

TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA

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TERMINATION OF PARENTAL RIGHTS

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

- I. Purposes of the Law (G.S. 7B-1100)
 - A. General purpose is to provide judicial procedures for terminating the legal relationship between a child and the child's biological or legal parents, when parents demonstrate that they will not provide care that promotes the child's healthy and orderly physical and emotional well-being.
 - B. A further purpose is to recognize both the child's need to have a permanent plan of care at the earliest possible age and the need to protect children from the unnecessary severance of the parent-child relationship.
 - C. If the interests of the child and parents (or others) are in conflict, the child's interests control. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984); *In re Tate*, 67 N.C. App. 89, 312 S.E.2d 535 (1984).
 - D. The article (Article 11 of G.S. Chapter 7B) should not be used to circumvent the provisions of G.S. Chapter 50A, the Uniform Child Custody Jurisdiction and Enforcement Act.

- II. Subject Matter Jurisdiction (G.S. 7B-1101, 7B-1104, G.S. Ch. 50A)
 - A. District court has exclusive jurisdiction over proceedings to terminate parental rights.
 - B. Proceedings must comply fully with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A.
 1. A proceeding to terminate parental rights is a child custody proceeding for purposes of the UCCJEA. G.S. 50A-102(4); *In re N.R.M.*, ___ N.C. App. ___, 598 S.E.2d 147 (7/6/04).
 2. When another state has entered a custody order relating to the child, an order terminating parental rights constitutes a "modification" of that order, and the court must make findings sufficient to conclude that it has jurisdiction to modify the other state's order. *In re N.R.M.* See also *In re J.B.*, ___ N.C. App. ___, 595 S.E.2d 794 (5/18/04)(court must make findings of fact, based on evidence in the record, to support a conclusion of law that the court has subject matter jurisdiction).
 3. Information about the child's status, required by G.S. 50A-209, must be set out in the petition or motion or attached affidavit. Failure to attach the affidavit does not divest the court of jurisdiction and can be cured by the court's requiring that the affidavit be filed within a specified time. *In re Clark*, 159 N.C. App. 75, 582 S.E.2d 657 (2003). [A form affidavit, AOC-CV-609, can be printed from the web site of the Administrative Office of the Courts, <http://www.nccourts.org/Forms/FormSearch.asp>.]

* Many of the cases cited herein were decided under former law, Article 24B of G.S. Chapter 7A, which was repealed effective July 1, 1999, when Chapter 7B of the General Statutes became effective.

4. Under the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, jurisdiction of a court that has made a child custody determination consistent with the PKPA continues as long as that court has proper jurisdiction under its state's laws and that state remains the residence of the child or any party. In re Bean, 132 N.C. App. 363, 511 S.E.2d 683 (1999)(trial court, after finding that Florida retained jurisdiction over the child, properly dismissed for lack of jurisdiction)(decided under the UCCJA, which was replaced by the UCCJEA effective October 1, 1999).
- C. The child must reside or be found in the district or be in the legal or actual custody of a county department of social services (hereinafter, DSS) or licensed child-placing agency in the district when the petition or motion is filed. G.S. 7B-1101.
1. Where petitioner in a private termination action filed the petition in the county where respondent was incarcerated, which was not the county in which she and the child resided, the court of appeals held that the issue was one of venue, not jurisdiction, and there was no error because the respondent made no objection to the trial court and, in addition, the child was "present" in the county when the petition was filed. In re J.L.K., ___ N.C. App. ___, 598 S.E.2d 387 (7/6/04).
 2. The court of appeals held that even though the trial court found that it would have jurisdiction under the [former] UCCJA, the district court did not have jurisdiction because the mother and child had left the state days before DSS filed a petition. In re Leonard, 77 N.C. App. 439, 335 S.E.2d 73 (1985)(court characterized the result as "unfortunate," but stated that only the legislature could change the requirement).
 3. This requirement may be at odds with a determination of subject matter jurisdiction under the UCCJEA, which states that physical presence of a party or a child is neither necessary nor sufficient to establish jurisdiction. G.S. 50A-201(c).
- D. The fact that a court in another district in N.C. has continuing jurisdiction in a custody action under G.S. Chapter 50 does not affect the jurisdiction of the court in the district in which the child resides to proceed in an action to terminate parental rights. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421 (2003). For a case in which the grandmother's civil action for custody and DSS's action to terminate parental rights were consolidated, see Smith v. Alleghany County DSS, 114 N.C. App. 727, 443 S.E.2d 101 (1994).
- E. It is unclear whether the trial court has jurisdiction to act on a termination petition or motion while an appeal of an adjudication, disposition, review, or permanency planning order is pending.
1. Cases supporting the trial court's authority to proceed include In re Stratton, 159 N.C. App. 461, 583 S.E.2d 323 (8/5/03), *appeal dismissed, review denied*, 357 N.C. 506, 588 S.E.2d 472 (10/1/03)(appeal of adjudication and disposition order rendered moot when trial court terminated parents' rights); In re N.B., ___ N.C. App. ___, 592 S.E.2d 597 (3/2/04)(appeal of adjudication and disposition order rendered moot by order terminating parent's rights) (*appeal docketed in supreme court*); In re V.L.B., ___ N.C. App. ___, 596 S.E.2d 896 (6/15/04)(appeal of a permanency planning order is moot after parents' rights are terminated).
 2. Cases holding that the court may not proceed include In re Hopkins, ___ N.C. App. ___, 592 S.E.2d 22 (2/17/04); In re J.C.S., ___ N.C. App. ___, 595 S.E.2d 155 (5/4/04)(court may not enter a termination order during appeal of a permanency planning order). *Also see* In re R.T.W. where, in an unpublished opinion filed July 6, 2004, the court of appeals vacated an order terminating a parent's rights, on the basis

that the trial court did not have jurisdiction to proceed with termination while a review hearing order was on appeal. Earlier in a related case, the court of appeals, in an unpublished opinion filed January 30, 2004, had held that the appeal of the review hearing order was moot after the trial court terminated the parent's rights. The supreme court granted respondent's petition for certiorari in that case on May 6, 2004.

- F. The parent's age is immaterial. G.S. 7B-1101, however, requires appointment of a guardian ad litem under G.S. 1A-1, Rule 17, for a parent under the age of eighteen.
- G. The petition or motion must be verified. The trial court lacked subject matter jurisdiction where the petition was not verified. Signing and notarization did not constitute verification. In re Triscari, 109 N.C. App. 285, 426 S.E.2d 435 (1993).
- H. The court does not have subject matter jurisdiction if the petition or motion is filed by someone who does not have standing. In re Miller, 162 N.C. App. 355, 590 S.E.2d 864 (1/20/04)(DSS filed petition to terminate a parent's rights after trial court had awarded custody to someone else, depriving DSS of standing to initiate a termination proceeding).
- I. The trial court does not have subject matter jurisdiction when the pleading (motion or petition) does not include a prayer for relief or request the entry of any order. The parties cannot consent to or waive subject matter jurisdiction. In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793 (2003). Cf. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986)(district court had jurisdiction when petition alleged that the mother had placed the child with DSS; that the father was unknown; that North Carolina was the child's home state and no other state had jurisdiction; and that the child's best interest would be served by the court's assuming jurisdiction).
- J. Parent who seeks to invoke the Indian Child Welfare Act, Pub. L. No. 95-608, 25 U.S.C. §§ 1901, et seq., as amended, has the burden of showing that the act applies. The trial court properly denied respondent's motion to dismiss for lack of subject matter jurisdiction where respondent merely made mention of his Indian heritage and provided no supporting evidence or documentation to support his claim that the act applied. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).
- K. District court jurisdiction extends to adoption proceedings.

III. Personal Jurisdiction

- A. North Carolina appellate courts have not addressed the conflict between (i) case law that requires that the court have personal jurisdiction over the parties as well as subject matter jurisdiction and (ii) the provision in the Uniform Child Custody Jurisdiction Act, at G.S. 50A-201(c), which states that personal jurisdiction is not necessary or sufficient to make a child custody determination, which the act defines to include termination of parental rights.
- B. The court may lack personal jurisdiction and authority to proceed in a termination case if an out-of-state respondent (even one who is served properly) does not have minimum contacts with North Carolina.
 - 1. Termination proceedings are *in rem*; however, a parent must have minimum contacts with the state before a court here may terminate the parent's rights. In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), *disc. review denied and cert. denied*, 330 N.C. 612, 413 S.E.2d 800,

overruled in part on other grounds by Bryson v. Sullivan, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992).

- a. The nonresident parent may raise the defense of lack of personal jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(2). Trueman.
 - b. Where the nonresident parent had no contacts with North Carolina, the termination order was void and could be set aside at any time under G.S. 1A-1, Rule 60(b)(4). Finnican.
2. Courts in a number of other states have reached a different conclusion, holding that termination of parental rights proceedings fall within the “status” exception to the minimum contacts requirement. *See, e.g., S.B. v. State of Alaska*, 61 P.3d 6 (AK Sup. Ct., 2002); *In re Thomas J.R.*, 262 Wis.2d 217, 663 N.W.2d 734 (WI Sup. Ct., 2003).
- C. Minimum contacts are not required in the case of a non-resident father of a child born out of wedlock if the father has failed to establish paternity, legitimate the child, or provide substantial financial support or care to the child and mother. *In re Dixon*, 112 N.C. App. 248, 435 S.E.2d 352 (1993); *In re Williams*, 149 N.C. App. 951, 563 S.E.2d 202 (2002).
 - D. Personal service of process while respondent is temporarily in the state will confer personal jurisdiction without regard to any other contacts with the state. *Burnham v. California Superior Court*, 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990)(due process does not bar exercise of personal jurisdiction over nonresident defendant based on personal service while temporarily in the state).
 - E. A parent can waive the defenses of personal jurisdiction or insufficiency of service or process by making a general appearance or by filing an answer, response, or motion without raising the defense. G.S. 1A-1, Rule 12. *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157 (12/16/03); *In re J.W.J.*, ___ N.C. App. ___, 599 S.E.2d 101 (8/3/04)(respondent mailed handwritten response to clerk of court and later filed formal answers without raising defense of lack of personal jurisdiction).

IV. Procedure (G.S. 7B-1102 through 7B-1109)

- A. A proceeding for termination of parental rights may be initiated by
 1. filing of a petition and issuance of a summons, or
 2. filing of a motion in an abuse, neglect, or dependency proceeding in which the court is exercising jurisdiction over the child and the parent.
- B. Any person or agency with standing to file a petition for termination may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a motion for termination of parental rights.
- C. When the proceeding is initiated by petition in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same child, the court on its own motion or motion of a party may consolidate the actions pursuant to G.S. 1A-1, Rule 42.
- D. Any respondent may file a written answer to a petition, or a written response to a motion,
 1. within 30 days after service of the summons and petition or the notice and motion, or

2. within the time established for a defendant's reply by G.S. 1A-1, Rule 4(j1), if service is by publication.
- E. If a county DSS, which is not the petitioner or movant, is served with a petition or motion seeking termination of parental rights, the DSS director
1. must file a written answer or response, and
 2. is deemed a party to the proceeding.
- F. Parents cannot unilaterally and extra-judicially terminate their own parental rights. In re Jurga, 123 N.C. App. 91, 472 S.E.2d 223 (1996).
- G. The Rules of Civil Procedure apply to termination proceedings unless the statute provides otherwise or the appellate courts have held otherwise in reference to a particular rule.
1. Statements in older cases saying that the Rules of Civil Procedure do not apply to termination proceedings appear to have been superseded. Such cases said, for example, that
 - a. the legislature intended for [former] G.S. Chapter 7A, Article 24B to control exclusively the procedure in termination cases and did not intend for the Rules of Civil Procedure to be superimposed on those provisions. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).
 - b. the Rules of Civil Procedure, while not to be ignored, are not super-imposed on termination hearings. Quoting extensively from Peirce, the court found no error in the trial court's entry of an order under [former] G.S. 7A-289.31, but went on to discuss and find no error under G.S. 1A-1, Rule 58. In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982).
 2. A few cases hold that particular rules do not apply in termination proceedings.
 - a. A parent does not have a right to file a counterclaim in a termination action. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).
 - b. Summary judgment procedures are not available in termination proceedings. Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); In re J.N.S., ___ N.C. App. ___, 598 S.E.2d 649 (7/20/04)(summary judgment as to a ground for termination is contrary to the procedural mandate of the juvenile code, which requires the court to hear evidence and make findings).
 3. A number of cases acknowledge that the Rules of Civil Procedure apply in termination cases, at least to the extent the termination statute does not deal with the procedure a rule addresses.
 - a. Citing Allen, the court of appeals said, "Having determined that [former] G.S. 7A-289.26 contains no provision for serving a known, but unlocatable parent, we must examine [former] G.S. 7A-289.27 and the Rules of Civil Procedure for guidance." The court held that the Rules' due diligence requirement for service by publication applies to termination cases. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, *disc. review denied*, 314 N.C. 665, 335 S.E.2d 322 (1985). See

- a/so* In re Manus, 82 N.C. App. 340, 346 S.E.2d 289 (1986)(real party in interest under G.S. 1A-1, Rule 17(a)).
- b. The North Carolina Supreme Court, in dicta, concluded that the Rules of Civil Procedure apply to termination proceedings: “A proceeding to terminate parental rights is . . . either a civil action or a special proceeding. . . . If this is a civil action, the Rules apply, G.S. 1A-1, Rule 2; if this is a special proceeding, the Rules apply, G.S. 1-393, except where a different procedure may be prescribed by statute.” In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).
 - c. See Judge Greene’s concurring opinion in In re Quevedo, 106 N.C. App. 574, 417 S.E.2d 260, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992), emphasizing the appropriateness of the court’s use of the Rules of Civil Procedure in a termination of parental rights case.
4. In relation to G.S. 1A-1, Rule 17, appointment of guardians ad litem in civil actions, both the supreme court and the court of appeals (in what is probably dicta in both cases) have stated that Rule 17 controls despite the fact that the termination statute deals specifically with the appointment of guardians ad litem. The General Assembly, in 1989, amended the termination statute to make clear that it, and not Rule 17, was controlling with regard to guardians ad litem in termination proceedings.
 - a. Acknowledging that the termination statute required appointment of a guardian ad litem for the child only if an answer was filed, the court in Clark said that regardless of whether the termination statute required it, “appointment of a guardian ad litem for both the minor respondent-mother and her minor child is mandated by G.S. 1A-1, Rule 17(c).” See *also* In re Searce, 81 N.C. App. 531, 345 S.E.2d 404, *disc. review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986).
 - b. The court of appeals reversed an order terminating a father’s rights, because the trial court failed to appoint a guardian ad litem for the child as required by statute. In re Barnes, 97 N.C. App. 325, 388 S.E.2d 237 (1990). Citing Clark, the court stated that even if the father had not filed an answer denying material allegations, the appointment of a guardian ad litem for the child would have been required (a) by “fundamental fairness,” because the father was represented by counsel, and (b) by Rule 17 of the Rules of Civil Procedure, which, the court said, “mandates that a guardian ad litem must always be appointed for a minor child in a termination proceeding”
 - c. In response to Barnes, the General Assembly amended the termination statute to make clear that appointment of a guardian ad litem is necessary only when required by the termination statute. See current provision in G.S. 7B-1108(c).
 - d. The cases described above refer to appointment of a guardian ad litem for a child. With respect to an adult parent, G.S. 7B-1101 requires appointment of a guardian ad litem when the parent’s incapability is alleged as a ground for termination. It seems certain that, even if that ground were not alleged, Rule 17 would continue to require appointment of a guardian ad litem for an incompetent adult respondent in a termination proceeding.
 5. In a number of termination of parental rights cases the courts apply one or more of the Rules of Civil Procedure with no discussion of whether the rule applies.

- a. Entry of judgment—Rule 58. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983).
- b. Motion for relief from a judgment or order—Rule 60(b). In re Saunders, 77 N.C. App. 462, 335 S.E.2d 58 (1985).
- c. Amendment of complaint—Rule 15. In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).
- d. Findings of fact and signing of judgment—Rule 52 and Rule 63. In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).
- e. Motion to intervene of right—Rule 24(a)(2). Hill v. Hill, 121 N.C. App. 510, 466 S.E.2d 322 (1996)(social services department that paid public assistance on behalf of the child and therefore had an interest in the father’s continued responsibility to pay child support, was entitled to intervene by right in an action to terminate the father’s rights).
- f. Motion for medical examination—Rule 35. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).

V. Appointment and Payment of Counsel and Guardian ad Litem (G.S. 7B-1101, 7B-1108, 7B-1109, 7A-450.1 through -450.4, and 7A-451(14) and (15))

- A. The parent has a right to counsel, and to appointed counsel if indigent, but may waive the right.
 - 1. If the proceeding is initiated by petition, an attorney appointed to represent the parent in a prior abuse, neglect, or dependency proceeding will not represent the parent in the termination proceeding unless so ordered by the court.
 - 2. If the proceeding is initiated by motion in a pending abuse, neglect, or dependency proceeding, an attorney appointed to represent the parent in that proceeding will continue to represent the parent in regard to termination unless the court orders otherwise.
 - 3. If the parent comes to the adjudication hearing and is not represented by counsel, the court must inquire whether the parent wants counsel and is indigent. If the parent wants counsel and is indigent, counsel must be appointed in accordance with rules of the Office of Indigent Defense Services. The parent’s failure to file an answer or response or to ask for counsel before the hearing does not constitute a waiver of the right to counsel. In re Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997); In re Hopkins, ___ N.C. App. ___, 592 S.E.2d 22 (2/17/04)(parent cannot waive the right to counsel by inaction).
 - 4. The parent has a right to effective assistance of counsel. In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996)(parent failed to show that counsel’s performance deprived her of a fair hearing; she was not prejudiced by the attorney’s failure to request a pretrial hearing, failure to move to dismiss, or choice of evidence to introduce).
- B. The court must appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, to represent any parent who is under age eighteen.

- C. The court must appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, to represent any parent whose incapability to provide proper care and supervision for the child is alleged as a ground for termination under G.S. 7B-1111(6), when the parent's incapability is alleged to be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or a similar cause or condition.
1. Failure to appoint a guardian ad litem is reversible error, since the statutory language is mandatory. In re Estes, 157 N.C. App. 513, 579 S.E.2d 496, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003); In re Richard v. Michna, 110 N.C. App. 817, 431 S.E.2d 485 (1993).
 2. Failure to appoint a guardian ad litem was error, even though case was tried only on the neglect ground and court adjudicated only neglect, when the dependency ground was alleged in the petition, the petitioner offered some evidence tending to show the parent was incapable of caring for the child due to mental illness, and the trial court referred to the mental health issues in its order. In re J.D., ___ N.C. App. ___, ___ S.E.2d ___ (5/4/04), *disc. review denied* ___ N.C. ___, ___ S.E.2d ___ (8/12/04).
 3. The statute does not require appointment of a guardian ad litem for a parent every time dependency or substance abuse is alleged, only when the parent's incapability as a result of substance abuse (or other statutory or similar cause) is alleged. See In re H.W., ___ N.C. App. ___, 594 S.E.2d 211 (4/6/04), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 46 (6/24/04)(in a dependency proceeding, although the petition alleged dependency, the court did not err in failing to appoint guardian ad litem for respondent, when there was no allegation that dependency was a result of respondent's substance abuse, mental retardation, mental illness, or a similar cause or condition).
- D. The role of a guardian ad litem appointed pursuant to G.S. 1A-1, Rule 17, because of a parent's minority or alleged incapability is not altogether clear.
1. Role of a Rule 17 guardian ad litem is as a "guardian of procedural due process for that parent, to assist in explaining and executing her rights." In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1 (1/20/04), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (6/24/04).
 2. No testimonial privilege applies to prevent a guardian ad litem from testifying; her testimony was admissible and could be used to establish a ground for termination. Shepard.
- E. See VIII.A.3., below, regarding appointment of a guardian ad litem for an unknown parent.
- F. Unless a guardian ad litem for the child has been appointed pursuant to G.S. 7B-601, the court must appoint a guardian ad litem to represent child's best interests in any case in which
- an answer or response is filed denying any material allegation of the petition or motion, and
 - the petition or motion is filed by someone other than the child's guardian ad litem.
1. Where the court of appeals could not determine from the record when or for what purpose respondent had filed a letter he later claimed was an "answer," the court

refused to assume trial court error and held that appointment of a guardian ad litem was not required. In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992).

2. In a private termination action, the court's failure to appoint a guardian ad litem for the child, when the father had filed an answer denying material allegations, required reversal despite the father's failure to object or assign error to the trial court's violation of the statutory requirement. In re Fuller, 144 N.C. App. 620, 548 S.E.2d 569 (2001).
 3. The person appointed as guardian ad litem for the child may not be a guardian ad litem trained and supervised by the state guardian ad litem program unless
 - a. the child is or has been the subject of an abuse, neglect, or dependency petition, or
 - b. the local guardian ad litem program, for good cause, consents to the appointment.
 4. Because the child is a party to the proceeding [see G.S. 7B-601(a)] and must be served regardless of age, in some cases appointment of a guardian ad litem for the child may be the only way to effect meaningful service of process on the child.
- G. In every case, the court has discretion to appoint a guardian ad litem for the child to assist the court in determining the child's best interest. Appointment may be made before or after the court adjudicates grounds for termination.
- H. If a guardian ad litem has been appointed to represent the child in an earlier juvenile proceeding, that guardian ad litem will also represent the child in any termination proceeding, unless the court determines that the child's best interests require otherwise.
- I. If the child's guardian ad litem is not an attorney, an "attorney advocate" must be appointed to assure protection of the child's legal rights in the proceeding.
- J. Fees of appointed counsel and guardians ad litem should be paid as follows:
1. Fees of counsel or guardian ad litem appointed for an indigent parent are to be paid by the Office of Indigent Defense Services. See 4, below, for alternate source of fees when the parent is a minor or dependent.
 2. If the parent is not indigent and does not secure private counsel, the fee of a guardian ad litem appointed for the parent is a proper charge against the parent.
 3. The child's (non-volunteer) guardian ad litem or attorney advocate
 - a. most often will be paid by direct engagement for specialized guardian ad litem services through the Administrative Office of the Courts.
 - b. in a private termination proceeding or when the guardian ad litem program has a conflict, must be paid a reasonable fee fixed by the court; however, it is not clear whose obligation it is initially to pay the fee.
 4. Whenever an attorney or guardian ad litem is appointed for a person under age eighteen, or eighteen or over but dependent on and domiciled with a parent or guardian, the court may require the parent, guardian, or trustee to pay the fee.

- K. Attorney fees for retained counsel are not awardable in termination of parental rights actions. *Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002).

VI. Who May File Petition or Motion (G.S. 7B-1103)

Only the following may file a petition or motion to terminate parental rights:

- A. Either parent seeking termination of the other parent's rights; except, the child's father may not file a petition if
 - 1. the father has been convicted of rape under G.S. 14-27.2 or G.S. 14-27.3, for a rape that occurred on or after December 1, 2004; and
 - 2. the child who is the subject of the termination proceeding was born as a result of the rape.
- B. Any judicially appointed guardian of the person of the child.
- C. Any county DSS or licensed child-placing agency to which (i) a court has given custody of the child, or (ii) a parent or guardian of the person of the child has surrendered the child for adoption pursuant to G.S. Chapter 48.
 - 1. A petition brought by a county DSS director was valid because it was apparent that he brought it not in his individual capacity but on behalf of the county DSS. *In re Manus*, 82 N.C. App. 340, 346 S.E.2d 289 (1986).
 - 2. Where the court had placed the child in the legal custody of an individual before DSS filed its petition, DSS did not have standing to petition for termination of parental rights. *In re Miller*, 162 N.C. App. 355, 590 S.E.2d 864 (1/20/04).
- D. Any person with whom the child has resided for a continuous period of two years or more immediately preceding the filing of the petition or motion for termination.
- E. A guardian ad litem appointed under G.S. 7B-601 to represent the child in an abuse, neglect, or dependency proceeding.
- F. Any person who has filed a petition for adoption of the child.

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

- A. The petition or motion must be entitled "In re (*last name of child*), a minor child" and either include the following facts or state that the facts are unknown:
 - 1. The child's birth certificate name, date and place of birth, and county of present residence.
 - 2. Petitioner's or movant's name and address and facts sufficient to show that the petitioner or movant has standing to file a petition or motion under VI, above.

3. Name and address of the child's parents. If a parent's name or address is unknown, the petition or motion, or attached affidavit, must describe efforts that have been made to find out the name and address.
 4. Name and address of any court-appointed guardian of the child's person and of any person or agency to which a court of any state has given custody of the child. A copy of any such order must be attached.
 5. Facts sufficient to support a determination that one or more grounds for terminating parental rights exist.
 - a. Bare allegation that parent neglected the child and willfully abandoned the child for six months did not comply with this requirement, but an attached custody decree incorporated into the petition did contain sufficient facts. *In re Quevedo*, 106 N.C. App. 574, 417 S.E.2d 260, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).
 - b. Allegations need not be exhaustive or extensive, but they must put a party on notice as to acts, omissions, or conditions that are at issue and must do more than recite the statutory wording of the ground. *In re Hardesty*, 150 N.C. App. 380, 563 S.E.2d 79 (2002). *See also* *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003)(allegations were sufficient to put respondent on notice even though the petition did not specifically allege neglect).
 6. A statement that the petition or motion has not been filed to circumvent the Uniform Child Custody Jurisdiction and Enforcement Act. *See In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003)(while the petition should include this statement, its omission did not result in prejudice to the respondent).
- B. Information about the child's status, as required by G.S. 50A-209, must be set out in the petition or motion or an attached affidavit, since a termination proceeding is a child-custody proceeding for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act. G.S. 50A-102(4). *See In re Clark*, 159 N.C. App. 75, 582 S.E.2d 657 (2003)(failure to attach the affidavit does not divest the court of jurisdiction and can be cured by requiring that the affidavit be filed within a specified time). The AOC provides a form affidavit, AOC-CV-609, that is available from the AOC web site, <http://www.nccourts.org/Forms/FormSearch.asp>.
 - C. The petition or motion must be verified. The fact that the petition is signed and notarized is not sufficient to constitute verification. *In re Triscari*, 109 N.C. App. 295, 426 S.E.2d 435 (1993).
 - D. The court may consider only those issues that are brought before it by proper pleading. A motion or petition that does not contain a prayer for relief or request the entry of any order is not a proper pleading, and the court does not have jurisdiction to proceed in the matter. *In re McKinney*, 158 N.C. App. 441, 581 S.E.2d 793 (2003).

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

- A. If the name or identity of a parent/respondent is unknown when a petition is filed, the court must conduct a hearing to determine the parent's name or identity.
 1. The hearing must be held within ten days after the petition is filed, or at the next term of court in the county if there is no court within ten days.

2. Notice of the preliminary hearing need be given only to the petitioner, but the court may summons others to testify.
 3. The court may inquire of any known parent about the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a “diligent search” for the parent.
 4. If the parent’s identity is determined, the court must enter a finding and summons the parent to appear.
 5. The court must make findings or issue a publication order (see B, below) within 30 days of the preliminary hearing unless additional time is required for investigation.
 6. These special hearing provisions do not apply in the case of a known parent whose whereabouts are unknown. *In re Clark*, 76 N.C. App. 83, 332 S.E.2d 196, *disc. review denied*, 314 N.C. 665, 335 S.E.2d 322 (1985).
- B. If not able to identify an unknown parent, the court must order publication of notice of the termination proceeding by means most likely to identify the child to the unknown parent.
1. The notice must be published in a newspaper qualified for legal advertising under G.S. 1-597 and 1-598 and published in counties directed by the court weekly for three successive weeks.
 - a. The notice must
 - (1) be directed to the unknown parent of (male) (female) child born at specified time and place.
 - (2) designate the court, docket number, and name of the case (at the direction of the court, “In re Doe” may be substituted).
 - (3) specify the type of proceeding.
 - (4) direct the respondent to answer the petition within 30 days after the specified date of first publication.

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

 - (5) follow the form set out in G.S. 1A-1, Rule 4.
 - (6) state that parental rights will be terminated if no answer is filed.
 - b. After service, a publisher’s affidavit must be filed with the court.
 2. If an unknown parent served by publication does not answer within the prescribed time, the court “shall” issue an order terminating the parent’s rights.

[NOTE: In several cases involving known parents, the court of appeals has said that the court is never required to terminate parental rights. See *In re Tyson*, 76 N.C. App. 411, 333 S.E.2d 554 (1985); *In re Godwin*, 31 N.C. App. 137, 228 S.E.2d 521 (1976);

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

- A. Except as provided in the case of an unknown parent, upon filing of the petition, the following must be named as respondents and summons must be directed to them:
1. The child's parents, except any parent who has
 - a. surrendered the child to a county DSS or licensed child-placing agency for adoption, or
 - b. consented to adoption of the child by the petitioner.
 2. Any judicially appointed custodian or guardian of the person of the child.
 3. Any county DSS or licensed child-placing agency to which the parent has released the child for adoption under G.S. Chapter 48.
 4. Any county DSS to which a court of competent jurisdiction has given placement responsibility for the child.
 5. The child.
- B. The summons must include the child's name and notice that
1. A written answer must be filed within 30 days or the parent's rights may be terminated.
 2. The parent, if indigent, is entitled to appointed counsel and may contact the clerk immediately to request counsel.
 3. It is a new case, and any attorney appointed to represent the parent in another case will not represent the parent in this case unless so ordered by the court.
 4. Notification of the date, time, and place of the hearing will be mailed upon filing of an answer or thirty days from the date of service.
 5. The purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated.
 6. The parent may attend the termination hearing.
- [NOTE: See cases holding that parent does not have an absolute right to be present at a termination hearing. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, *affirmed per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992); In re Quevedo, 106 N.C. App. 574, 417 S.E.2d 260, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).]
- C. Summons must be served pursuant to G.S. 1A-1, Rule 4(j), except that service on the child is made on the child's guardian ad litem if one has been or is appointed.

1. Because the child is a party to the proceeding [see G.S. 7B-601(a)] and must be served regardless of age, in some cases appointment of a guardian ad litem for the child may be the only way to effect meaningful service on the child.
2. A parent is not deemed to be under a disability even if a minor; however, G.S. 7B-1101 requires appointment of a guardian ad litem for any parent under age eighteen.
3. Petitioner must comply with Rule 4(j1) regarding service by publication and specifically with the section's due diligence requirement. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, *disc. review denied*, 314 N.C. 665, 335 S.E.2d 322 (1985). See also later related case, In re Clark, 327 N.C. 61, 393 S.E.2d 791 (1990)(court correctly dismissed adoption proceeding when order terminating father's rights was reversed and father had filed a legitimation proceeding).
4. Service by publication is void, and an order for termination can be overturned, where petitioner did not use diligence in trying to ascertain the respondent/ parent's whereabouts. Clark.
5. When respondent/parent's whereabouts are unknown, service must comply with both rule 4(j1) and with [former] G.S. 7A-289.27(b) (contents of summons; see VIII.B., above). In re. Joseph, 122 N.C. App. 468, 470 S.E.2d 539 (1996)(failure to comply fully with [former] G.S. 7A-289.27(b) was error, but did not prejudice respondent).

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

- A. Upon the filing of a motion for termination of parental rights, the movant must prepare a notice directed to each of the following that is not a movant:
 1. The child's parents, except any parent who has
 - a. surrendered the child to a county DSS or licensed child-placing agency for adoption, or
 - b. consented to adoption of the child by the movant.
 2. Any court-appointed custodian or guardian of the person of the child.
 3. Any county DSS or licensed child-placing agency to which the parent has released the child for adoption under G.S. Chapter 48.
 4. Any county DSS to which a court of competent jurisdiction has given placement responsibility for the child.
 5. The child's guardian ad litem, if one has been appointed under G.S. 7B-601 and has not been relieved of responsibility.
 6. The child, if twelve or older when the motion is filed. (The reason for requiring service of a summons on the child regardless of age and limiting service of a notice to older children is not apparent.)
- B. The notice must include the child's name and notice that

1. A written response must be filed within 30 days after service of the motion and notice, or the parent's rights may be terminated.
2. Any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parent unless the court orders otherwise.
3. The parent, if indigent, is entitled to appointed counsel and, if not already represented by appointed counsel, may contact the clerk immediately to request counsel.
4. Notification of the date, time, and place of the hearing will be mailed upon filing of a response or thirty days from the date of service.
5. The purpose of the hearing is to determine whether the parent's rights in relation to the child will be terminated.
6. The parent may attend the termination hearing.

[NOTE: See cases holding that parent does not have absolute right to be present at termination hearing. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, *affirmed per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992); In re Quevedo, 106 N.C. App. 574, 417 S.E.2d 260, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).]

- C. The motion and notice must be served pursuant to G.S. 1A-1, Rule 4, if
1. The person or agency to be served
 - a. was not served originally with summons, or
 - b. was served originally by publication that did not include notice, substantially in conformity with G.S. 7B-406(b)(4)(e), that the court would have jurisdiction to terminate parental rights;
 2. A period of two years has elapsed since the date of the original action; or
 3. The court in its discretion orders that service be pursuant to G.S. 1A-1, Rule 4.
- D. Except as provided in C., above, the motion and notice may be served pursuant to G.S. 1A-1, Rule 5(b).
- E. A parent is not deemed to be under a disability even if the parent is a minor; however, G.S. 7B-1101 requires appointment of a guardian ad litem for any parent under age eighteen.
- F. Failure to give the respondent notice that complies fully with G.S. 7B-1106.1 is reversible error. In re Alexander, 158 N.C. App. 522, 581 S.E.2d 466 (2003). *Cf.* In re Howell, 161 N.C. App. 650, 589 S.E.2d 157 (12/16/03)(a parent can waive the defenses of insufficiency of service or process by making a general appearance or by filing an answer, response, or motion without raising the defense).

XI. Answer or Response: Hearing to Determine Issues (G.S. 7B-1107, 7B-1108)

- A. If a respondent fails to file a timely answer or response, the court must order a hearing on the petition or motion and may issue an order terminating respondent's parental and

custodial rights. At the hearing, the court may examine the petitioner or movant or others, on facts alleged in the petition or motion.

[NOTE: Before October 1, 2000, the statute said that the court “shall” (instead of “may”) issue an order terminating parental rights upon a parent’s failure to file an answer. The court of appeals has held that a parent’s failure to file an answer is grounds for terminating parental rights. In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993). *But see* In re Tyner, 106 N.C. App. 480, 417 S.E.2d 260 (1992), where the court of appeals, in dicta, concluded that the absence of an answer denying material allegations of the petition does not authorize a “default type” order terminating parental rights, since the statute requires a hearing on the petition. Even if the parent does not file an answer or response, the court should inquire into and receive evidence regarding grounds for termination and the child’s best interest and determine whether parental rights should be terminated. The court is never required to terminate parental rights. See *also* In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976); Forsyth County Dep’t of Social Services v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974).]

- B. Respondent’s answer or response must admit or deny allegations of the petition or motion and provide the name and address of the respondent or respondent’s attorney.
- C. The court is required to conduct a special hearing to determine the issues raised by the petition or motion and answer(s) or response(s).
 - 1. Petitioner or movant must give notice of not less than ten days or more than thirty days to the answering respondent(s) and the child’s guardian ad litem.
 - 2. Notice of hearing is deemed to be given upon deposit of notice, properly addressed, in the U.S. mail, first-class postage paid.
 - 3. The fact that this special hearing is brief and held just before trial does not conflict with statutory requirements. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); In re Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990). Delineation of the issues for adjudication just before the termination hearing satisfied the “special hearing” requirement. Taylor.
- D. If a county DSS, not otherwise a party petitioner or movant, is served with a petition or motion to terminate parental rights, the DSS must file a written answer or response and is deemed a party to the proceeding.

XII. Adjudicatory Hearing on Termination (G.S. 7B-1109)

- A. A hearing on a termination petition or motion must be held within 90 days after it is filed unless the court orders that it be held at a later time.
 - 1. The adjudicatory hearing is without a jury. There is no constitutional right to a jury trial in termination proceedings. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).
 - 2. Knowledge of evidentiary facts from an earlier proceeding does not require a judge’s disqualification. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65 (2002). The trial judge is not required to recuse himself or herself merely because the judge has had prior involvement with the family in a juvenile proceeding. In re Larue, 113 N.C. App. 807, 440 S.E.2d 301 (1994)(fact that judge had conducted review, found that children

should remain with DSS, and recommended that termination be pursued was not sufficient to show bias).

3. For good cause, the court may continue the hearing up to 90 days from the date of the initial petition to receive additional evidence or to allow the parties to conduct expeditious discovery. The court may grant a continuance that extends beyond 90 days after the initial petition only in extraordinary circumstances when necessary for the proper administration of justice, and must issue a written order stating the grounds for granting the continuance.
4. Although different evidentiary standards apply at the adjudicatory and dispositional stages, it is not necessary for the two stages to be conducted at two separate hearings. In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994); In re White, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986).
5. The hearing is reported as provided for civil trials.
 - a. Electronic recording equipment may be used when court reporters are not available. G.S. 7A-198.
 - b. When the parties stipulate to the use of recording machines in lieu of a court reporter, they are estopped from complaining on appeal about the quality of the recording equipment. If the equipment fails to function, the record must be reconstructed. To show prejudicial error, a party must show (1) that the party was prejudiced by loss of specific testimony and (2) what the content of any gaps or lost testimony was. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985); In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981). See *also* In re Clark, 159 N.C. App. 75, 582 S.E.2d 657 (2003).
 - c. The fact that a recording is incomplete or inadequate, by itself, is not ground for reversal. There is a presumption of regularity in a trial, and the appellant must make a specific showing of probable error. In re Howell, 161 N.C. App. 650, 589 S.E.2d 157 (12/16/03); In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83 (10/21/03)(respondent took no steps to reconstruct the record and alleged only general prejudice).
6. The court must inquire whether parents are present and, if so, whether they are represented by counsel or desire counsel.
 - a. If a parent desires counsel and is indigent and unable to obtain counsel, counsel for the parent must be appointed according to the rules of the Office of Indigent Defense Services, and the court must grant an extension of time to permit counsel to prepare.
 - (1) Even if the parent has not filed an answer [or response] or taken other action, if the parent is present at the hearing the court must inquire about counsel and counsel must be appointed for an indigent parent unless the court finds that the parent knowingly and voluntarily waives the right. In re Little, 127 N.C. App. 191, 487 S.E.2d 823 (1997); In re Hopkins, ___ N.C. App. ___, 592 S.E.2d 22 (2/17/04)(parent cannot waive the right to counsel by inaction).

- (2) Caution should be exercised in appointing one attorney to represent both parents, given the potential for conflicting interests and evidence. In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985).
 - b. If the parent declines counsel, the court must examine the parent and find that the waiver is knowing and voluntary. The examination must be reported as provided in G.S. 7A-198.
 - c. Failure to appoint separate counsel for respondents (mother and father) was not error, where respondents made no objection at the time of the appointment, the record showed that the evidence was sufficient to terminate both parents' rights, and there was no indication that the court treated respondents as a couple rather than as individuals. In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985).
 7. The court, upon finding reasonable cause, may order the child examined by a psychiatrist, clinical psychologist, physician, agency, or other expert, to ascertain the child's psychological or physical conditions or needs. The court may order a parent similarly examined if the parent's ability to care for the child is in issue.
- B. A parent does not have an absolute right to be present at the termination hearing.
1. Respondent's due process rights were not violated, and the trial court did not abuse its discretion when it ordered respondent removed from the courtroom and did not provide him a means to testify, after respondent repeatedly cursed, disrupted the proceedings, and ignored the court's warnings. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65 (2002)(applying the *Matthews v. Eldridge* balancing test, the court examined (a) private interest affected by the proceeding; (b) risk of error caused by the procedure; and (c) countervailing governmental interest supporting the use of the challenged procedure).
 2. The trial court's denial of respondent's motion to be brought to the hearing from a state correction facility did not violate respondent's state or federal constitutional rights. In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396, *affirmed per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992).
 3. The parent's due process rights were not violated by the court's refusal to order his transportation from an out-of-state prison for the hearing or to pay for his attorney to go there to take his deposition. In re Quevedo, 106 N.C. App. 574, 417 S.E.2d 260, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992)(when incarcerated parent is denied transportation to the hearing in a contested termination case, better practice is for the court, when so moved, to provide the funds necessary for deposing the incarcerated parent).
 4. Mother's failure to appear for the hearing was not excusable neglect when she had received proper notice and did not seek appointment of counsel or a continuance. In re Hall, 89 N.C. App. 685, 366 S.E.2d 882 *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988). *See also* In re. Carpenter, 127 N.C. App. 353, 489 S.E.2d 437 (1997), *affirmed*, 347 N.C. 569, 494 S.E.2d 763 (1998).
 5. The trial court did not abuse its discretion in denying respondent's motion for a continuance. Respondent's absence was voluntary or the result of her own negligence in failing to obtain adequate transportation. In re Mitchell, 148 N.C. App.

483, 559 S.E.2d 237, *reversed on other grounds*, 356 N.C. 288, 570 S.E.2d 212 (2002).

6. The trial court did not err in allowing the child to testify in closed chambers, over the respondent's objection, when all attorneys were allowed to be present and the court made findings about the child's best interest. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).

C. The rules of evidence for civil cases apply.

1. It was not error for the court to permit a social worker to give an opinion as to the parents' capacity to provide a stable home environment, even though the witness was not tendered as an expert. In re Pierce, 67 N.C. App. 257, 312 S.E.2d 900 (1984). It was not error for the court to allow a social worker to give an expert opinion about whether the parents' actions were indicative of good parenting skills, even though there was no explicit finding that she was an expert. In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).
2. The trial court did not err in refusing to allow an expert witness to testify about the mother's mental health and parenting capacity, where the witness was an expert in clinical social work specifically dealing with adolescents, and there was no evidence that she was an expert in mental health issues. In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994).
3. It was not error for the court to admit expert testimony of witnesses tendered as experts in juvenile protective services, infant development, and permanency planning. In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985).
4. Admission into evidence of the report of the guardian ad litem was error, but the error was harmless because the report did not contain information that was not properly before the court from another witness. In re Quevedo, 106 N.C. App. 574, 417 S.E.2d 260, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).
5. It was not error to allow a ten-year-old child to testify. Any inability she had to remember relevant events went to the weight, not admissibility or competence, of her testimony. Quevedo.
6. The trial court did not err in allowing the child to testify in closed chambers, over respondent's objection, when all attorneys were allowed to be present and the court made findings about the child's best interest. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).
7. In reversing a case because the trial court improperly granted partial summary judgment based on the parent's criminal conviction, the court of appeals stated, in dicta, "Properly admitted evidence of the father's conviction of first-degree sexual offense against the minor child constitutes sufficient, clear, cogent, and convincing evidence of the respondent's abuse of the child. The child's testimony will not be necessary at the adjudicatory stage." Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

8. The respondent may be called to testify as an adverse party; a subpoena is not necessary. The parent may claim his or her fifth amendment privilege and refuse to answer questions that might incriminate the parent. *In re Davis*, 116 N.C. App. 409, 448 S.E.2d 303 (1994).
 9. The husband-wife or physician-patient privilege is not grounds for excluding evidence regarding grounds for termination. G.S. 7B-1109(f).
 10. The court may admit and consider evidence relating to events between the time the petition [or motion] was filed and the hearing. *In re Bishop*, 92 N.C. App. 662, 375 S.E.2d 676 (1989).
 11. DSS records were admissible under the business records exception to the hearsay rule; testimony of social workers who had familiarized themselves with the records was competent even though they had no contact with the case before the petition was filed. *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).
- D. The court must find facts and adjudicate the existence or nonexistence of grounds set forth in G.S. 7B-1111 (see XIII, below) for terminating parental rights.
1. Findings must be based on clear, cogent, and convincing evidence. G.S. 7B-1109(f). *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984); *In re White*, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986); *In re Ennix*, 76 N.C. App. 512, 333 S.E.2d 540 (1985). See *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997), for case reversing termination on neglect and abandonment grounds, on basis that there was not clear, cogent, and convincing evidence to support the trial court's findings.
 2. The order must recite the standard of proof. *In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000); *In re Lambert-Stowers*, 146 N.C. App. 438, 552 S.E.2d 278 (2001); *In re Matherly*, 149 N.C. App. 452, 562 S.E.2d 15 (2002); *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002).
 3. Findings of fact must do more than merely repeat the allegations in the petition. *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002).
 4. It is not proper for the court to exercise discretion in making findings at the adjudicatory stage, where the issue is whether there is proof, by clear and convincing evidence, that a ground for termination exists. *In re Carr*, 116 N.C. App. 403, 448 S.E.2d 299 (1994).
 5. Where the findings did little more than restate the statutory grounds and discuss DSS's efforts to reunify, the order was not sufficient to establish a ground for termination. *In re Locklear*, 151 N.C. App. 573, 566 S.E.2d 165 (2002).
 6. The order must include findings of fact and conclusions of law. Findings of fact are determinations from the evidence concerning facts averred by one party and denied by another; conclusions of law are findings by a court as determined through the application of rules of law. *In re Johnston*, 151 N.C. App. 728, 567 S.E.2d 219 (2002).
- E. The order must be entered within 30 days following completion of the hearing; however, the statute specifies no consequence of failing to meet this requirement.

1. Where written order was not entered until 89 days after the hearing, but respondent failed to show prejudice, court held that vacating the order was not an appropriate remedy and that the error was harmless. In re J.L.K., ___ N.C. App. ___, 598 S.E.2d 387 (7/6/04).
2. In a neglect case, failure to enter the order within 30 days was harmless error, where respondent failed to show how she was prejudiced. The court of appeals stated that the probable intent of the requirement was to achieve speedy resolutions in juvenile custody matters, and that reversing the order would have the opposite effect. In re E.N.S., ___ N.C. App. ___, 595 S.E.2d 167 (5/4/04)

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

- A. The parent has abused or neglected the child within the meaning of G.S. 7B-101. [G.S. 7B-1111(a)(1)]
 1. A prior adjudication of abuse or neglect is not a precondition to a termination proceeding based on those grounds. In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65 (2002).
 2. Evidence of a prior adjudication of neglect is admissible; however, the court must consider evidence of changed conditions and the probability of repetition of neglect. Determinative factors are the child's best interests and the parent's fitness to care for the child at the time of the termination proceeding. A prior adjudication of neglect, standing alone, is unlikely to be sufficient to support termination when the parents have been deprived of custody for a significant period before the termination proceeding. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984). *See also* In re Beasley, 147 N.C. App. 399, 555 S.E.2d 643 (2001); In re Brim, 139 N.C. App. 733, 535 S.E.2d 367 (2000); In re Reyes, 136 N.C. App. 812, 526 S.E.2d 499 (2000); Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995); In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988); In re Manus, 82 N.C. App. 340, 346 S.E.2d 289 (1986); In re White, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986); In re Tyson, 76 N.C. App. 411, 333 S.E.2d 554 (1985); In re Black, 76 N.C. App. 106, 332 S.E.2d 85 (1985); In re Garner, 75 N.C. App. 137, 330 S.E.2d 33 (1985); In re Byrd, 72 N.C. App. 277, 324 S.E.2d 273 (1985); In re McDonald, 72 N.C. App. 234, 324 S.E.2d 847 *disc. review denied*, 314 N.C. 115, 332 S.E.2d 490 (1985).
 - a. Even if there is no evidence of neglect at the time of the termination proceeding, the court may terminate parental rights if there is a prior adjudication of neglect and the court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to the parent. It was not necessary for petitioner to present evidence of neglect subsequent to the prior adjudication. In re Pope, 144 N.C. App. 32, 547 S.E.2d 153, *affirmed per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001).
 - b. Evidence was insufficient to establish that an incarcerated parent abandoned or neglected the child. The father wrote to and called his sons while in prison and made progress on a case plan after his release. There was no evidence of a likelihood of repetition of prior neglect, because the earlier neglect was due solely to the mother's failure to provide proper care and supervision. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403 (2003). *See also*, In re Yocum,

- 158 N.C. App. 198, 580 S.E.2d 399, *affirmed per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003), where majority in court of appeals, affirming the termination order, and the dissent disagreed as to whether there was clear, cogent, and convincing evidence that an incarcerated parent had neglected his child.
- c. Court of appeals affirmed termination based on “evidence of past neglect in conjunction with the special needs of the children and the evidence that respondent-mother [had] made no advancements in confronting and eliminating her problem with alcohol.” In re Leftwich, 135 N.C. App. 67, 518 S.E.2d 799 (1999).
 - d. It was not error for the court to consider evidence of a neglect adjudication in a prior termination proceeding in which the court found that, even though the neglect ground existed, termination was not in the child’s best interest; but the court also must consider evidence of changed conditions and the probability of repeated neglect. In re Stewart, 82 N.C. App. 651, 347 S.E.2d 495 (1986).
 - e. Admissibility of a prior order is not conditioned on whether the parent was represented by counsel at the earlier hearing. Byrd.
 - f. Neglect was properly established where the order was based in part on a prior adjudication to which the parties had stipulated, but the trial judge also had reviewed the entire file, including at least twelve detailed orders regarding the parents’ lack of progress between the initial juvenile petition and the termination order. In re Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984). *See also* In re Davis, 116 N.C. App. 409, 448 S.E.2d 303 (1994)(failure to correct conditions that led to the earlier finding of neglect constituted a failure to provide “proper care, supervision, or discipline” and a failure to correct an environment that was “injurious” to the child’s welfare).
 - g. It is not essential that there be evidence of culpable neglect following the initial adjudication of neglect. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985); In re Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).
 - h. It was not error for the court to consider evidence of a prior neglect adjudication, even though a later order had found that the child was no longer neglected. In re Castillo, 73 N.C. App. 539, 327 S.E.2d 38 (1985).
 - i. The reasoning of Ballard also applies to prior abuse. In re Reber, 75 N.C. App. 467, 331 S.E.2d 256 (1985), *affirmed per curiam*, 315 N.C. 382, 337 S.E.2d 851 (1986)(court’s findings about prior abuse, probability of repetition of abuse, and child’s best interests were not based on clear, cogent and convincing evidence sufficient to support termination on the ground of abuse); In re Beck, 109 N.C. App. 539, 428 S.E.2d 232 (1993) (court did not err in admitting prior order finding child to be abused, since court did not rely solely on that order). *See also* In re McMillon, 143 N.C. App. 402, 546 S.E.2d 169 (2001).
 - j. A prior adjudication of abuse was *res judicata* on the question of whether the father had abused the children; the parties were estopped from relitigating that issue of abuse. The court did not rely solely on the prior adjudication in terminating parental rights. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

3. There is a substantive difference between the quantum of proof of neglect required for termination and that required for mere removal of the child from a parent's custody. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).
 - a. Parental rights may not be terminated for threatened future harm. Evans; In re Phifer, 67 N.C. App. 16, 312 S.E.2d 684 (1984)(parent's abuse of alcohol, without proof of adverse impact on the child, was insufficient for adjudication of neglect as a ground for termination).
 - b. A showing of risk of future neglect, absent proof of actual harm to the child, is insufficient to establish neglect. If the petitioner seeks termination based on the parent's failure to correct conditions that led to the child's removal from the home, it must do so within the statutory provisions that require a two-year [now, twelve-month] trial period, when there is no showing of harm to the child. Phifer.
 - c. Trial court's failure to make findings about the "impairment" prong of the neglect ground was not reversible error when evidence in the record supported such a finding. In re Ore, 160 N.C. App. 586, 586 S.E.2d 486 (10/7/03).
4. An earlier adjudication that the child was dependent was not inconsistent with a finding that the parent neglected the child for purposes of termination. It was not error for the court to consider the parent's incarceration and criminal conduct along with other factors. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).
5. For a finding of neglect, it is not necessary to find a failure to provide the child with physical necessities. In re Black, 76 N.C. App. 106, 332 S.E.2d 85 (1985); In re Apa, 59 N.C. App. 322, 296 S.E.2d 811 (1982).
6. Determinative factors are the child's circumstances and conditions, not the parent's fault or culpability; the fact that the parent loves or is concerned about the child will not necessarily prevent the court from making a determination that the child is neglected. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).
7. Parent's nonfeasance, as well as malfeasance, can constitute neglect. In re Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984)(mother's failure to intervene or protect child from another person's physical abuse).
8. This ground is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).
9. The statute does not apply only to the poor and thus violate equal protection. In re Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984); In re Wright, 64 N.C. App. 135, 306 S.E.2d 825 (1983).
10. Lack of involvement with children for more than two years established a pattern of abandonment and neglect. The fact that the parent was incarcerated much of that time did not justify the parent's failure to communicate with or inquire about the children. In re Graham, 63 N.C. App. 146, 303 S.E.2d 624, *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983). *Also see* In re J.L.K., ___ N.C. App. ___, 598 S.E.2d 387 (7/6/04) (affirming order terminating rights of incarcerated father on basis of neglect); In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83 (10/21/03)(although

incarcerated respondent's lack of contact with child was beyond his control, other evidence and findings supported conclusion that the neglect ground existed).

11. It was error to admit evidence of father's failure to participate in the underlying neglect proceeding when there was no evidence that he was served in that action. In re Mills, 152 N.C. App. 1, 567 S.E.2d 166 (2002).
 12. Neglect in the form of abandonment does not require findings regarding the six-month period immediately preceding the filing of the petition, as does the separate ground of abandonment. The court may examine the parent's conduct over an extended period of time. In re Humphrey, 156 N.C. App. 533, 577 S.E.2d 421 (2003). See also In re Apa, 59 N.C. App. 322, 296 S.E.2d 811 (1982)(father's willful failure to support or visit the child for eleven-year period constituted neglect in the form of abandonment).
 13. Trial court did not err in admitting evidence of mother's surrender of her rights to another child, since how another child in the same home was treated and that child's status clearly were relevant to whether children in the present action were neglected. In re Johnston, 151 N.C. App. 728, 567 S.E.2d 219 (2002). See also, In re Allred, 122 N.C. App. 561, 471 S.E.2d 84 (1996).
 14. Evidence of child's four years in DSS custody and mother's conduct and conditions during that time, even though the mother made some progress, was sufficient to establish that the neglect ground existed at the time of the hearing. In re Allred, 122 N.C. App. 561, 471 S.E.2d 84 (1996).
 15. For a case reversing termination on the neglect ground on the basis that there was not clear, cogent, and convincing evidence to support findings that neglect or probability of its repetition existed at the time of the proceeding, see In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997).
 16. Evidence was sufficient to establish the abuse ground (creation of a substantial risk of serious non-accidental physical injury and a probability of repeated abuse if the child returned home) where the court found that the mother was diagnosed with Munchausen Syndrome by Proxy, the mother had violated various court orders and had not benefited from treatment, and the child's recurring need for medical attention ended when the child was removed from the mother's custody. In re Greene, 152 N.C. App. 410, 568 S.E.2d 634 (2002).
 17. "The determination of neglect, requiring application of legal principles, is a conclusion of law." In re Reyes, 136 N.C. App. 812, 526 S.E.2d 499 (2000), citing In re Everette, 133 N.C. App. 84, 514 S.E.2d 523 (1999).
- B. The parent has willfully left the child in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; provided, parental rights may not be terminated for the sole reason that the parents are unable to care for the child on account of their poverty. [G.S. 7B-1111(a)(2)]

NOTES:

- Before January 1, 2002, this ground referred to whether reasonable progress had been made "within twelve months." An amendment effective 1/1/02 deleted those words.
- Some cases cited below were decided under a former version of this ground that included the following additional wording: "or without showing a positive response within twelve months to the diligent efforts of a county DSS, child-caring institution, or licensed

child-placing agency to encourage the parent to strengthen the parental relationship or plan constructively for the child's future.”

- For cases filed before October 1, 1992, this ground referred to a two-year or eighteen-month, instead of twelve-month, period.]
1. It is not necessary that the eighteen [now, twelve] months in foster care be continuous. In re Taylor, 97 N.C. App. 57, 387 S.E.2d 230 (1990).
 2. Willfulness, for purposes of this ground, is something less than willful abandonment and does not require a showing of parental fault. Evidence was sufficient even though the parent had made some effort and some progress. In re Bishop, 92 N.C. App. 662, 375 S.E.2d 676 (1989). See also In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992); In re Nolen, 117 N.C. App. 693, 453 S.E.2d 220 (1995); In re Clark, 159 N.C. App. 75, 582 S.E.2d 657 (7/15/03). Cf. In re Fletcher, 148 N.C. App. 228, 558 S.E.2d 498 (2002) (affirming termination of mother's rights, but not the father's, on this ground).
 3. For willfulness to attach, evidence must show a parent's ability (or capacity to acquire the ability) to overcome factors that resulted in the child's placement. See In re Baker, 158 N.C. App. 491, 581 S.E.2d 144 (2003)(evidence of willfulness included parents' refusal to inquire about or complete parenting classes, sign a reunification plan, or use mental health services). In the case of a minor parent, the court must make specific findings showing that the parent's age-related limitations as to willfulness have been adequately considered. In re Matherly, 149 N.C. App. 452, 562 S.E.2d 15 (2002).
 4. A parent's incarceration, standing alone, neither requires nor precludes a finding that the parent willfully left the child in foster care. The parent's failure to contact DSS or the child is evidence of willfulness. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987). See also, In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403 (2003)(evidence insufficient to establish that incarcerated parent willfully left the child in foster care, where the father wrote to and called his sons while in prison and made progress on a case plan after his release); Whittington v. Hendren, 156 N.C. App. 364, 576 S.E.2d 372 (2003) (termination affirmed where court found that “[e]ven though the respondent was incarcerated, he could have made more of an effort to maintain contact with his child,” and respondent had foregone the opportunity to attend the termination hearing).
 5. The fact that a parent makes some efforts within two years [now, twelve months] does not preclude a finding of willfulness or lack of positive response. “Positive response” implies not only efforts, but also some positive results. In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984). See also In re Oghenekevebe, 123 N.C. App. 434, 473 S.E.2d 393 (1996); In re B.S.D.S., ___ N.C. App. ___, 594 S.E.2d 89 (4/6/04)(although evidence showed some efforts and some progress by respondent, there was sufficient evidence to support the trial court's finding that respondent's prolonged inability to improve her situation during the year before the termination petition we filed was willful).
 6. For a discussion of the elements of “willfulness” and “substantial progress” [now, “reasonable progress under the circumstances”], see In re Wilkerson, 57 N.C. App. 63, 291 S.E.2d 182 (1982). See also In re Nesbitt, 147 N.C. App. 349, 555 S.E.2d 659 (2001)(reversing termination on basis that even if the mother had failed to make reasonable progress, her failure was not willful).

7. This ground is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983).
 8. Other cases involving this ground:
 - In re Pierce, 356 N.C. 68, 565 S.E.2d 81 (2002), *affirming*, 146 N.C. App. 641, 554 S.E.2d 25 (2001)(affirming court of appeals' conclusion that the record did not contain clear, cogent, and convincing evidence that the parent had failed to make reasonable progress under the circumstances during the 12-month period immediately before the filing of the petition, based on the statute as it read before the January 1, 2002, amendment noted above).
 - In re McMillon, 143 N.C. App. 402, 546 S.E.2d 169 (2001).
 - In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379 (2001).
 - In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599 (2002).
- C. The child has been placed in the custody of DSS, a licensed child-placing agency, a child-caring institution, or foster home, and the parent has willfully failed to pay a reasonable portion of the cost of the child's care for a continuous period of six months next preceding the filing of the petition or motion, although physically and financially able to do so. [G.S. 7B-1111(a)(3)]
1. A finding that the parent is able to pay support is essential to termination on this ground. In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984).
 2. A finding as to the cost of foster care can establish the child's reasonable needs. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).
 3. The trial judge must make findings of fact concerning both the parent's ability to pay and the amount of the child's reasonable needs. In re Phifer, 67 N.C. App. 16, 312 S.E.2d 684 (1984); In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599 (2002); In re Clark, 151 N.C. App. 286, 565 S.E.2d 245, *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002). In the case of a minor parent, the findings must evidence appropriate consideration of respondent's age. In re Matherly, 149 N.C. App. 452, 562 S.E.2d 15 (2002).
 4. Determination of a reasonable portion of the cost of the child's care depends on the parent's ability to pay. In re Manus, 82 N.C. App. 340, 346 S.E.2d 289 (1986); In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983); In re Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982).
 5. Neither the absence of notice of the support obligation nor the father's lack of awareness that support was required of him was a defense to termination on this ground. In re Wright, 64 N.C. App. 135, 306 S.E.2d 825 (1983).
 6. Parent cannot assert lack of ability or means to contribute to support when the opportunity to do so is lost due to the parent's own misconduct. In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984); Bradley.
 7. This ground is not unconstitutionally vague. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), *appeal dismissed*, 459 U.S. 1139 (1983); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); Bradley.
 8. Termination was upheld on this ground where neither parent paid support during the six-month period or until over a year after the termination petition was filed; neither offered any specific reason for failing to pay support; both signed a service agreement

and later a voluntary support agreement committing to pay support; both were employed during at least half of the six-month period; and neither offered evidence of sickness or disability that prevented their being employed. In re Huff, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *appeal dismissed, review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

9. Trial court's findings and evidence in the record were not sufficient to support a conclusion that this ground existed, where there was not specific evidence or findings as to the mother's employment, earnings, or other financial means during the relevant six-month period. In re Faircloth, 161 N.C. App. 523, 588 S.E.2d 561 (12/2/03).
- D. One parent has custody of the child pursuant to court order or agreement of the parents, and the other parent (respondent), for one year or more immediately preceding the filing of the petition or motion, has willfully failed without justification to pay for the child's care, support, and education as required by court order or custody agreement. [G.S. 7B-1111(a)(4)]
1. Trial court's findings and conclusions that this ground existed and that termination was in the child's best interest were supported by the evidence and, even though some evidence was contra, are binding on the appellate court. In re McMahon, 98 N.C. App. 92, 389 S.E.2d 632 (1990) (one judge dissenting).
 2. It was not necessary for petitioner to prove or for the court to find that respondent had the ability to pay support, since proof of a valid court order or support agreement is required. Father's evidence of emotional difficulties was not sufficient to rebut evidence that his failure to pay was willful. In re Roberson, 97 N.C. App. 277, 387 S.E.2d 668 (1990).
 3. Parent may present evidence sufficient to prove that he or she was unable to pay child support, to rebut a finding of willful failure to pay. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995)(evidence of financial status and alcoholism).
- E. The father of a child born out of wedlock has not, before the filing of the termination petition or motion,
- established paternity judicially or by affidavit, or
 - legitimated the child pursuant to G.S. 49-10 or filed a petition to do so, or
 - legitimated the child by marriage to the mother, or
 - provided substantial financial support or consistent care with respect to the child and mother. [G.S. 7B-1111(a)(5)]
1. The court must inquire of the Department of Health and Human Services as to whether an affidavit has been filed and must incorporate the certified reply in the case record. G.S. 7B-1111(a)(5).
 2. For a case decided under the same wording in former adoption statute, holding that putative father's consent to adoption was required because he had filed a petition for legitimation, see In re Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).
 3. Petitioner must prove that respondent failed to take any of the four listed actions. Allegation of respondent's "putative" fatherhood in a DSS affidavit for publication was

not clear, cogent, and convincing evidence of a ground for termination under this subdivision. In re Harris, 87 N.C. App. 179, 360 S.E.2d 485 (1987).

4. The statute does not require a finding that respondent had the ability to support the child, but in this case the trial court made such a finding in any event. In re Hunt, 127 N.C. App. 370, 489 S.E.2d 428 (1997) (one judge dissenting, on basis that record did not support conclusion that termination was in the child's best interest).
 5. For adoption cases dealing with a similar ground for determining that a parent's consent to adoption is not required, see In re Adoption of Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001); In re Adoption of Baby Girl Anderson, ___ N.C. App. ___, 598 S.E.2d 638 (7/20/04).
- F. The parent is incapable of providing for the proper care and supervision of the child, such that the child is a "dependent juvenile" as defined in G.S. 7B-101; there is a reasonable probability that the parent's incapability will continue for the foreseeable future; and the parent does not have an appropriate alternative child care arrangement. The parent's incapability may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the child. [G.S. 7B-1111(a)(6)]

[Note: Cases cited below were decided under former versions of this ground, which was rewritten most recently effective June 4, 2003, by S.L. 2003-140 (H 1048).]

1. This ground does not violate the equal protection clause or deny due process. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).
2. Taken as whole, a physician's testimony about a mother with a personality disorder did not provide clear and convincing evidence to support the trial court's findings and termination order. In re Scott, 95 N.C. App. 760, 383 S.E.2d 690, *disc. review denied*, 325 N.C. 708, 388 S.E.2d 459 (1989). See also, In re Small and Cobb, 138 N.C. App. 474, 530 S.E.2d 104 (2000)(trial court's findings not supported by clear and convincing evidence).
3. The court will not read into this ground a requirement that DSS make "diligent efforts" to provide services to parents before proceeding to seek termination; any such requirement must come from the legislature. In re Guynn, 113 N.C. App. 114, 437 S.E.2d 532 (1993).
4. Evidence did not support the trial court's finding that parents were mentally retarded, where evidence showed that they had IQs of 71 and 72, placing them in the borderline range of mental retardation. Since the statute does not define "mental retardation," the court looked at other definitions, including G.S. 122C-3(22), and concluded that the term does not apply to someone with an IQ of 70 or more if the person does not exhibit significant defects in adaptive behavior. In re Larue, 113 N.C. App. 807, 440 S.E.2d 301 (1994).
5. In the case of a minor parent, the court must adequately address "capacity" in light of the parent's youth. In re Matherly, 149 N.C. App. 452, 562 S.E.2d 15 (2002).
6. This ground was not established by clear and convincing evidence where evidence was that the father was incarcerated and his release date was 17 months away;

evidence did not show that he was incapable of arranging for the child's care; and father testified that he had told DSS about several close relatives whom DSS had not contacted. In re Clark, 151 N.C. App. 286, 565 S.E.2d 245, *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002).

- G. The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition or motion. [G.S. 7B-1111(a)(7)]
1. This ground was added in 1985 when provisions for the clerk of superior court to make determinations of abandonment in adoption proceedings were deleted from G.S. Chapter 48. The wording is comparable to that in the former adoption statute.
 2. The state supreme court, in an adoption case, defined abandonment essentially as follows: A parent's willful or intentional conduct evincing a settled purpose to forego all parental duties and relinquish all parental claims. Willful intent, an integral part of abandonment, is a question of fact. Abandonment also has been defined as willful neglect and refusal to perform natural and legal parental obligations of care and support. If a parent withholds the parent's presence, love, care, and opportunity to display filial affection, and willfully neglects to lend support and maintenance, the parent relinquishes all parental claims and abandons the child. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).
 3. Neither a parent's history of alcohol abuse nor a parent's incarceration, standing alone, necessarily negates a finding of willfulness for purposes of abandonment. In re McLemore, 139 N.C. App. 426, 533 S.E.2d 508 (2000).
 4. Willful abandonment under this subsection connotes more than the mere neglect implied in [former] G.S. 7A-289.32(3). In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992). See *also*, In re. T.C.B., ___ N.C. App. ___, ___ S.E.2d ___ (9/21/04)(trial court's order included findings that were contrary to conclusion of willfulness).
 5. Failure to pay support, in and of itself, does not constitute abandonment. Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995).
 6. Whether a parent has the willful intent to abandon the child is an issue of fact. The fact that parent paid some support during relevant six-month period does not preclude a finding of willful abandonment. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).
 7. In an adoption case, the superior court erred in instructing the jury to consider the six-month period preceding the filing of the petition, since the summons was endorsed 102 days after it was issued. The action commenced as to the respondent on the day of endorsement; the six-month period preceding that date should have been used. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986). [*Query*: Unlike the termination ground, the applicable adoption statute referred to six consecutive months preceding institution of an abandonment proceeding. Would the result differ under the termination statute, which refers to six months preceding filing of the petition?]
 8. In an adoption proceeding, the court erred in finding that the mother had willfully abandoned the child, where the court made no findings in support of its conclusion that her failure to communicate with the child was willful, and where the record revealed that she had introduced substantial evidence that her actions in not

communicating with the child were not willful. In re Clark v. Jones, 67 N.C. App. 516, 313 S.E.2d 284, *disc. review denied*, 311 N.C. 756, 321 S.E.2d 128 (1984).

9. The critical period for a finding of abandonment is at least six consecutive months immediately preceding the filing of a petition to terminate parental rights. In re Young, 346 N.C. 244, 485 S.E.2d 612 (1997)(reversing a termination order on the basis that the findings did not manifest “a willful determination to forego all parental duties and relinquish all parental claims to the child”).

H. The parent has

- committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; or
 - aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child, another child of the parent, or other child in the home; or
 - committed a felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home.
- [G.S. 7B-1111(a)(8)]

1. The petitioner has the burden of proving the criminal offense by either (1) proving the elements of the offense or (2) proving that a court of competent jurisdiction has convicted the parent of the offense, whether by jury verdict or any kind of plea.
2. To prove that respondent committed a felony assault resulting in serious bodily injury by proving that respondent was convicted of the offense, a petitioner would have to show a conviction under G.S. 14-318.4(a3), assault causing “serious bodily injury.” A conviction under G.S. 14-318.4(a), assault causing “serious physical injury,” would not be sufficient. Serious bodily injury (1) creates a substantial risk of death; or (2) causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ; or (3) results in prolonged hospitalization. G.S. 14-318.4(a3). See State v. Romero, ___ N.C. App. ___, 595 S.E.2d 208 (5/4/04).

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

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

XIV. Disposition (G.S. 7B-1110)

- A. At disposition, petitioner [or movant] does not have the burden of proving by clear, cogent, and convincing evidence that termination is in the child’s best interest. That standard applies at adjudication. At disposition, the court makes a discretionary determination as to whether to terminate parental rights. In re Roberson, 97 N.C. App. 277, 387 S.E.2d 668 (1990). See *also*, In re Mitchell, 356 N.C. 288, 570 S.E.2d 212 (2002), *reversing, per curiam*, 148 N.C. App. 483, 559 S.E.2d 237 (2002).
- B. Although the court must apply different evidentiary standards at each stage, there is no requirement that adjudicatory and dispositional stages be conducted at two separate hearings. In re White, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986).

- C. If the court finds that grounds for termination of parental rights exist, the court is required to issue an order terminating rights, unless the court further determines that the child's best interests require that rights not be terminated.
1. The child's best interests, not the rights of the parents, are paramount. It is in the court's discretion to consider such factors as family integrity in deciding whether termination is in the child's best interest. *In re Adcock*, 69 N.C. App. 222, 316 S.E.2d 347 (1984); *In re Tate*, 67 N.C. App. 89, 312 S.E.2d 535 (1984); *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).
 2. Upon finding grounds for termination, trial court is not required to terminate parental rights, but is merely given discretion to do so. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984); *In re Webb*, 70 N.C. App. 345, 320 S.E.2d 306 (1984), *affirmed per curiam*, 313 N.C. 322, 327 S.E.2d 879 (1985); *In re McMillon*, 143 N.C. App. 402, 546 S.E.2d 169 (2001); *In re Parker*, 90 N.C. App. 423, 368 S.E.2d 879 (1988); *In re Tyson*, 76 N.C. App. 411, 333 S.E.2d 554 (1985); *In re Godwin*, 31 N.C. App. 137, 228 S.E.2d 521 (1976); *Forsyth County Dep't of Social Services v. Roberts*, 22 N.C. App. 658, 207 S.E.2d 368 (1974). *But see In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001)(trial court did not abuse its discretion in terminating mother's rights where there was "nothing upon which the trial court could reasonably base a decision to find it would *not* be in [the child's] best interests to terminate parental rights").
 3. It was error (not prejudicial in this case) for the court to allow the guardian ad litem to give a lay opinion that it was in the children's best interests for parental rights to be terminated. *In re Wheeler*, 87 N.C. App. 189, 360 S.E.2d 458 (1987).
 4. The trial court did not commit constitutional error in permitting questions and testimony about the parents' religious beliefs and practices, where (a) the inquiry was brief; (b) the inquiry related primarily to practices that might affect the child, not to beliefs; (c) the inquiry was directed to the father, not an "expert" or minister; and (d) the court made no findings about the parties' religious practices. Even assuming that the inquiry was improper, any error was not prejudicial because there was no indication that the testimony affected the trial court's decision. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *appeal dismissed, review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).
 5. Trial court did not err in concluding that termination was in child's best interest, where the record included overwhelming evidence that the parents had not accepted responsibility for ways their actions affected the family and created a significant likelihood of future neglect. (The court pointed to the parents' failures to maintain a sanitary, hygienic home; visit or otherwise contact the child for extended period; follow medical advice regarding one child's health needs; or obtain counseling. *Huff*. See also, *In re Brim*, 139 N.C. App. 733, 535 S.E.2d 367 (2000)(despite some evidence of improvement in mother's mental condition, trial court did not abuse its discretion in finding and concluding that terminating mother's rights was in the child's best interest); *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157 (12/16/03)(fact that child had been in DSS custody over six years, strength of evidence establishing ground for termination, plan for foster parents to adopt, and other evidence did not show abuse of discretion in court's decision to terminate parent's rights).
 6. The court is not required to find that the child is adoptable before terminating parental rights. *In re Norris*, 65 N.C. App. 269, 310 S.E.2d 25 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984).

7. When the child's and parents' interests conflict, the child's best interests control. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); In re Tate, 67 N.C. App. 89, 312 S.E.2d 535 (1984).
 8. The trial court is not required to make findings regarding its refusal to exercise its discretion not to terminate parental rights. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).
 9. For a case in which the court of appeals held that the trial court abused its discretion in finding termination to be in child's best interest, see *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995). The court of appeals referred to the supreme court's holding in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994)(focusing on parents' paramount right to custody and care of their children). Since the court of appeals also held that the trial court erred in finding that grounds for termination existed, however, it appears that the court of appeals need not have reached the best interest issue. (One judge, dissenting, did not think the trial court had abused its discretion.)
- D. A finding that DSS made diligent efforts to provide services to a parent is not a condition precedent to terminating a parent's rights. In re Frasher, 147 N.C. App. 513, 555 S.E.2d 379 (2001); In re J.W.J., ___ N.C. App. ___, 599 S.E.2d 101 (8/3/04).
 - E. Where there was only "remote chance" that troubled teenager would be adopted and there was possibility of benefit from continued relationship with his mother and other relatives, trial court abused its discretion in terminating parental rights. In re J.A.O., ___ N.C. App. ___, 601 S.E.2d 226 (9/7/04).
 - F. If the Indian Child Welfare Act applies because of the child's status as a Native American, "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian Custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. sec. 1012(f). In re Bluebird, 105 N.C. App. 42, 411 S.E.2d 820 (1992).
 - G. It was reversible error for a judge other than the one who presided at the hearing to sign the order terminating parental rights. (Presiding judge had stated that a ground for termination existed and that the child's best interest would be served by termination, and asked the guardian ad litem, an attorney, to prepare an order with appropriate findings.) G.S. 1A-1, Rule 52, requires the judge in a non-jury proceeding to find facts, make conclusions of law, and enter judgment accordingly. Rule 63 would allow another judge to sign the order, but only as a ministerial act, if the presiding judge were disabled and had already made findings of fact and conclusions of law. In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).
 - H. Where evidence established neglect, the petitioner's failure to comply with the periodic review requirements of [former] G.S. 7A-657 did not bar termination. In Re Swisher, 74 N.C. App. 239, 328 S.E.2d 33 (1985).
 - I. If the court determines that circumstances authorizing termination do not exist, or that the child's best interests require that rights not be terminated, the court must dismiss the petition or motion after setting forth findings and conclusions.
 - J. The court may tax the costs to any party.

- K. The order must be entered within 30 days following completion of the hearing; however, the statute specifies no consequence of failing to meet this requirement.
 - 1. Where written order was not entered until 89 days after the hearing, but respondent failed to show prejudice, court held that vacating the order was not an appropriate remedy and that the error was harmless. In re J.L.K., ___ N.C. App. ___, 598 S.E.2d 387 (7/6/04).
 - 2. In a neglect case, failure to enter the order within 30 days was harmless error, where respondent failed to show how she was prejudiced. The court of appeals stated that the probable intent of the requirement was to achieve speedy resolutions in juvenile custody matters, and that reversing the order would have the opposite effect. In re E.N.S., ___ N.C. App. ___, 595 S.E.2d 167 (5/4/04)
- L. Counsel for the petitioner or movant must serve a copy of the termination order on the child's guardian ad litem, if any, and the child, if twelve or over.

XV. Effect of Termination Order (G.S. 7B-1112)

- A. An order terminating parental rights completely and permanently severs all rights and obligations of the parent to the child and the child to the parent; except, the child's right of inheritance does not terminate until a final order of adoption is issued. When parental rights have been terminated, parents no longer have any constitutionally protected interest in their children. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).
- B. After termination, the parent is not entitled to notice of adoption proceedings and may not object to or participate in them.
- C. A parent whose rights have been terminated does not have standing to seek custody of the child as an "other person" under G.S. 50-13.1(a). Krauss v. Wayne County Dep't of Social Services, 347 N.C. 371, 493 S.E.2d 428 (1997).
- D. If the child had been placed in the custody of (or released for adoption by one parent to) a county DSS or licensed child-placing agency and is in the custody of that agency when the petition or motion is filed, upon entry of a termination order that agency acquires all rights for placement of the child that the agency would have acquired, including the right to consent to adoption, had the parent released the child to the agency pursuant to G.S. Chapter 48. See In re Asbury, 125 N.C. App. 143, 479 S.E.2d 229 (1997).
- E. Except as provided in D, above, upon entry of a termination order, the court may place the child in the custody of the petitioner or movant, some other suitable person, a county DSS, or a licensed child-placing agency, as the child's best interests require.
- F. When DSS has custody of the child pursuant to termination of one parent's rights and the other parent's surrender and consent to adoption, grandparents do not have standing under G.S. 50-13.1 to seek custody or visitation. In re Swing v. Garrison, 112 N.C. App. 818, 436 S.E.2d 895 (1993). *But see* Smith v. Alleghany County DSS, 114 N.C. App. 727, 443 S.E.2d 101 (1994).
- G. After termination, the court must conduct review hearings under G.S. 7B-908 every six months until the child is placed for adoption and an adoption petition is filed, if
 - 1. a DSS or licensed child-placing agency has custody of the child and

2. the petition or motion was filed by a person or agency designated in G.S. 7B-1103(2) through (5).

XVI. Appeals; Modification of Order (G.S. 7B-1113)

- A. A child, parent, guardian, custodian, or agency that is a party to the action may appeal any adjudication or disposition order to the court of appeals. The juvenile may appeal through the juvenile's guardian ad litem if one is appointed.
- B. Notice of appeal must be given in writing within ten days after entry of the order. Timing of the entry of the order is governed by G.S. 1A-1, Rule 58. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk.
- C. A respondent may appeal from an order adjudicating that a ground for termination exists before the trial court enters a disposition order. In re. T.C.B., ___ N.C. App. ___, ___ S.E.2d ___ (9/21/04).
- D. Motions to appeal in forma pauperis must be made within ten days after expiration of the session at which the judgment is rendered. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985); In re Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984); In re Shields, 68 N.C. App. 561, 315 S.E.2d 797 (1984).
- E. It was error for the trial court to provide a transcript without cost to a respondent and to allow the respondent to appeal in forma pauperis based on a simple assertion of poverty, without inquiry as to the respondent's actual financial status. In re Smith, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).
- F. Pending disposition of an appeal, the court may enter such temporary orders affecting the child's custody or placement as the court finds to be in the best interest of the child or state.
- G. Counsel for a parent appealing from a termination order has no right to file an *Anders* brief (indicating the attorney believes the appeal is meritless and asking the appellate court to conduct its own review of the record for possible error). In re Harrison and Koros, 136 N.C. App. 831, 526 S.E.2d 502 (2000).
- H. On affirmation of an order by the appellate court, the trial court may modify its original order in the child's best interest to reflect the child's adjustment or changed circumstances. If modification is *ex parte*, the court must notify interested parties to show cause to vacate or alter the order within ten days.
 1. The statute does not create a right to another review proceeding; it gives the district court discretion to modify or vacate the original order due to changed circumstances. In re Montgomery, 77 N.C. App. 709, 336 S.E.2d 136 (1985).
 2. The district court has discretion to hear or decline to hear evidence in support of a motion to modify or vacate an order after an appeal. Montgomery.
 3. The hearing on a motion for review is in the nature of a dispositional hearing rather than an adjudicatory hearing; the formal rules of evidence do not apply. Montgomery.