV. 1063, 1073 (2006).

107. The simulation is available at *Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice*, http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from r=0.1 to r=0.2, which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, *see supra* note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).

total of 20.7 million state criminal cases[108] and 70 thousand federal criminal cases.[109] And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.[110]

B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual[111] bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way.[112] Second, after exhausting necessary administrative remedies,[113] the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

108. *See* ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

109. *See* Rachlinski et al., *supra* note 86, at 1202.

110. *See* Robert P. Abelson, *A Variance Explanation Paradox: When a Little Is a Lot*, 97 PSYCHOL. BULL. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, *supra* note 2, at 489.

111. We acknowledge that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. *See id.* at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist's analysis that Wal-Mart's corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).

112. For example, in a Title VII cause of action for disparate *treatment*, the plaintiff must demonstrate an adverse employment action "because of" the plaintiff's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate *impact*, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.

113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. *See* 2 CHARLES SULLIVAN & LAUREN WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 12.03[B], at 672 (4th ed. 2012).

stages,[114] implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a "but-for" sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably "because of" a protected characteristic, such as race or sex.[115] But our objective here is not to engage the doctrinal[116] and philosophical questions[117] of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial.[118] Although those questions are critically important, our

114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

116. For discussion of legal implications, see Faigman, Dasgupta & Ridgeway, *supra* note 19; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Krieger & Fiske, *supra* note 2.

117. For a philosophical analysis, see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists' ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. *See* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as "social framework" evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to

task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been "several dozen testing studies" in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).[119] These studies consistently reveal typical "net rates of discrimination" that range from 20–40 percent.[120] In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed "agentic," worse than an

whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, *supra* note 19, at 1394 ("The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision."); and John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*," 94 VA. L. REV. 1715, 1719 (2008) ("[Testimony] in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes 'social framework' evidence."). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings*, 83 TEMPLE L. REV. 867, 876 (2011) ("Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.").

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant's work environment and asking that witness whether each of those particular attributes exists.

119. *See* Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISSUES (forthcoming 2012), *available at* http://www.bendickegan.com/pdf/Sent_to_JSI_Feb_27_2010.pdf.

120. *Id.* (manuscript at 15).

equally agentic man.[121] When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hirable than the equally agentic male.[122] Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence.[123] Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic)[124] did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.[125]

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews.[126] These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back "Emily" more often than "Lakisha."[127] Less attention has been paid to Dan-Olof Rooth's extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior.[128] Rooth has found these correlations

121. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. *See id.* at 748. Agentic candidates were contrasted with candidates whom the researchers labeled "androgynous"—they also demonstrated the characteristics of interdependence and cooperation. *Id.*

122. The difference was M=2.84 versus M=3.52 on a 5 point scale ($p<0.05$). *See id.* at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. *See id.*

123. *See id.* at 753–54.

124. The agentic stereotype was captured by word stimuli such as "independent," "autonomous," and "competitive." The communal stereotype was captured by words such as "communal," "cooperative," and "kinship." *See id.* at 750.

125. *See id.* at 756 (r=–0.49, $p<0.001$). For further description of the study in the law reviews, see Kang, *supra* note 46, at 1517–18.

126. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). A search of the TP-ALL database in Westlaw on December 10, 2011 revealed ninety-six hits.

127. *Id.* at 992.

128. Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. *See id.*

with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.[129]

Because implicit bias in the *courtroom* is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the *workplace*.[130] We do, however, wish briefly to highlight lines of research—variously called "constructed criteria," "shifting standards," or "casuistry"—that emphasize the *malleability of merit*. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.[131] Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff's case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning[132] in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.[133] One candidate's profile signaled *book smart*, the other's profile signaled *streetwise*, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

129. Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

130. Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, *supra* note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

131. One recent exception is Rich, *supra* note 25.

132. For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is "the process through which we assimilate information in a self-serving manner." *Id.* at 1029.

133. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005).

smarts) was considered more important when the man had it.[134] Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.[135]

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender.[136] Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate's profile signaled more education; the other's profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down "what was most important in determining [their] decision."[137]

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time.[138] In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.[139]

The discrimination itself is not as interesting as *how* the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent).[140] By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience.[141] In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of

134. *See id.* (M=8.27 with education versus M=7.07 without education, on a 11 point scale; p=0.006; d=1.02).
135. *See id.* (M=6.21 with family traits versus 5.08 without family traits; p=0.05; d=0.86).
136. Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).
137. *Id.* at 820.
138. *Id.* at 821.
139. *Id.*
140. *Id.*
141. *Id.*

experiments, in the context of race and college admissions.[142] In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score.[143] To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant's race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes).[144] After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

> [t]hese results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.[145]

142. Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 42 (2006).

143. *Id.* at 44.

144. *See id.*

145. *Id.* at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.

The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.[146]

2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of *Conley v. Gibson*.[147] Under *Conley*, all factual allegations made in the complaint were assumed to be true. As such, the court's task was simply to ask whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[148]

Starting with *Bell Atlantic Corp. v. Twombly*,[149] which addressed complex antitrust claims of parallel conduct, and further developed in *Ashcroft v. Iqbal*,[150] which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the *Conley* standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.[151] Second, courts must decide on the plausibility of the claim based on the information before them.[152] In *Iqbal*, the Supreme Court held that

146. *See generally* TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).
147. 355 U.S. 41 (1957).
148. *Id.* at 45–46.
149. 550 U.S. 544 (2007).
150. 129 S. Ct. 1937 (2009).
151. *Id.* at 1951.
152. *Id.* at 1950–52.

because of an "obvious alternative explanation"[153] of earnest national security response, purposeful racial or religious "discrimination is not a plausible conclusion."[154]

How are courts supposed to decide what is "Twom-bal"[155] plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[156]

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.[157]

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.[158] According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing

153. *Id.* (quoting *Twombly*, 550 U.S. 544) (internal quotation marks omitted).
154. *Id.* at 1952.
155. *See In re* Iowa Ready-Mix Concrete Antitrust Litig., No. C 10-4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (referring to a *Twombly-Iqbal* motion as "Twom-bal").
156. *Iqbal*, 129 S. Ct. at 1940.
157. These schemas also reflect cultural cognitions. *See generally* Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).
158. *See* Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994).

Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983.[159] When participants only received economic status information, they declined to evaluate Hannah's intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.[160]

Vincent Yzerbyt and colleagues, who call this phenomenon "social judgeability," have produced further evidence of this effect.[161] If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of "True," "False," or "I don't know," how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information?[162] This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with "I don't know."[163] They also found that those operating under the illusion gave more stereotype-consistent answers.[164] In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, "in the debriefings,

159. *See* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 22–23 (1983).

160. *See id.* at 24–25, 27–29.

161. *See* Yzerbyt et al., *supra* note 158.

162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. *See id.* at 50.

163. *See id.* at 51 (M=5.07 versus 10.13; p<0.003).

164. *See id.* (M=9.97 versus 6.30, out of 1 to 20 point range; p<0.006).

subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person."[165] Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas. Just as Yzerbyt's illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after *Iqbal* that are consistent with our analysis. Again, since *Iqbal* made dismissals easier, we should see an increase in dismissal rates across the board.[166] More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect *Iqbal* to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

165. *Id.*

166. In the first empirical study of *Iqbal*, Hatamyar sampled 444 cases under *Conley* (from May 2005 to May 2007) and 173 cases under *Iqbal* (from May 2009 to August 2009). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. *See id.* at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for *Conley*, *Twombly*, and *Iqbal* for three results: grant, mixed, and deny.

to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer's possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after *Iqbal* into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases.[167] She found that in contract cases, the rate of dismissal did not change much from *Conley* (32 percent) to *Iqbal* (32 percent).[168] By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent.[169] Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after *Iqbal*.[170] He found an even larger jump. Under the *Conley* regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the *Iqbal* regime, courts granted 54.6 percent of them.[171] These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that *Iqbal*'s plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the

167. *See id.* at 591–93.
168. *See id.* at 630 tbl.D.
169. *See id.*
170. *See* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011). Quintanilla counted both Title VII and 42 U.S.C. § 1981 cases.
171. *See id.* at 36 tbl.1 ($p<0.000$).

other hand, the judge still has to make a judgment call on whether any "genuine dispute as to any material fact"[172] remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).[173]

3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

172. FED R. CIV. P. 56(a).

173. *See, e.g.*, Charlotte L. Lanvers, *Different Federal Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & POL'Y 381, 395 (2007); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch. Research Paper No. 08-022, 2008), *available at* http://ssrn.com/abstract=1138373 (finding that civil rights cases, and particularly employment discrimination cases, have a consistently higher summary judgment rate than non–civil rights cases).

status of the juror's racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.[174]

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.[175] Then they were asked various questions about America's relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,[176] standards of injustice,[177] and collective guilt.[178] Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);[179] they thought less harm was done by slavery;[180] and, as a result, they felt less collective guilt compared to other White students who identified less with America.[181] In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).[182]

174. Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 769 (2010).
175. The participants were all American citizens. The question asked was, "I feel strong ties with other Americans." *Id.* at 771.
176. A representative question was, "How much damage did Americans cause to Africans?" on a "very little" (1) to "very much" (7) Likert scale. *Id.* at 770.
177. "Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation" on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. *Id.* at 771.
178. "I feel guilty for my nation's harmful past actions toward African Americans" on a "strongly disagree" (1) to "strongly agree" (9) Likert scale. *Id.*
179. *See id.* at 772 tbl.I (r=0.26, p<0.05).
180. *See id.* (r=–0.23, p<0.05).
181. *See id.* (r=–0.21, p<0.05). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. *See id.* at 772–73.
182. The manipulation was successful. *See id.* at 773 (p<0.05, d=0.54.).

Those who were experimentally made to feel *less* identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel *more* identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery's harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery's harms as less severe, and they felt less guilt.[183] In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, "preponderance of the evidence") but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one's ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant's harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

183. In standards for injustice, M=2.60 versus 3.39; on judgments of harm, M=5.82 versus 5.42; on collective guilt, M=6.33 versus 4.60. All differences were statistically significant at p=0.05 or less. *See id.*

market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.[184] When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.[185] Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys' last names.[186]

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT D=0.45);[187] this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91% of the participants were White) in terms of his competence ($r=0.32$, $p<0.01$), likeability ($r=0.31$, $p<0.01$), and hireability ($r=0.26$, $p<0.05$).[188] These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT D=1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American

184. *See, e.g.*, Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); Alice H. Eagly, Steven J. Karau & Mona G. Makhijani, *Gender and the Effectiveness of Leaders: A Meta-Analysis*, 117 PSYCHOL. BULL. 125 (1995); *see also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 213–17 (2000) (discussing how conceptions of merit are designed around masculine norms); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

185. *See* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

186. *See id.* at 892–99 (describing method and procedure, and identifying attorney names as "William Cole" or "Sung Chang").

187. *See id.* at 900. They also found strong negative implicit attitudes against Asian Americans (IAT D=0.62). *See id.*

188. *Id.* at 901 tbl.3.

lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.[189]

This study provides some evidence that potential jurors' implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.[190] Jurors also feel accountable[191] to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?

189. These figures were calculated using the regression equations in *id.* at 902 n.25, 904 n.27.

190. *See infra* text accompanying notes 241–245.

191. *See, e.g.*, Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary's thoughtful attempts to go beyond cosmetic compliance.[192] Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to "Be fair!" do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?[193] One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

192. In a 1999 survey by the National Center for State Courts, 47 percent of the American people doubted that African Americans and Latinos receive equal treatment in state courts; 55 percent doubted that non–English speaking people receive equal treatment. The appearance of fairness is a serious problem. *See* NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 37 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. The term "cosmetic compliance" comes from Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, *Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).

These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.[194] One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women's college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.[195] By carefully examining differences in the two universities' environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.[196]

Nilanjana Dasgupta and Luis Rivera also found correlations between participants' self-reported numbers of gay friends and their negative implicit attitudes toward gays.[197] Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had "only slightly smaller" implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).[198] In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.[199]

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,

194. *See* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004).

195. *See id.* at 651.

196. *See id.* at 651–53.

197. *See* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006).

198. *See* Rachlinski et al., *supra* note 86, at 1227.

199. *See* Correll et al., *supra* note 51, at 1014 ("We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.").

videos, simulations, or even imagination and which does not require direct face-to-face contact?[200] Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans.[201] These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.[202]

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident.[203] Situating African Americans in a positive setting produced lower implicit bias scores.[204]

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom.[205] But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only

200. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166–67 (2000) (comparing vicarious with direct experiences).

201. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect M=78ms versus 174ms, p=0.01) and remained for over twenty-four hours.

202. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001). *See generally* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (literature review).

203. *See* Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 818–19 (2001).

204. *Id.* at 819.

205. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive countertypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?

during their typically brief visit to the court.[206] Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.[207]

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated.[208] Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article's scope manageable, we focus on the two key players in the courtroom: judges and jurors.[209]

1. Judges

a. Doubt One's Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in "avoid[ing] racial prejudice in decisionmaking"[210] relative to other judges attending the same conference. That is, obviously, mathematically impossible.

206. *See* Kang, *supra* note 46, at 1537 (raising the possibility of "debiasing booths" in lobbies for waiting jurors).
207. Rajees Sritharan & Bertram Gawronski, *Changing Implicit and Explicit Prejudice: Insights From the Associative-Propositional Evaluation Model*, 41 SOC. PSYCHOL. 113, 118 (2010).
208. *See* Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, *see supra* note 201).
209. Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 46–48 (2010).
210. *See* Rachlinski et al., *supra* note 86, at 1225.

(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible.[211] Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled "Gary" or the candidate profile labeled "Lisa" for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills.[212] Half the participants were primed to view themselves as objective.[213] The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.[214] But those who were manipulated to think of themselves as objective evaluated the male candidate higher (M=5.06 versus 3.75, p=0.039, d=0.76).[215] Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective (M=3.12 versus 1.94, p=0.023, d=0.86).[216] In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief

211. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

212. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).

213. This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average on objectivity. *See id.* at 209. The participants were drawn from a lay sample (not just college students).

214. *See id.* at 210–11 (M=3.24 for male candidate versus 4.05 for female candidate, p=0.21).

215. *See id.* at 211.

216. *See id.* Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. *See id.*

that others are biased but we ourselves are not.[217] In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors.[218] After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers.[219] By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group.[220] These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

b. Increase Motivation

Tightly connected to doubting one's objectivity is the strategy of increasing one's motivation to be fair.[221] Social psychologists generally agree that motivation is an important determinant of checking biased behavior.[222] Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.[223]

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and

217. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007).

218. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007). The intervention article was 1643 words long, excluding references. *See id.* at 575.

219. *See id.* at 575 (M=5.29 where 6 represented the same amount of bias as peers).

220. *See id.* For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way, p=0.01. *See id.*

221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009).

222. *See* Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude–Behavior Processes*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97 (Shelly Chaiken & Yaacov Trope eds., 1999).

223. *See* Dasgupta & Rivera, *supra* note 197, at 275.

awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.[224] The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.[225] It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.[226] Before and after watching the documentary, participants were asked to what extent they thought "a judge's decisions and court staff's interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups."[227] Before viewing the documentary, approximately 16 percent chose "rarely-never," 55 percent chose "occasionally," and 30 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 20 percent chose "occasionally," and 79 percent chose "most-all."[228]

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose "rarely-never," 45 percent chose "occasionally," and 45 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 14 percent chose "occasionally," and 84 percent

224. Several of the authors of this Article have spoken to judges on the topic of implicit bias.

225. *See* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), *available at* http://www.ncsc.org/IBReport.

226. The program was broadcast on the Judicial Branch's cable TV station and made available streaming on the Internet. *See The Neuroscience and Psychology of Decisionmaking*, ADMIN. OFF. COURTS EDUC. DIV. (Mar. 29, 2011), http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm.

227. *See* CASEY ET AL., *supra* note 225, at 12 fig.2.

228. *See id.*

chose "most-all."[229] These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments[230] support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, "I will apply the course content to my work." In California, 90 percent (N=60) reported that they agreed or strongly agreed.[231] In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed.[232] Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias.[233] In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit

229. *Id.* at 12 fig.3.

230. Comments included: "raising my awareness of prevalence of implicit bias," "enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same," and "greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested." *See* CASEY ET AL., *supra* note 225, at 11.

231. *See id.* at 10.

232. *See id.* at 18. Minnesota answered a slightly different question: 81 percent gave the program's applicability a medium high to high rating.

233. *See id.* at 20. The strategies that were identified included: "concerted effort to be aware of bias," "I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination," "Simply trying to think things through more thoroughly," "Reading and learning more about other cultures," and "I have made mental notes to myself on the bench to be more aware of the implicit bias and I've re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part."

bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing.[234] But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking,[235] which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.[236]

234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one's mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. *See generally* Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., *supra* note 221, at 218–21 (discussing bottom-up correction versus top-down).

235. *See* Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 621 (1994).

236. *See* Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. *See id.* at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. *See id.* at 589; *see also* David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004).

In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees' foul calling;[237] Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires' strike calling.[238] These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

237. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010) ("We find that players have up to 4% fewer fouls called against them and score up to 2½% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.").

238. Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011) ("Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires' behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers' measured performance and games' outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate).").

to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

2. Jurors

a. Jury Selection and Composition

Individual screen. One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments.[239] Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

239. The test-retest reliability between a person's IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, *supra* note 2, at 477–78. Readers should understand that "the IAT's properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension." *See* Anthony G. Greenwald & N. Sriram, *No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test*, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).

be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection.[240]

Jury diversity. Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

> During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). *Had just one African-American been sitting in that room, the content of discussion would have been quite different.* And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.
>
> I pass these thoughts onto you in the hope that the jury system can some day be improved.[241]

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries[242] to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people's willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries.[243] Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. *Id.* at 863–66.

241. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror) (emphasis added).

242. For a structural analysis of why juries lack racial diversity, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 68–71 (2008).

243. The juries labeled "diverse" featured four White and two Black jurors.

uncorrected statements, and greater discussion of race-related topics.[244] In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.[245]

Given these benefits,[246] we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most.[247] Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges.[248] In addition, we encourage consideration of restoring a 12-member jury size as "the most effective approach" to maintain juror representativeness.[249]

b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

244. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

245. *See* Sommers, *supra* note 242, at 87.

246. Other benefits include promoting public confidence in the judicial system. *See id.* at 82–88 (summarizing theoretical and empirical literature).

247. *See* Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467 (2007); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008) (reviewing literature); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (finding that race influences the exercise of peremptory challenges in participant populations that include college students, law students, and practicing attorneys and that participants effectively justified their use of challenges in race-neutral terms).

248. *See, e.g.*, Bennett, *supra* note 85, at 168–69 (recommending the tandem solution of increased lawyer participation in voir dire and the banning of peremptory challenges); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

249. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427 (2009).

Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.[250]

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

> I pledge ***:
>
> I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.[251]

He also gives a specific jury instruction on implicit biases before opening statements:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common

250. Judge Bennett starts with a clip from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders' reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. *What Would You Do?* (ABC television broadcast May 7, 2010), *available at* http://www.youtube.com/watch?v=ge7i60GuNRg.

251. Mark W. Bennett, Jury Pledge Against Implicit Bias (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.

> sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[252]

Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction's rationale. For example, jurors seem to comply more with an instruction to ignore inadmissible evidence when the *reason* for inadmissibility is potential unreliability, not procedural irregularity.[253] Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with the judges, the juror's education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett's instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge Bennett's—although we believe there are good reasons to hypothesize about its benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami demonstrated that a particular type of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias,

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252. *Id.* In all criminal cases, Judge Bennett also instructs on explicit biases using an instruction that is borrowed from a statutory requirement in federal death penalty cases:

> You must follow certain rules while conducting your deliberations and returning your verdict:
>
> * * *
>
> Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

The certification statement, contained in a final section labeled "Certification" on the Verdict Form, states the following:

> By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

This certification is also shown to all potential jurors in jury selection, and each is asked if they will be able to sign it.

253. *See, e.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled inadmissible either because it was illegally obtained or unreliable).

appeared successful at removing juror racial bias in assessments of guilt.[254] That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

c. Encourage Category-Conscious Strategies

Foreground social categories. Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.[255]

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.[256]

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

254. Regina A. Schuller, Veronica Kazoleas & Kerry Kawakami, *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009).

255. *See supra* notes 70–71.

256. *See* Alexander M. Czopp, Margo J. Monteith & Aimee Y. Mark, *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 791 (2006).

above approvingly.[257] But a command that the race (and other social categories) of the defendant should not influence the juror's verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.[258]

Engage in perspective shifting. Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant.[259] Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others' psychological experiences weakens the automatic expression of racial biases.[260] In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine "what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary."[261] By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT.[262] More important, these changes in implicit bias, as measured by reaction time instruments,

257. *See* Bennett, *supra* note 252 ("[Y]ou must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.").

258. Although said in a different context, Justice Blackmun's insight seems appropriate here: "In order to get beyond racism we must first take account of race." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

259. For a thoughtful discussion of jury instructions on "gender-, race-, and/or sexual orientation-switching," see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 252–55 (2003); *see also id.* at 257–58 (quoting actual race-switching instruction given in a criminal trial based on Prof. Lee's work).

260. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

261. *See id.* at 1030.

262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of M=0.43, whereas those in the control showed a bias of M=0.80. Experiment two involved the essay, in which participants in the perspective-taking condition showed M=0.01 versus M=0.49. *See id.* at 1031. Experiment three used the standard IAT. *See id.* at 1033.

also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer,[263] and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.[264]

CONCLUSION

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

263. *See id.* at 1035.
264. *See id.* at 1037.

Race & Ethnic Fairness in the Courts

Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts

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ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

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Implicit Bias: A Primer

Schemas and Implicit Cognitions (or "mental shortcuts")

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that's happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a "chair." Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category "chair." Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully--because we like the style or think it might collapse--we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

Implicit Social Cognitions (or "thoughts about people you didn't know you had")

What is interesting is that schemas apply not only to objects (e.g., "chairs") or behaviors (e.g., "ordering food") but also to human beings (e.g., "the elderly"). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail--such as the elderly--we will not raise our guard. If we think that another category is foreign--such as Asians--we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term "implicit bias"

includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly "colorblind" (or gender-blind, ethnicity-blind, class-blind, etc.) way?

Asking about Bias (or "it's murky in here")

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a "willing and able" problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

Implicit measurement devices (or "don't tell me how much you weigh, just get on the scale")

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17" screen laptop with 2GB memory and 3 USB ports, versus a 15" laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question "How much would you pay for an extra USB port?" Recently, social cognitionists have adapted this methodology by creating "bundles" that include demographic attributes. For instance, how

would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word "moon," and I then ask you to think of a laundry detergent, then "Tide" might come more quickly to mind. If the word "RED" is painted in the color red, we will be faster in stating its color than the case when the word "GREEN" is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

Pervasive implicit bias (or "it ain't no accident")

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of "career" versus "family"), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases--those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely "accurate" or "authentic" measure of bias. Both measures tell us something important.

Real-world consequences (or "why should we care?")

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of implicit bias predict an individual's behaviors or decisions? Do milliseconds really matter>? (Chugh 2004). If, for example, well-intentioned people committed to being "fair and square" are not influenced by these implicit biases, then who cares about silly video game results?

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world--in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- implicit bias predicts the amount of shooter bias--how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms--sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or "is there any good news?")

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence

that implicit biases are malleable and can be changed.

- An individual's motivation to be fair does matter. But we must first believe that there's a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertypical exemplars who function as "debiasing agents" seems to decrease our bias.
    - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
    - Exposure to "positive" exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
    - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
    - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. (Goldin & Rouse 2000).
    - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
    - In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of "blindness" (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there's no justification for throwing our hands up in resignation. Certainly the science doesn't require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

The big picture (or "what it means to be a faithful steward of the judicial system")

It's important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias--the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we

should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.

Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude

An attitude is "an association between a given object and a given evaluative category." R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect "common sense" based on naïve psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of "the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view." Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation

Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only "true" or "authentic" measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.

Implicit

Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test

The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the "E" key on the left side of the keyboard, or "I" on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as "joy" or "agony". A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes

"Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases

A bias is a departure from some point that has been marked as "neutral." Biases in implicit stereotypes and implicit attitudes are called "implicit biases."

Implicit Stereotypes

"Implicit stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category" Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. See also stereotype; implicit.

Implicit Social Cognitions

Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype

A stereotype is an association between a given object and a specific attribute. An example is "Norwegians are tall." Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.

Validities

To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.

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